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CORRIGENDA

[1948] Vol. 1.
P. 514. ELLIGOTT *v.* NEBBETT. Line B.6: for "HALSBURY, Vol. 24" read "HALSBURY, Vol. 34."

[1949] Vol. 1.
P. 927. NORTON *v.* WHITE. Line F.4: for "principal Acts shall apply" read "principal Acts shall not apply."
P. 1002. VICTORIA LAUNDRY (WINDSOR), LTD. *v.* NEWMAN INDUSTRIES, LTD. Line H.6: for "breach of that ordinary course" read "breach in that ordinary course."

[1949] Vol. 2.
P. 71. *Re* READING'S PETITION OF RIGHT. Line D.6: for "in the manner and/or for the purpose . . ." read "in the manner and for the purpose."
P. 145. EDWARDS *v.* EDWARDS. Catchwords: read "*Desertion—Defence—Reasonable cause for spouse leaving matrimonial home—Conduct falling short of cruelty.*" instead of as printed.
P. 265. *Re* KAVANAGH. Line G: for "Court of Appeal" read "Divisional Court."
P. 315. MINISTER OF PENSIONS *v.* HORSEY. Line F: for "and, unless all the members of the tribunal are satisfied that the onus is discharged, the claim must be allowed," read "and that, if the Minister had satisfied only a minority of the members of the tribunal that a claim should be rejected, it must be allowed."
P. 427. LANGFORD PROPERTY, CO., LTD. *v.* BATTEN. Solicitors: for "*R. Elder & Co.*" read "*R. Edler & Co.*"
P. 546. OXFORD GROUP *v.* INLAND REVENUE COMRS. Lines A-B: after COHEN, L.J.'s judgment read "SINGLETON, L.J.: I agree that the appeal should be dismissed."
P. 652. R. *v.* PARKIN. Solicitor for the Crown should read "*Eric G. Weale,*" instead of as printed.
P. 715. SMITH *v.* MORRIS MOTORS, LTD. We are informed by Messrs. Herbert & Gowers & Co., Oxford, who acted for the first respondents that the ground on which the court refused an order that the respondents should pay the successful appellants' costs (p. 718) was that the two unreported decisions on the authority of which the appeal was allowed were not disclosed to the first respondents although they were known to the appellant. The court, it is stated, took the view that the first respondents might have decided not to oppose the appeal had the decisions been disclosed to their counsel before the day of the hearing.
P. 810. R. *v.* DICKSON. Line G.3 (also p. 811, Line H.4, and p. 812, Line A): for "LEWIS, J." read "JONES, J." P. 813. Solicitors: read "*Freeborough & Co.* (for the appellant); *C. P. Brutton*, Dorchester (for the Crown)" instead of as printed.
P. 845. PARIS *v.* STEPNEY BOROUGH COUNCIL. Lines E-F: after "The risk is no greater, but" read "if it materialises . . ." For "The greater risk of injury is not the same thing as the risk of greater injury, and the first thing seems to me to be relevant here." read "A greater risk of injury is not the same thing as a risk of greater injury. The first of these factors seems to me alone to be relevant to liability, however relevant the second may be to quantum of damage."
P. 966. LAKE *v.* BUSHBY. Counsel: for "*S. N. Bernstein*" read "*R. H. Bernstein.*"

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THE
ALL ENGLAND
LAW REPORTS
INCORPORATING THE
LAW TIMES REPORTS

JAMES BIBBY, LTD. *v.* WOODS (HOWARD, *Garnishee*).

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Lynskey, JJ.), May 5, 1949.]

Solicitors—Lien—Charging order—Money payable on compromise of actions—No application for charging order—Garnishee order nisi made in favour of client's judgment creditor—Creditor's right to have order made absolute—Solicitors Act, 1932 (*c.* 37), *s.* 69—*R.S.C., Ord.* 45, *r.* 5.

Appeal—Divisional Court—Garnishee order absolute.

By R.S.C., Ord. 45, r. 5: " Whenever in any proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court or a judge may order such third person to appear, and state the nature and particulars of his claim upon such debt."

On Feb. 25, 1949, judgment creditors obtained a garnishee order *nisi* on a sum of £90 which became payable to the judgment debtor on the compromise of certain actions to which he was a party. On Mar. 4, on the application by the judgment creditors for the garnishee order to be made absolute, the judgment debtor informed the registrar that his solicitor claimed to be entitled to a charge on the garnished debt for his costs. The solicitor knew of the garnishee order *nisi* on Feb. 28, but he had not applied to the court to obtain a charging order under the Solicitors Act, 1932, s. 69. The registrar made the garnishee order absolute without ordering an inquiry under R.S.C., Ord. 45, r. 5. On an appeal by the judgment debtor to the Divisional Court:

HELD: a solicitor had a lien only on property which was in his possession, and, where a sum of money was recovered through his professional exertions, he did not have a charge on the money for his costs, but he merely had a right to apply to the court for such a charge: *Mercer* v. *Graves* (1872) (L.R. 7 K.B. 499; 26 L.T. 551), *followed.* As, therefore, the solicitor had not applied for a charging order before the application for the garnishee order to be made absolute, he was not entitled to an inquiry under R.S.C., Ord. 45, r. 5, and the judgment creditors were entitled to have the order made absolute.

Mason v. *Mason and Cottrell* ([1933] P. 199), *applied.*

Shippey v. *Grey* (1880) (42 L.T. 673), *distinguished.*

Per curiam: the judgment debtor was not adversely affected by the garnishee order absolute and it was doubtful whether he had any right to be heard on the appeal.

Held, further: An appeal from a garnishee order absolute lies to the Divisional Court under R.S.C., Ord. 54, r. 22A, and not to a judge in chambers under R.S.C., Ord. 35, r. 9.

[As to Charging Order, see HALSBURY, Hailsham Edn., Vol. 31, pp. 252-261, paras. 275-282; and for Cases, see DIGEST, Vol. 42, pp. 290-305, Nos. *3250-3387*.]

Cases referred to:

(1) *Roberts* v. *Death*, (1881), 8 Q.B.D. 319; 51 L.J.Q.B. 15; 46 L.T. 246; 21 Digest 629, *2131*.

(2) *Mercer* v. *Graves*, (1872), L.R. 7 Q.B. 499; 41 L.J.Q.B. 212; 26 L.T. 551; 42 Digest 286, *3213*.

(3) *Mason* v. *Mason and Cottrell*, [1933] P. 199; 102 L.J.P. 91; 149 L.T. 346; Digest Supp.

(4) *Shippey* v. *Grey*, (1880), 49 L.J.Q.B. 524; 42 L.T. 673; 21 Digest 644, *2232*.

Appeal by the judgment debtor from an order of Mr. Registrar Benjamin, made at the Liverpool District Registry, on Mar. 4, 1949.

At the hearing of an application for a garnishee order to be made absolute, the judgment debtor informed the registrar that his solicitor claimed to be entitled to a charge on the sum in question in respect of his costs. No charging order had, however, been made under the Solicitors Act, 1932, s. 69, and the registrar made the garnishee order absolute without directing an inquiry under R.S.C., Ord. 45, r. 5. The Divisional Court now dismissed the appeal from the registrar's order. The facts appear in the judgment of Lord Goddard, C.J.

Craine for the judgment debtor.

The judgment creditors did not appear.

LORD GODDARD, C.J.: This is an appeal from a garnishee order absolute made by the learned district registrar at Liverpool. The facts were that James Bibby, Ltd., the judgment creditors, had obtained a judgment against Woods, the judgment debtor, who had previously been in partnership with one Howard. Differences had arisen between Woods and Howard, and actions had been begun, by one of them in the Court of Passage and by the other in the county court at Liverpool. The parties then negotiated, and the two actions were compromised on the terms that Howard should pay to Woods a sum of £90. The judgment creditors then obtained a garnishee order *nisi* on Feb. 25, 1949.

A garnishee order *nisi*, as everyone knows, merely holds matters in suspense with regard to the debt. The money cannot be dealt with, but the order does not decide who is entitled to it. That has to be decided on the application to make the garnishee order absolute. When the application for the absolute order was made, counsel for the judgment debtor informed the court that the solicitor instructing him on behalf of the judgment debtor claimed that he was entitled to a charge on the debt for his costs. The registrar made the garnishee order absolute, and it is contended here that he ought not to have done so, but should have ordered an inquiry by reason of R.S.C., Ord. 45, r. 5, which states:

> "Whenever in any proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court or a judge may order such third person to appear, and state the nature and particulars of his claim upon such debt."

It is true, as counsel for the judgment debtor argued, that, if it comes to the knowledge of, or is suggested to, the court, when asked to make a garnishee order absolute, that the money does not, in fact, belong to the garnishee, but

belongs to some one else, the court ought to order that third person to come in and make a claim. A sort of interpleader proceeding is to take place to decide who has the right to the money. In *Roberts* v. *Death* (1) it was suggested that the money was trust money, and not really the money of the judgment debtor. Trust money cannot, of course, be used to satisfy the judgment creditor's debt, because in equity the money does not belong to the trustee—it is the property
A of the *cestui que trust*. In this case the district registrar did not make an order for an inquiry, and, for reasons which I will give in a moment, I think he was right in not doing so.

This is alleged to be an appeal by the judgment debtor. In truth, it is not an appeal by the judgment debtor at all, but is an appeal by his solicitor who claims that he is entitled to a charge on the money. The court has had very
B great doubt whether or not counsel has any right to be heard on this appeal as representing the judgment debtor, and, so far as the judgment debtor is concerned, I do not understand how he is affected by the order. He has a sum of money due to him which either he must pay to his solicitor for costs, or, if he does not pay it to the solicitor, he must pay it to the judgment creditors. If he pays it to the solicitor, he still owes the judgment creditors the money,
C and, if he pays it to the judgment creditors, he still owes the solicitor the money. The solicitor is no party to these proceedings, and, although we have allowed the matter to go on and to be argued, it seems to me to be extremely doubtful whether we really had any right to hear the judgment debtor at all on this matter.

The only ground on which the district registrar could have ordered the issue
D to be tried, or the solicitor to come in and state the nature of his claim, was if it was proved or suggested to the district registrar that the solicitor had a lien or charge on the money. It is said here that the solicitor had a lien or charge on the money, because [under the Solicitors Act, 1932, s. 69] he had a right to apply to the court for a charging order, but he had not done so. The fallacy that underlies the argument which has been addressed to us is that it is not
E appreciated what is a solicitor's lien on a sum of money which is recovered by his exertions. I will assume in this case that, if the solicitor had applied for a charging order to the appropriate court, which would have been either the Court of Passage or the Liverpool County Court, and possibly both, he might have obtained a charging order, but he did not do so. Until he obtained a charging order, he had, at the most, only an inchoate right, *i.e.*, he had not got
F a lien on the money, but he had a right to apply for a lien. This is made perfectly clear when the nature of the lien is understood. A lien in the ordinary strict sense can only exist where the person claiming the lien has the property in his possession. The common lien is the artificer's lien to hold property on which he has spent time, labour and trouble in making repairs, and it exists because he has the property in his possession and can refuse to give it up until
G he is paid. Questions of lien have often arisen, *e.g.*, in the case of livery stable keepers, and the courts have refused to allow a claim for lien because it has been held that the very nature of the contract was that the horse should be allowed to go out whenever its owner required it, and, therefore, the livery stable keeper had no right to a lien, as a lien could only exist on those things which were in one's possession and which one had a right to keep.

H A solicitor's lien is of two-fold character. He has a lien on the papers of his clients which are in his possession, and he can refuse to give up those papers so long as his costs are not paid. With regard to a sum of money which comes into existence owing to his professional exertions, the term " lien " is really a misnomer. Although it is always referred to as a lien, it is not strictly and accurately a lien, because it has not got the characteristics of a lien. That was made clear by the judgment of COCKBURN, C.J., in *Mercer* v. *Graves* (2), where, speaking of the solicitor's lien, he said (L.R. 7 Q.B. 503) :

> ". . . there is no such thing as a lien except upon something of which you have possession . . . although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs."

That passage was cited by Lord Merrivale, P. ([1933] P. 205) in *Mason* v. *Mason and Cottrell* (3), which went to the Court of Appeal, where Lord Hanworth, M.R., referring to *Mercer* v. *Graves* (2) said ([1933] P. 214) :

> " The nature of a solicitor's lien is pointed out in the course of that case. It is merely a right to claim the equitable interference of the court, who may order that the judgment obtained by the solicitor's client do stand as security for her costs and that payment of such an amount as will cover them be made to the solicitor in the first instance. That lien is one which prevails over a fund which is in sight ; the right is one which, so to speak, cannot prevail at large."

That shows what the nature of the lien is. It is a right to go to the court and ask the court to charge the property in favour of the solicitor, and, until that is done, the solicitor has no right to the money.

In the present case, when the summons was before the district registrar, no charging order had been made or applied for. Therefore, there was at that time no lien or charge on the money. There certainly was no lien on it in the strict sense of the term, and there was no charge on it because the charge had not been applied for. Counsel for the judgment debtor has referred us to a considerable number of cases. The one nearest in point is *Shippey* v. *Grey* (4), but, when the facts of that case are understood, it is no authority for the present application. In that case the plaintiffs were the solicitors for W. in an action in which he recovered a sum of money, and the defendant was a judgment creditor of W. who had obtained *ex parte*, on the day that judgment was signed in the action, a garnishee order attaching all debts due to W. On the taxation of costs on the same day, the plaintiffs for the first time learned of the defendant's claim, and then gave notice, to the defendant in the action in which W. was plaintiff, of their claim in lien, and within five days applied for an order declaring that they were entitled to a charge on the money recovered by W. It was held, affirming the decision of the Common Pleas Division, that the plaintiffs had a lien for their costs on the sum recovered by W., that they were entitled to the order sought for, and that the garnishee order obtained by the defendant did not take priority over that lien. In that case, the Court of Appeal held that the solicitor had been wrongfully refused the charging order for which he had applied, and, therefore, as the charging order should have been made, the solicitor was to be in the same position for all purposes as if it had been made. He could not be defeated because the court did not make the order which it ought to have made. In the present case, however, there was no charge in existence when the case came before the learned registrar, and, therefore, the judgment creditors were entitled to have the garnishee order made absolute. That is one form of execution, and it not infrequently happens that where there are or may be several claims against money the person who gets in first gets the fruits of his diligence. It is said that the solicitor could not have applied for a charging order as he did not know until Feb. 28 that the garnishee order *nisi* had been made. If, however, he had then gone to the court and asked for a charging order, he might have obtained it. Had he obtained it, his charge would have taken precedence over the judgment creditor's claim. As, however, no charging order had been made, the so-called lien had not been perfected, and, therefore, I think that the learned district registrar was perfectly right. This appeal fails, and is dismissed.

BIRKETT, J. : I agree.

LYNSKEY, J. : I agree. It seems to me that the solicitor has not taken the correct proceedings to protect his own right. As my Lord has pointed out, a solicitor's lien on money which is not in his own possession but has come into existence owing to his professional exertions is not strictly a lien at all, but is merely a right to go to the court and ask the court to charge the money for the amount of the costs. No such application had been made in this case, and the judgment debtor is now claiming that he is affected adversely by the judgment on the garnishee proceedings. Personally, I cannot see that he is adversely affected in any way. It seems to me that he really has no right to be heard in this court on this appeal. After the solicitor had heard about the garnishee order *nisi* on Feb. 28, his proper course would have been to apply for a charging order. If he had got his charging order before the garnishee order *nisi* was made absolute and had brought the charging order to the attention of the registrar, there would have been a dispute as to the facts and the registrar would have been bound to direct an inquiry under R.S.C., Ord. 45, r. 5. In my view, the learned district registrar did the only thing competent to him in the circumstances, having regard to the terms of the rule. I agree with my Lord that this appeal must be dismissed.

Craine (for the judgment debtor) : My Lords, may I now refer you to an order which was made by BIRKETT, J., on Mar. 15, 1949. This appeal was originally brought to BIRKETT, J., in chambers under R.S.C., Ord. 35, r. 9, and he held that he had no jurisdiction to deal with it under that rule and that the appeal should have been to a Divisional Court under R.S.C., Ord. 54, r. 22A. He dismissed the appeal, but reserved the costs, making this order :

> " It is ordered that the said appeal be dismissed and time for appealing to the Divisional Court be extended to Apr. 5, 1949. And it is further ordered that the costs of this application be reserved if the appeal be prosecuted but that otherwise such costs be taxed and paid by the judgment debtor to the judgment creditors."

LORD GODDARD, C.J. : The judgment creditors attended before the learned judge in chambers ?

Craine : Yes, my Lord.

LORD GODDARD, C.J. : There should be no costs on the order before BIRKETT, J. What happened in this case has happened on more than one occasion, *viz.*, that, where garnishee orders have been finally made, an appeal is very often taken to the judge in chambers. That is wrong. R.S.C., Ord. 54, r. 22A, provides for the appeal to come to the Divisional Court. It is well for practitioners to remember that the appeal in these garnishee matters lies to the Divisional Court and not to the judge in chambers.

Appeal dismissed. No order as to costs.

Solicitors : *McKenna & Co.*, agents for *G. H. Mossop*, Liverpool (for the judgment debtor).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re STRAKOSCH (*deceased*). TEMPERLEY AND ANOTHER *v.* ATTORNEY-GENERAL AND OTHERS.

[Court of Appeal (Lord Greene, M.R., Somervell and Evershed, L.JJ.), February 21, 22, May 16, 1949.]

Charitable Purpose—" To strengthen bonds between Union of South Africa and mother country and incidentally conduce to appeasement of racial feeling in South Africa."

A testator by his will directed his trustees to apply part of his estate " to a fund for any purpose which in their opinion is designed to strengthen the bonds of unity between the Union of South Africa and the mother country, and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking sections of the South African community."

Held : (i) although undoubtedly of benefit to the community, the purpose expressed in the disposition was not charitable in the sense of the preamble to the statute 43 Eliz. c. 4, because it could be achieved by many methods which would not involve charitable benefits, such as the support of a political party or a newspaper. The terms of the disposition comprehended purposes that were not charitable, and, in particular, " the appeasement of racial feeling " was a political cause which did not have as its dominant motive the desire to profit people who would not otherwise be profited, and which was not, therefore, charitable.

Dictum of Lord Haldane in *A.-G.* v. *National Provincial Bank* ([1924] A.C. 267), *applied.*

(ii) even if there were a principle that general words that money was to be applied for the benefit of a district or a country were construed as meaning for such purposes as were recognised by the law as charitable purposes, the principle had no application in this case where the purpose was expressed.

Re Smith ([1932] 1 Ch. 153), *explained and distinguished.*

Decision of Roxburgh, J. ([1947] 2 All E.R. 607), *affirmed.*

[As to Gifts for Public Purposes, see HALSBURY, Hailsham Edn., Vol. 4, pp. 122-127, paras. 161-168 ; and for Cases, see DIGEST, Vol. 8, pp. 255-260, Nos. *161-217.*]

Cases referred to :

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel,* [1891] A.C. 531 ; 61 L.J.Q.B. 265 ; 65 L.T. 621 ; 55 J.P. 805 ; 3 Tax Cas. 53 ; 8 Digest 241, *1.*

(2) *Williams Trustees* v. *Inland Revenue Comrs.,* [1947] 1 All E.R. 513 [1947] A.C. 447 ; 176 L.T. 462 ; 27 Tax Cas. 409 ; 2nd Digest Supp

(3) *Verge* v. *Somerville,* [1924] A.C. 496 ; 131 L.T. 107 ; *sub nom., Verg* v. *Somerville, A.-G. for Australia* v. *Somerville,* 93 L.J.P.C. 173 ; Diges Supp.

(4) *A.-G.* v. *National Provincial and Union Bank of England,* [1924] A.C 262 ; *sub nom., Re Tetley,* 93 L.J.Ch. 231 ; 131 L.T. 34 ; Digest Supp

(5) *Re Hood,* [1931] 1 Ch. 240 ; 100 L.J.Ch. 115 ; 143 L.T. 691 ; Diges Supp.

(6) *National Anti-Vivisection Society* v. *Inland Revenue Comrs.,* [1947] All E.R. 217 ; [1948] A.C. 31 ; [1947] L.J.R. 1112 ; 117 L.T. 226 2nd Digest Supp.

(7) *Re Smith,* [1932] 1 Ch. 153 ; 100 L.J.Ch. 409 ; 146 L.T. 145 ; Diges Supp.

(8) *West* v. *Knight,* (1669), 1 Cas. in Ch. 134 ; 8 Digest 255, *163.*

(9) *A.-G.* v. *Lonsdale* (*Earl*), (1827), 1 Sim. 105 ; 5 L.J.O.S.Ch. 99 ; Digest 312, *932.*

(10) *A.-G.* v. *Carlisle Corpn.*, (1828), 2 Sim. 437 ; *affmd.*, (1830), 8 L.J.O.S. Ch. 146 ; *subsequent proceedings*, (1831), 4 Sim. 275 ; 8 Digest 256, *176.*

(11) *Mitford* v. *Reynolds*, (1842), 1 Ph. 185 ; 12 L.J.Ch. 465 ; *subsequent proceedings*, (1846), 1 Ph. 706 ; (1848), 16 Sim. 105 ; 8 Digest 256, *179.*

A (12) *Nightingale* v. *Goulbourn*, (1848), 5 Hare 484 ; 2 Ph. 594 ; 17 L.J.Ch. 296 ; 11 L.T.O.S. 169 ; 8 Digest 242, *2.*

APPEAL by the Attorney-General from an order of ROXBURGH, J., dated Oct. 29, 1947, reported [1947] 2 All E.R. 607.

ROXBURGH, J., held that the disposition in the testator's will whereby the
B trustees were directed to apply a fund for any purpose which was designed to strengthen the bonds of unity between the Union of South Africa and the mother country and which incidentally conduced to the appeasement of racial feeling in South Africa was not charitable. The Court of Appeal now affirmed his decision. The Government of the Union of South Africa intervened in the appeal by leave. The facts appear in the judgment of the court.

C *The Attorney-General* (*Sir Hartley Shawcross, K.C.*) and *Danckwerts* for the Attorney-General.

Wilfrid Hunt for the executors of the will.

Charles Russell, K.C., and *Winterbotham* for one of the next of kin.

Sir Cyril Radcliffe, K.C., and *Tonge* for other next of kin.

Sir David Maxwell Fyfe, K.C., and *J. H. Barrington* for the Government
D of the Union of South Africa.

Cur. adv. vult.

May 16. **LORD GREENE, M.R.,** read the following judgment of the court. The gift which we have to construe is in the following terms :

> " I direct that the trust fund and the income thereof or such part or parts
> E thereof respectively as shall not have been paid or applied under the trusts affecting the same shall be held upon trust to be applied by my trustees to a ' fund ' for any purpose which in their opinion is designed to strengthen the bonds of unity between the Union of South Africa and the mother country and which incidentally will conduce to the appeasement of racial feeling between the Dutch and English speaking sections
> F of the South African community."

ROXBURGH, J., held that it was not a good charitable gift. Before us, further evidence was produced consisting of an affidavit by Field Marshal Smuts. We have given this affidavit most careful consideration, but we are unable to regard it as affording a reason for coming to a conclusion different from that at which ROXBURGH, J., arrived. We realise the truth of the contention
G that the objects to which the gift is to be devoted are matters of great public concern both in the Union of South Africa and in the mother country. In particular, the appeasement of racial feeling in the Union cannot but benefit all inhabitants of the Union, not merely the members of the two sections of the community expressly referred to, but the very wide and vague scope of the gift and the unrestricted latitude of application which its language permits
H make it impossible, in our opinion, to find that it falls within the spirit and intendment of the preamble to the statute of Elizabeth (43 Eliz. c. 4). We are quite prepared to accept the views expressed by the Field Marshal as to the most effective and satisfactory methods of achieving the objects of the testator, but the question is not what persons of sound judgment would consider to be the best manner of application. It is how, on the true construction of the gift, it would be permissible to apply the trust funds. In answering this question it is, we think, impossible to limit the permissible methods of

application on the lines indicated in the affidavit. The argument of the Attorney-General—and, in particular, the contention of counsel for the Government of the Union of South Africa (which we will deal with more fully hereafter) that anything which contributes to the " common stock " of a community is charitable—in our view amount to no more than a re-statement in different language of the oft-rejected argument that what is for the benefit of the public is *ipso facto* charitable within LORD MACNAGHTEN'S fourth class in *Income Tax Special Purposes Comrs.* v. *Pemsel* (1). We may observe that, if this gift were to be held to be charitable, it would mean that any gift in favour of " charity " generally (*i.e.*, without any specific direction as to its application) could lawfully be applied (*e.g.*, under a scheme) to the objects here stated. This would, in our view, amount to an extension of the ambit of charity for which the law relating to charities, full as it is of anomalies, affords no warrant either in principle or in authority. With these general observations we will proceed to state more fully the reasons which have led us to our conclusion.

As ROXBURGH, J., read them, the terms of the disposition comprehend any application which, in the opinion of the testator's trustees, is calculated to promote or subserve what is in truth a political cause or aspiration, *viz.*, that of closer collaboration or relations between two national groups, those of the United Kingdom and the Union of South Africa, and at the same time closer collaboration or relations between those of English and Dutch descent within the confines of one of those national groups, *viz.*, South Africa. We do not think the case is altered if it be assumed in favour of the Attorney-General that the unlimited discretion given to the trustees extends only to the first limb of the objective and not to the second. For in that case the result is that (as counsel for the several next of kin put it) the drawing together of the two divergent races in South Africa (which on this hypothesis is made a condition of any application of the fund) is a part or incident of the broader aim of drawing together two communities which form part of the political organisation of the British Commonwealth of Nations, and that which is made the condition is still what we have called a political cause or aspiration.

In *Williams Trustees* v. *Inland Revenue Comrs.* (2), the House of Lords has laid down very clearly that in order to come within LORD MACNAGHTEN'S fourth class the gift must be not only for the benefit of the community but beneficial in a way which the law regards as charitable. In order to satisfy the latter it must be within the " spirit and intendment " of the preamble of the statute of Elizabeth. That preamble set out what were then regarded as purposes which should be treated as charitable in law. It is obvious that as time passed and conditions changed common opinion as to what was properly covered by the word charitable also changed. This has been recognised by the courts as the most cursory examination of the cases shows. In order to be within the spirit and intendment of the preamble we take it that one must find something charitable in the same sense as the recited purposes are charitable. LORD MACNAGHTEN'S fourth class is represented in the preamble by the repair of bridges, etc., and possibly by the maintenance of houses of correction. This negatives any suggestion that " charitable " must be confined to the poor: *Verge* v. *Somerville* (3) [1924] A.C. 502. We have come to the conclusion that, though undoubtedly of benefit to the community, the purpose under consideration is not " charitable " in the sense in which the benefits to the community instanced in the preamble are charitable. The benefit, as we understand it, does not have to be in any way *ejusdem generis* with the recited purposes, but it has to be charitable in the same sense. In *A.-G.* v. *National Provincial Bank* (4), LORD HALDANE, in considering whether patriotic purposes were charitable, says ([1924] A.C. 267):

> " In the case of a gift for charitable purposes there is a desire to profit people who would not be profited without your gift—that is the dominant

> motive. In the case of patriotism there is a desire to fulfil one dominant purpose, that is to benefit the cause of the country to which you belong."

We think " the appeasement of racial feeling " is within the class of " cause " which LORD HALDANE was distinguishing from charity.

Field Marshal Smuts (than whom no one can speak with greater authority on this subject) expresses a strong opinion that the proper method for the appeasement of racial feeling is education in its widest sense—" students' education, journalistic training, interchange of young men and women between Britain and South Africa and between young South Africans of different racial origin." It is unfortunate if, as may well be, these methods were in the testator's mind he did not seek to constitute a trust which might well have been valid as an educational trust notwithstanding that the education had the ultimate aim as set out in the will. We, however, find it impossible to construe this trust as one confined to educational purposes. These may be the best methods, but they are certainly not the only methods. The problem of appeasing racial feeling within the community is a political problem, perhaps primarily political. One method conducive to its solution might well be to support a political party or a newspaper which had such appeasement most at heart. This argument gains force in the present case from the other political object, namely, the strengthening of the bonds of unity between the Union and the mother country. It would also we think be easy to think of arrangements for mutual hospitality which would be conducive to the purposes set out but would not be charitable. We may mention that the words do not, at any rate to us, suggest the support or promotion of legislation. What we have said in this paragraph we think supports the view which we related to LORD HALDANE's observation in the *National Provincial Bank* case (4) and also would make the trust invalid because the words used themselves cover, and, indeed, suggest, modes of expenditure which would plainly not be charitable. If the object and the means indicated are clearly charitable, then the court is not astute to look for possible, but subsidiary, non-charitable means which might be within the words used : *Re Hood* (5) and *National Anti-Vivisection Society* v. *Inland Revenue Comrs.* (6). The non-charitable purposes to which we have referred cannot, we think, be disregarded as merely subsidiary and possible modes of achieving the stated purpose, whatever may have been in the testator's mind.

That disposes of the case, but as the Attorney-General relied very strongly on *Re Smith* (7) we will give our reasons for thinking that that case and the line of cases referred to in it do not lay down the principle which it was sought to extract from them. Counsel for the Government of the Union of South Africa, who developed this part of the argument, submitted that these cases showed that anything which contributed to increase the " common stock "—to use his expression—of a community was charitable. It was held in *Re Smith* (7) that a gift " unto my country England—for own use and benefit absolutely " was a valid gift. The cases which are reviewed and relied on go back to *West* v. *Knight* (8) in 1669. It was decided in that case that a gift by a testator to the parish of Great Creaton, where he was born, without saying to what use, was good. There are two possible views of these cases. In TUDOR ON CHARITIES, 5th ed., p. 45, the view appears to be taken that under such a gift as that to Great Creaton the trustees could expend the money on " public or benevolent " purposes which, if expressly referred to, would have voided the gift. The other view is that where general words are used such as to benefit such and such a parish or " my country," the law will construe these words as restricted to benefits which are charitable in law. We are not suggesting that there may not be cases or statements made in cases which appear to justify the statement in TUDOR, but the cases referred to and relied on in *Re Smith* (7) seem to us to proceed on the basis of what we have called the second view. In *West* v. *Knight* (8), the master was directed to see that the money was disposed of for the benefit of the poor of the parish. In *A.-G.* v. *Lonsdale* (*Earl*) (9) Leach, V.-C., in the passage cited in *Re Smith* (7) ([1932] 1 Ch. 159), construed the words " conducing to the good of the county of Westmorland " as meaning charitable purposes. The master was directed to settle a scheme under which the money was to be applied for some charitable purpose or purposes. *A.-G.* v. *Carlisle Corpn.* (10) is a complicated case dealing with a special subject-matter and we doubt if it assists on the point under consideration. In *Mitford* v. *Reynolds* (11) an objection was based on a provision of the trust that the Governor-General and the inhabitants of Dacca had to agree on the application of the money. It was said: What are you to do if they differ ? Lord Lyndhurst, L.C., in dealing with this objection, used these words (1 Ph. 195) :

> " I think the answer is obvious. You could not apply the fund to any charitable object until they agreed, or until the court, if the court thought itself justified in doing so, should interfere for that purpose. But the same difficulty would exist in a great variety of cases. If property is given for a charitable object to A. and B., to be applied to such charitable institutions in this metropolis as they shall agree upon, they may differ ; but such a bequest was never considered on that account as not constituting a valid bequest."

From these words and a study of the whole judgment, it is clear to us that the purposes had to be charitable purposes. In *Nightingale* v. *Goulbourn* (12), Wigram, V.-C., at the beginning of his judgment states and comments on the argument for the next of kin in these words. He says (5 Hare 487) :

> " The argument for the next of kin was, that the words of the bequest are so general as to admit of the application of the property by the trustee to purposes not charitable, within the construction of that term adopted in the decided cases. If it can be shown that the trustee could have such a power as that which it is suggested on the part of the next of kin that he would have, the case is at an end . . ."

The learned Vice-Chancellor regarded the case as open to doubt, but in holding that the bequest was valid he clearly construed it as covering only charitable purposes according to the decided cases. There are other citations in *Re Smith* (7) which point in the same direction, for example, that from Lord Eldon ([1932] 1 Ch. 169).

If we are right in holding that the principle laid down is that general words that money is to be applied for the benefit of a district or a country are construed as meaning for such purposes as are recognised by the law as charitable purposes, the principle has no application here where the purpose is expressed. Lord Simonds, in his speech ([1947] 1 All E.R. 521) in *Williams Trustees* v. *Inland Revenue Comrs.* (2), referred shortly to this class of case and cited the passage we have referred to from Tudor on Charities. After referring to the difficulty he said : " But I would suggest that it is possible to justify as charitable a gift ' to my country England ' on the ground that, where no purpose is defined, a charitable purpose is implicit in the context." In the case to which we have referred, this was, we think, the basis of the decisions, and there is, therefore, no inconsistency between these cases and the law as stated in *Williams Trustees* v. *Inland Revenue Comrs.* (2). The appeal must be dismissed. *Appeal dismissed with costs.*

Solicitors : *Treasury Solicitor* ; *Herbert Smith & Co.* (for the executors of the will, and one of the next of kin) ; *Lewin, Gregory, Torr, Durnford & Co.* (for other next of kin) ; *Jaques & Co.* (for the Government of the Union of South Africa).

[*Reported by* G. F. Guttman, Esq., *Barrister-at-Law.*]

Re WILLIAMS' WILL TRUSTS. REES *v.* WILLIAMS AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), April 26, 27, 1949.]

Will—"If any daughter of mine shall die without lawful issue her surviving" her share to devolve on other children—Whether death at any time would cause divesting.

By his will a testator devised and bequeathed all his property to his trustees on trust to pay his debts and funeral and testamentary expenses and subject thereto to hold for his wife for her life. Thereafter the testator devised certain realty on trust for his son D., and other realty on trust for his daughter M. His interest and shares in certain colliery undertakings he gave equally to his four children D., M.J., E., and M. in equal shares, and all the residue of his estate, subject to the setting aside of £3,000 which was to be held on certain trusts for his son H. and H.'s widow and issue, he gave on trust for his two daughters M.J. and E. equally. The will continued: "I declare that if any child of mine shall predecease me leaving lawful issue such issue shall take and if more than one equally amongst them the share which such child of mine so dying would have taken had he or she survived me. I declare that if any daughter of mine shall die without lawful issue her surviving her share shall thereupon devolve upon my other children then surviving and the issue of such as may be then dead in equal shares *per stirpes*." The testator's wife survived the testator and died on Mar. 22, 1947.

HELD: on the true construction of the will the second declaration divesting a daughter's interest would have effect if the daughter should die at any time and was not limited to the event of her death during the lifetime of the tenant for life.

Dicta of STIRLING, L.J., in *Re Schnadhorst* ([1902] 2 Ch. 239), *applied*.

[AS TO GIFT OVER IN CASE OF DEATH, see HALSBURY, Hailsham Edn., Vol. 34, pp. 407, 408, paras. 452, 453; and FOR CASES, see DIGEST, Vol. 44, pp. 1118-1124, Nos. *9684-9737*.]

Cases referred to:

(1) *Re Schnadhorst*, [1902] 2 Ch. 234; 71 L.J.Ch. 454; 86 L.T. 426; 44 Digest 1051, *9039*.

(2) *O'Mahoney* v. *Burdett*, (1874), L.R. 7 H.L. 388; 44 L.J.Ch. 56 *n.*; 31 L.T. 705; 44 Digest 1119, *9692*.

(3) *Re Roberts*, [1916] 2 Ch. 42; 85 L.J.Ch. 713; 114 L.T. 1119; 44 Digest 1122, *9714*.

(4) *Olivant* v. *Wright*, (1875), 1 Ch.D. 346; 45 L.J.Ch. 1; 33 L.T. 457; 44 Digest 1120, *9694*.

ADJOURNED SUMMONS to determine whether on the true construction of a will a clause divesting a daughter's interest (to which she became entitled on the death of the widow of the testator) if she should "die without lawful issue her surviving" would have effect on the daughter's death at any time, or whether its effect was limited to the death of the daughter during the lifetime of the tenant for life. ROXBURGH, J., held that it would have the former effect. The facts appear in the judgment.

Hubert A. Rose for the plaintiff, a daughter of the testator.

Richmount for the first defendant, the surviving executor and trustee of the will.

Lazarus for the second defendant, a son of the testator.

M. J. Albery for the third defendant, a daughter of the testator.

Mervyn Davies for the fourth defendant, a granddaughter.

ROXBURGH, J.: By his will the testator gave, devised and bequeathed all his property to his trustees

> "Upon trust thereout to pay my just debts and funeral and testamentary expenses and subject thereto upon trust for my said wife Margaret Williams for her life if she shall so long continue my widow and from and after her decease or re-marriage whichever shall first happen upon the following trusts namely As to the freehold dwelling-house called The Park wherein I now reside and the ground held therewith and also my one-fourth share of and in the freehold farm called Poundfold Farm situate at Three Crosses upon trust for my son Daniel Williams. And as to my freehold hereditaments known as Bryncam situate in the parish of Bettws in the county of Carmarthen upon trust for my daughter Margaretta Williams And as to all my share and interest in the undertaking known as the Berthllwyd Colliery or all my shares therein in case the same shall have been converted into a limited company before my decease and all my shares in the Cefngolau Collieries Ltd. upon trust for my children Daniel Williams, Mary Jane Williams, Elinor Rees and Margaretta Williams in equal shares as tenants in common and as to all the residue of my estate both real and personal upon trust to set apart the sum of £3,000 upon the trusts hereinafter declared in favour of my son Alfred David Williams and his widow and issue if any and subject thereto upon trust for my two daughters Mary Jane Williams and Elinor Rees in equal shares as tenants in common I declare that if any child of mine shall predecease me leaving lawful issue such issue shall take and if more than one equally amongst them the share which such child of mine so dying would have taken had he or she survived me. I declare that if any daughter of mine shall die without lawful issue her surviving her share shall thereupon devolve upon my other children then surviving and the issue of such as may be then dead in equal shares *per stirpes*."

The testator's wife survived him and died on Mar. 22, 1947, without having re-married. The question is whether in that second declaration which I last read the words "shall die without lawful issue her surviving" refer to the death of the daughter at any time or are limited to the death of the daughter during the lifetime of the tenant for life.

The law on this question is in no doubt, but the difficulty, as usual, lies in its proper application. The law is stated by STIRLING, L.J., in *Re Schnadhorst* (1) in the Court of Appeal. He said ([1902] 2 Ch. 239):

> "Adopting the words of LORD CAIRNS, L.C., in *O'Mahoney* v. *Burdett* (2) (L.R. 7 H.L. 398) I say that the gift over should be read according to its natural and proper meaning—that is, as meaning death at any time; and that this original and literal meaning ought not to be departed from unless the context renders it necessary or proper to do so. That being so, we have to see what sort of context would render that necessary or proper. In *O'Mahoney* v. *Burdett* (2), LORD SELBORNE pointed out two classes of cases in which such a context is found: one is where there is an express direction that the distribution is to take place at a particular time; and the other class of cases is where there is an indication on the face of the will that the legatee is to take in a certain event an absolute interest."

STIRLING, L.J., continues (*ibid.*, 241):

> "In my opinion, the present case does not fall within either of the two classes of cases LORD SELBORNE mentions; but those two classes are not exhaustive: there may be others. In every case there may be a question what the context is, and the court has to give effect to the language of the will."

It is clear that here there is not an express direction that distribution is to take place at any particular time, but I have the authority of SARGANT, J., in *Re Roberts* (3) for saying that such an express direction is not essential. In considering, however, the actual words which are to be found in the will, I have received great assistance from STIRLING, L.J.'s discussion in *Re Schnadhorst* (1) of the particular language in that will. According to the headnote the language there was :

> " . . . upon trust for his widow for life or widowhood, and after her A decease or second marriage to apply the income for the maintenance and education of his children until the youngest who should be living being a son should attain 21, or being a daughter should attain that age or marry. Subject thereto he directed that the trust fund and the income thereof, and any accumulations not vested or applied under his will, should be held in trust for all his children who being sons should attain 21, or being B daughters should attain that age or marry, to whom he gave his residuary estate in equal shares. And he directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common."

With regard to that will, STIRLING, L.J., said (*ibid.*, 240) :

> C " There are two points that have been relied upon in argument. In the first place, it is said that the direction for the application of the income lasts only until the youngest child attains 21, and that when that child attains 21, there being no direction as to the application of the income after that, the trustees are to pay the trust fund to the children who have become entitled. The other contention is that the words ' to whom I give D and bequeath my residuary real and personal estate in equal shares ' give the children an absolute interest. I cannot see in either of these circumstances any expression or indication of the testator's meaning that after the death of the widow and on the youngest child attaining 21 there is to be a distribution. The testator does not say so in express terms : so far as the language goes it has a contrary meaning. The fund is not to E pass away from the hands of the trustees, but to continue to be held by them. The testator has given his trustees a direction to pay the whole income for the maintenance of the children until the youngest attains 21, or being a daughter marries. When the youngest child attains 21, then that trust comes to an end. But there is no express direction for payment or distribution, and the income will follow the ordinary course F of law, namely, that a child who takes a vested interest liable to be divested in a certain event takes the benefit of the income until the event occurs. I cannot attribute any further meaning to the words ' to whom I give and bequeath my residuary real and personal estate in equal shares.' They do not amount to a direction to divide the property at any particular period : still less do they amount to an indication of intention on the G part of the testator that in any particular event the objects of his bounty were to take absolute interests."

I turn now to the will that is before me. The first consideration which I must bear in mind is that I must read the will as a whole, and that warning to myself is particularly necessary in the present case because the indications favourable to the plaintiff all occur in the earlier parts of the will and those H against the plaintiff in the later parts of the will. It is undoubtedly true that, if I read the dispositions contained in the will, but omit the two declarations, I shall be inclined to conclude that the testator did contemplate a distribution on the death of the tenant for life not only of the sons' shares but also of the daughters' shares, but, if I so read the will, I should be disregarding its express language, which, so far from directing me to do anything of that kind, tells me that from and after the decease of the tenant for life the property is to be held upon the following trusts, and those trusts incorporate and include the two declarations. If I read the whole of it, it seems to me that the testator is plainly making some differentiation between daughters' shares and sons' shares, and the nature of the differentiation is to be found in the second declaration. The second declaration is quite unambiguous in itself, and, reading the trusts together, so far from finding an intention to distribute the daughters' shares on the death of the tenant for life, I find a declared intention that the daughters shall not be mistresses of their own shares if they should die without lawful issue. It is, of course, quite common to make provision for the retention of the daughters' shares during their respective lives. Therefore, there is nothing strange in this provision except to the extent—and this point counsel for the plaintiff has made very forcibly—that it is curious that the declaration would operate to defeat a daughter's interest, even if she had issue who attained 21, if that issue failed to survive her. That is certainly curious, but it is not, in my judgment, a sufficient ground to enable me to say that the words do not mean what they say. There are other difficulties in the way of departing from the literal meaning of the second declaration. It is immediately preceded by the first declaration, which expressly refers to a child who should predecease the testator. If, as counsel for the plaintiff submits, he intended in the second declaration to refer to a daughter who should predecease the tenant for life, it is strange indeed that he should not have said so.

There is another difficulty which arises from the use of the word "then" in the second declaration. In *Olivant* v. *Wright* (4) the Court of Appeal was able, in quite a different context, to assign the word "then" to the death of the tenant for life and not to the death of the child and by that means escaped from the difficulties arising from the use of the word "then," but no such course is open to me. The word "then" in the context which I have before me must refer to the time of the death of the child, and not to the time of the death of the tenant for life. Accordingly, I am left with the problem of disposing adequately of the word "then" if the declaration does not mean what it says.

I now look back at the judgment of Stirling, L.J., in *Re Schnadhorst* (1). Can I say that the dispositions of this will amount to a direction to divide the property at any particular period? I think not. Can I say that they amount to an indication of intention on the part of the testator that in any particular event the objects of his bounty were to take absolute interests? So far as the daughters are concerned, I think not. Can I say that the context renders it necessary or proper for me to depart from the original and literal meaning of the second declaration? I think not. What then must I do? I must say that the second declaration should be read according to its natural and proper meaning, that is to say, as meaning death at any time.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the estate.

Solicitors: *Burton, Yeats & Hart*, agents for *W. Naunton Evans*, Tonypandy (for the plaintiff); *Helder, Roberts, Giles & Co.*, agents for *Roger Williams & Son*, Swansea (for the first defendant); *Mills, Lockyer & Co.* (for the second defendant); *T. D. Jones & Co.*, agents for *Edward Harris & Son*, Swansea (for the third defendant); *Murray Napier & Co.*, agents for *Andrew, Thompson & Partners*, Swansea (for the fourth defendant).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

HONIG *v.* REDFERN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Lynskey, JJ.), May 11, 1949.]

Alien—Lodger—Registration—Signed statement of alien—All rooms in house let to tenants—Premises not managed by or on behalf of owner—Premises visited only for rent collecting—Aliens Order, 1920 (*S.R. & O.*, 1920, *No.* 448), *art.* 7 (1), (2) (*as amended by the Aliens* (*No.* 2) *Order*, 1945 (*S.R. & O.*, 1945, *No.* 1535)).

The appellant owned a house of which the ground floor was let by him to a seaman's club, and all the other rooms were let to various residents at rents from 15*s.* to 30*s.* a week. Each resident had exclusive use of his rooms and held the keys thereof, and the only parts used in common were the staircases and toilets which the residents cleaned in turn. The appellant did not live on the premises and employed no one to manage them for him. He visited the premises once a week to collect rent and did not otherwise supervise them. Certain aliens were among the residents, but the appellant kept no register of the residents and did not keep a signed statement of the aliens. He was charged under the Aliens Order, 1920, art. 7 (2), (as amended by the Aliens (No. 2) Order, 1945), with failing to keep a register, and also, under art. 7 (1) of the Order (as amended), with failing to keep a signed statement in the prescribed form of every alien lodger.

HELD : art. 7 (1) and (2) of the Order of 1920 (as amended) applied only to lodgers and not to tenants ; the appellant had demised the whole of the premises to tenants, and did not himself manage the premises as a lodging house nor were they so managed by a servant on his behalf ; and, therefore, the residents were not lodgers and the charges should be dismissed.

Rodda v. *Godfrey* (1926) (135 L.T. 31), *distinguished.*

[AS TO WHO IS A LODGER, see HALSBURY, Hailsham Edn., Vol. 20, pp. 12, 13, para. 7 ; and FOR CASES, see DIGEST, Vol. 30, pp. 516, 517, Nos. *1711-1718*.]

Cases referred to :

(1) *Rodda* v. *Godfrey*, (1926), 95 L.J.K.B. 704 ; 135 L.T. 31 ; 90 J.P. 111 ; Digest Supp.

(2) *Helman* v. *Horsham and Worthing Assessment Committee*, [1949] 1 All E.R. 776.

CASE STATED by a metropolitan magistrate.

The appellant, Emanuel Honig, was charged before a court of summary jurisdiction sitting at Thames Magistrate's Court under the Aliens Order, 1920, art. 7 (1) and (2) (as amended by the Aliens (No. 2) Order, 1945), with having failed to keep a register of all lodgers over the age of sixteen years at No. 37, Pennyfields, Limehouse, London, E.14, and with having failed to keep a signed statement in the prescribed form of every alien lodger over the age of sixteen years. The magistrate found the charges proved, and convicted the appellant, imposing a fine of £50 with the alternative of three months' imprisonment on each information. The Divisional Court now allowed the appeal. The facts appear in the judgment of LORD GODDARD, C.J.

M. Waters for the appellant.

Vernon Gattie for the respondent.

LORD GODDARD, C.J. : This is a Case stated by a metropolitan magistrate before whom the appellant was charged with "failing to keep a register of all lodgers (irrespective of their nationality) over the age of sixteen years contrary to art. 7 (2) of the Aliens Order, 1920 (S.R. & O. 1920, No. 448) as amended by the Aliens (No. 2) Order, 1945 (S.R. & O. 1945, No. 1535)."

A second information was preferred against him for "failing to keep a signed statement in the prescribed form of every alien lodger over the age of sixteen years" contrary to art. 7 (1) of the Order of 1920, as amended by the Order of 1945. The learned magistrate found:

> "(i) That the appellant was at all material times the owner of 37, Pennyfields, in the county of London. (ii) That the ground floor of the said premises was let by the appellant to, and was occupied by, a seaman's club. (iii) That the six rooms on the first and second floors were let by the appellant furnished to a number of tenants in separate lettings at rents which ranged from 15*s*. per week to 30*s*. per week. (iv) That each of the said tenants had exclusive possession of his own rooms and separate locks on his doors. (v) That the said tenants used the toilets in the said premises and the staircases, but no other parts, in common with one another. (vi) That the said tenants took it in turns to clean the said toilets and staircases. (vii) That the appellant did not reside on the said premises nor did he employ anyone on his behalf to manage the said premises. (viii) That the appellant visited the premises once a week for the purpose of collecting rent."

The magistrate also found "that the appellant did not undertake the duty of cleaning the staircases or toilets in the said premises or otherwise supervise the said premises except as aforesaid." Then he found that a British-born woman, who had married a Chinese, and, therefore, was an alien, "was a tenant of two rooms on the first floor of the said premises and that she had keys to her said rooms and a rent book, which keys and book she produced before me," and her husband was residing on the premises and that no register was kept. The appellant was not in possession of a signed statement by the Chinese in accordance with art. 7 (1) of the Aliens Order, 1920 (as amended).

Article 7 of the Aliens Order, 1920, as amended by the Order of 1945, provides:

> "(1) Every alien of the age of sixteen years or over staying at any premises to which this article applies shall at such times as may be prescribed furnish to the keeper of the premises a signed statement in such form and containing such particulars as may be prescribed, and it shall be the duty of the keeper of the premises to require every such alien to comply with his obligations under this paragraph. (2) It shall be the duty of the keeper of any premises to which this article applies to keep a register relating to all persons (irrespective of their nationality) of the age of sixteen years or over staying at the premises . . . (*b*) it shall be the duty of the keeper of the premises to require every such person to comply with his obligations under this paragraph. (3) The keeper of any premises to which this article applies shall preserve any statement furnished and register kept thereunder relating to persons staying at the premises . . . (4) The premises to which this article applies are any premises, whether furnished or unfurnished, where lodging or sleeping accommodation is provided for reward; and in this article the expression 'stay' means to lodge or sleep, for one night or more, in accommodation so provided."

Therefore, there must be premises in which lodging or sleeping accommodation is provided for reward and there must be a person who is the keeper of those premises. Article 20 (2) of the Order provides:

> "The expression 'keeper' where used in relation to premises where accommodation is provided for reward includes any person who for reward receives any other person to lodge in the premises, either on his own behalf or as manager or otherwise on behalf of any other person."

On the facts found by the learned magistrate it seems clear that there was a demise of all the rooms in the house to different tenants. In those circumstances it is difficult to see how lodging or sleeping accommodation can be said to have been provided by the appellant for reward. The appellant had no power to go into any of the rooms so long as they were occupied by the tenants, and he certainly would not receive any other person to lodge in the premises because the whole premises were let. The distinction, it seems to me, here is between letting to tenants and letting to lodgers, and unless these premises are occupied by lodgers the appellant cannot be the keeper of a lodging house.

I should have thought that the case was clear were it not for a decision of this court in *Rodda* v. *Godfrey* (1). The judgments in that case at first sight appear to be extremely wide, but we must see exactly what were the facts with which the court was dealing. It was found that :

> " . . . several of the rooms of the house were let unfurnished by the appellant to various persons as tenants in separate lettings at rentals ranging from £1 a week to £3 a week, and other rooms were unoccupied."

There was, therefore, an opportunity there for receiving people to lodge or sleep for reward. It was found that :

> " . . . the house was managed on behalf of the appellant by one Scott, whose duties included the cleaning of passages, stairways, landings, water-closets, and bathrooms, the maintenance of the electric light service, and the care of the garden."

That is a finding that the landlord, not by himself, but by his servant, retained control of the house and managed it. There is a large number of cases which are well-known and which used to be very material in the days when revising barristers had to decide who were lodgers and entitled to lodgers' votes and who was an occupier entitled to an ordinary occupier's vote, and the distinction has recently been considered [in *Helman* v. *Horsham and Worthing Assessment Committee* (2)] in connection with matters relating to rating. The general test, which has been laid down for many years, is that if the owner of a house who allows other people to live in it lives on the premises and manages the premises himself, or if the owner has a servant resident on the premises to manage them on his behalf, the other people living in the house are lodgers, whereas if he does not live in the house but lets the whole house out to various people it is a letting out of the house in tenements and the persons occupying the tenements are not lodgers but tenants.

On the findings of the magistrate this case seems clearly to fall within the second of those classes, and, therefore, is distinguishable from *Rodda* v. *Godfrey* (1). I think *Rodda* v. *Godfrey* (1) must be taken to have been decided on its own particular facts and the court must have considered in that case that the defendant retained the management of the house by his servant. There was also the material fact that there were certain unoccupied rooms in the house so that the whole house was not let out but could be regarded as a lodging house, *i.e.*, the magistrates could find that the persons who were in the house were lodgers and the house could be regarded as being within the Order. In the present case I cannot see any evidence to justify the finding that these people were lodgers or were otherwise than tenants to whom rooms had been demised. For those reasons I think the appeal succeeds.

BIRKETT, J. : I agree.

LYNSKEY, J. : I agree.

Appeal allowed with costs.

Solicitors : *Elder & Co.* (for the appellant) ; *Solicitor, Metropolitan Police* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Affirmed in part and reversed in part.
C.A. *post* p. 985.

GIBSON AND ANOTHER *v.* SOUTH AMERICAN STORES, LTD. (GATH & CHAVES) AND OTHERS.

[Chancery Division (Harman, J.), April 28, May 12, 1949.]

Charitable Purpose—Relief of poverty—Requirement of public element—Employees' health and relief fund—Funds provided by company for assistance of necessitous employees and their dependants—Right of company to revoke trust deed and hold fund freed from the trust.

The articles of association of a public limited company, incorporated in 1912 and conducting chain stores in the Argentine Republic and elsewhere, provided that the board of directors should set aside every year two per cent. of its profits for the employees' savings and insurance fund, later called " the Employees' Health and Relief Fund." On Apr. 14, 1918, a trust deed was executed in order to define and declare the trusts on which the fund was and should be held and the terms on which it was and should be administered, and it provided : " (3) The fund shall both as to capital and income and accumulations of income be used and applied at such times and in such manner in all respects for the benefit of such members of the class of beneficiaries hereinafter designated as the [board] shall from time to time direct and (without prejudice to the generality of the discretion intended to be hereby reposed in the [board] may be used and applied in or towards the granting of gratuities pensions or allowances of such respective amounts to be paid to such persons (being members of the said class of beneficiaries) upon such terms and subject to such conditions as the [board] shall from time to time think proper to prescribe. (4) The class of beneficiaries for whose benefit the fund may be used or applied as aforesaid shall include all persons who in the opinion of the [board] are or shall be necessitous and deserving and who for the time being are or have been in the company's employ or the employ of any agents of the company or in the employ of [a subsidiary company] and the wives widows husbands widowers children parents and other dependants of any person who for the time being is or would if living have been himself or herself a member of the class of beneficiaries." The trust deed further provided : " (15) The company may at any time or times with the sanction of a special resolution of the company in general meeting rescind alter or modify the provision of these presents or any of them." Until 1948, when the articles were amended by deleting the direction to the board, the appropriate amount was set aside each year and the sum in the hands of the trustees of the fund rose to £105,000. The fund was employed in accordance with cll. 3 and 4 of the deed, and from time to time gratuities, pensions or allowances were granted to employees and their dependants, including employees in the Argentine, France and Chile. The calls on the fund were much less than its income, and they appeared to be decreasing, and the company desired to wind up the fund, using part of it to contribute to a new pensions scheme, and returning the rest to the ordinary funds of the company free from the trusts.

Held : it being a necessary qualification of beneficiaries under the fund that they were necessitous, the trust was for the relief of poverty ; the class of beneficiaries under the trust deed was sufficiently wide to constitute the public element which was necessary to make it charitable ; and, therefore, the trust was a charitable trust which it was not competent to the company to revoke.

Re Drummond ([1914] 2 Ch. 90 and *Re Rayner* (1920) (89 L.J.Ch. 369), *distinguished.*

Re Compton ([1945] 1 All E.R. 198), and *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* ([1946] 1 All E.R. 501), *applied.*

[As to How Far "Private" Charities are Legal Charities, see HALSBURY, Hailsham Edn., Vol. 4, pp. 127-136, paras. 169-176; and for Cases, see DIGEST, Vol. 8, pp. 261-263, Nos. *240-252.*]

Cases referred to:

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, *1.*

(2) *Morice* v. *Durham (Bp.)*, (1805), 10 Ves. 522; 8 Digest 293, *705.*

(3) *Ommanney* v. *Butcher*, (1823), Turn. & R. 260; 8 Digest 292, *696.*

(4) *Jones* v. *Williams*, (1767), Amb. 651; 8 Digest 256, *172.*

(5) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.

(6) *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, [1946] 1 All E.R. 501; [1946] Ch. 194; 115 L.J.Ch. 158; 174 L.T. 428; 2nd Digest Supp.

(7) *Re Clark's Trust*, (1875), 1 Ch.D. 497; 45 L.J.Ch. 194; 8 Digest 325, *1080.*

(8) *Spiller* v. *Maude*, (1864), 5 New Rep. 30; 11 L.T. 329; 28 J.P. 804; *subsequent proceedings*, (1881), 32 Ch.D. 158, *n.*; 8 Digest 261, *240.*

(9) *Re Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest 265, *267.*

(10) *Re Rayner*, (1920), 89 L.J.Ch. 369; 122 L.T. 577; 84 J.P. 61; Digest Supp.

(11) *Re Gosling*, (1900), 48 W.R. 300; 8 Digest 244, *27.*

(12) *Re Buck*, [1896] 2 Ch. 727; 65 L.J.Ch. 881; 75 L.T. 312; 60 J.P. 775; 8 Digest 262, *246.*

Adjourned Summons to determine *inter alia* whether a fund provided by a company for the benefit of necessitous employees and their dependants was the subject of a charitable trust, and, if so, whether there was power in the company to revoke that trust. Harman, J., held that the trust was charitable and irrevocable. The facts are set out in the judgment and are summarised in the headnote.

Lindner for the plaintiffs, the trustees of the fund.

E. Blanshard Stamp for the defendant company.

R. H. Walton for the defendant Barnes, a beneficiary under the trust deed.

Danckwerts for the Attorney-General.

Cur. adv. vult.

May 12. **HARMAN, J.,** read the following judgment. In 1912, there was incorporated under the Companies Acts as a public company the first defendant in this case. It is a company conducting certain chain stores in the Argentine Republic and it has a subsidiary which operates in Chile and certain local subsidiary companies incorporated in Chile and in France. The company's board has always sat in England, where it had certain employees. The company, by art. 134 of its articles of association, laid it down that the board should set aside every year 2 per cent. of its profits for "the employees' savings and insurance fund." This article was modified by special resolution passed on Dec. 29, 1915, and confirmed on Jan. 14, 1916, by changing the style of the object to which the two per cent. above referred to was to be devoted. The amended article provides: "134. The board shall set aside out of the profits of the company in each financial year . . . the following sums . . . (*d*) Two per cent. thereof to the employees' health and relief fund." Ever since its incorporation down to 1948, the company has, accordingly, set aside two per cent. of its profits for the benefit of this fund which is vested in trustees who are the plaintiffs in the action. The amount in their hands at present is about £105,000. By special resolution passed on Aug. 4, 1948, art. 134 was amended by striking out the words following "(*d*)" above quoted, so that from that date no further monies of the company accrued to the fund.

There is no evidence what, if any, part of the fund was expended prior to the execution of the deed of Apr. 14, 1918, mentioned in the heading to the summons. By this deed, after reciting art. 134 as it then stood, and that no contribution had ever been made to the fund by any employee of the company and that the fund then stood at rather over £20,000, and reciting that: "It is considered expedient to define and declare the trusts upon which the fund is and shall be held and the terms upon which the same is being and shall be administered", the operative part of the deed provided that the fund should be vested in trustees (as it is now vested in the plaintiffs) and invested with the consent of the London board of the company in certain forms of security. The deed then proceeded:

> "(3) The fund shall both as to capital and income and accumulations of income be used and applied at such times and in such manner in all respects for the benefit of such members of the class of beneficiaries hereinafter designated as the London board shall from time to time direct and (without prejudice to the generality of the discretion intended to be hereby reposed in the London board) may be used and applied in or towards the granting of gratuities pensions or allowances of such respective amounts to be paid to such persons (being members of the said class of beneficiaries) upon such terms and subject to such conditions as the London board shall from time to time think proper to prescribe. (4) The class of beneficiaries for whose benefit the fund may be used or applied as aforesaid shall include all persons who in the opinion of the London board are or shall be necessitous and deserving and who for the time being are or have been in the company's employ or the employ of any agents of the company or in the employ of Gath & Chaves Sociedad Anonima and the wives widows husbands widowers children parents and other dependants of any person who for the time being is or would if living have been himself or herself a member of the class of beneficiaries."

There was a power for the London board to delegate to local authorities certain of its powers. It was provided that membership of the class of beneficiaries should give no right to anybody. Provision was made for the destination of the fund by its distribution among members of the class of beneficiaries in the event of the company's liquidation. Clause 15 provides:

> "The company may at any time or times with the sanction of a special resolution of the company in general meeting rescind alter or modify the provision of these presents or any of them."

The company's Chilean subsidiary had a somewhat similar deed and in 1938 the fund subsisting under that deed was amalgamated with the fund under the deed now in question, and I shall assume for present purposes that this was validly done. Ever since the date of the deed (and I shall assume also before that date) the fund has been administered in accordance with the provisions of cll. 3 and 4 by providing gratuities, pensions or allowances for employees and ex-employees of the company or its agents including the Chilean subsidiary and the companies incorporated in Chile and France and their dependants. At one time as many as seventy ex-employees in the Argentine were in receipt of pensions, but for one reason and another explained in the evidence the number now being assisted is very much less. The persons in the employment of the company and its subsidiaries at present number about 4,400 in the Argentine, about 600 in Chile, about 40 in England and a few in France. There appears to be no record of ex-employees. The persons at present in receipt of benefits from the fund are the defendant, Barnes, and four other ex-employees in England, ten ex-employees in the Argentine, and one ex-employee in France. The calls on the fund are at present very much less than its income, and are, apparently, likely to decrease rather than to increase. The company has also put into operation in England a contributory pension scheme and proposes to put into operation a further non-contributory pension scheme at considerable expense to itself.

In the circumstances the company not unnaturally is desirous, if it can
A properly do so, of winding-up the fund under the deed of 1918, using part of it to contribute to the new pension scheme, and putting the remainder back into the coffers of the company. Accordingly, having obtained the sanction of the company in the form of a special resolution, the board, affecting to act in pursuance of cl. 15 of the deed of 1918, has authorised the execution of a deed poll bearing date Aug. 26, 1948, rescinding the deed of 1918 and declaring
B that the fund shall be held henceforth in trust for the company free from the trusts set forth in the deed of 1918. The questions before me are, first, whether the fund under the deed of 1918 is held on a charitable trust. If not so held, it is admitted that the trusts are void and that there is a resulting trust of the fund to the company from whom alone the fund has emanated. Secondly, whether, if there is a charitable trust, there was any right in the company to
C revoke it and to resume the dominion over the fund.

Before considering whether the trusts are charitable, I must construe cll. 3 and 4 of the deed. In my judgment, the class of beneficiaries defined in cl. 4 must all satisfy the requirement of being necessitous and deserving, that is to say, that poverty is a necessary element to qualify a person for benefit. It was suggested to me that, though employees or ex-employees must neces-
D sarily be poor, yet that qualification did not extend to their dependants. I cannot so construe the deed. In my judgment, dependants must be necessitous and deserving just as a member of the primary class of employees or ex-employees must himself or herself be. This, then, is a fund devoted to the relief of poverty, and that is one of the objects of charity set forth in the preamble to the statute of Elizabeth (43 Eliz. c. 4) under the words: "Relief
E to aged impotent and poor people." It is the first of the objects enumerated by LORD MACNAGHTEN in *Income Tax Special Purposes Comrs.* v. *Pemsel* (1) where he adopts the classification put forward in argument by Mr. *Romilly* in *Morice* v. *Bishop of Durham* (2) dividing charity in four categories—first, the relief of poverty; secondly, the advancement of education; thirdly, the advancement of religion; and, fourthly, other purposes beneficial to the com-
F munity (these are described in Mr. *Romilly's* argument as objects of general public utility). The last three categories embrace the rich as well as the poor. Now, charity in its legal sense does not include private charity which in the eye of the law is benevolence, so in the celebrated case of *Ommanney* v. *Butcher* (3) a direction to distribute "in private charity" was held not to constitute a charitable trust and in *Jones* v. *Williams* (4) charity is defined by LORD
G CAMDEN, L.C., as a general public use.

The public element of charity has been lately emphasised in two cases in the Court of Appeal, namely, *Re Compton* (5) and *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (6). The first of these cases involved a gift to educate members of the family of the testatrix, and the judge of first instance felt constrained to hold this a good charity on the analogy of what
H are known as the "poor relations" cases, where relief of the poverty of a man's own relations was held to be a good charity. The argument was that if to relieve a relation's poverty was an act of charity, so was the relief of his ignorance, and it might have been added so would have been the relief of his ungodliness or want of religion. The Court of Appeal rejected this contention, emphasising that charity must be public and setting aside the poor relations cases on the footing that they were anomalous and ought not to be extended. LORD GREENE, M.R., said ([1945] 1 All E.R. 206), after reciting the cases:

> " In these circumstances the question arises whether we ought to extend the analogy of these decisions so as to cover a trust of the kind now in controversy. Taking the view which I do, as already expressed, I do not think that we are bound or ought to do so. There may perhaps be some special quality in gifts for the relief of poverty which places them in a class by themselves. It may, for instance, be that the relief of poverty is to be regarded as in itself so beneficial to the community that the fact that the gift is confined to a specified family can be disregarded : whereas in the case of an educational trust where there is no poverty qualification the funds may at any time be applied for the purpose of educating a member of the family for whose education ample means are already available, thus providing a purely personal benefit and one freed, incidentally, from the burden of income tax. Failing such a ground of distinction, I can only regard the poor relations cases as anomalous and I prefer to let them remain as such rather than to extend the anomaly to a different class of case."

In *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (6), the Court of Appeal had to deal with a fund for the relief of air-raid distress among the employees of a certain firm. It was held that there was no element of poverty involved, and the court rejected the view that this was a charity, for reasons here not material, but dealt again with the cases in which trusts, which apparently would otherwise have failed for want of a public element, were held good because relief of poverty was their object. LORD GREENE, M.R., reviewed the cases and again referred to the poor relations cases in the following terms ([1946] 1 All E.R. 508) :

> " In *Re Compton* (5) I referred to what are commonly known as the poor relations cases, in which, in the case of a class of potential beneficiaries of a strictly private and personal nature, it had been held in past days that a charitable character was, nevertheless, attributable to the trust if it was a trust for the relief of poverty. The cases mentioned in connection with this passage in TUDOR ON CHARITIES were not quoted to the court on that occasion, and if I have any criticism of the decision in *Re Compton* (5) it is that, in referring to the poor relations cases as in a category by themselves, I might have added a reference to the other cases mentioned in TUDOR ON CHARITIES as falling into the same category. But no authority has been cited to us which would justify the proposition that what is *prima facie* a personal or private trust can be saved except on the ground that its purpose is the relief of poverty."

He then cites a number of the cases which are set out in TUDOR ON CHARITIES on the poverty point, and continues :

> " What I have said will perhaps be made clearer by reference to one or two of the authorities which were cited. First, there is *Re Clark's Trust* (7). That was a case of a friendly society which was held not to be a good charitable institution on the ground that it was a private charity, *i.e.*, a charity not recognised as a charity by law. I can get no help out of that decision except that HALL, V.-C., calls attention to this in connection with the rules of the society (1 Ch.D. 500) : ' Poverty of the member at the time of his sickness or lameness, or in his old age, was not required to entitle him to an allowance. It appears to me that the society was not a charitable institution.' Then comes a decision of SIR GEORGE JESSEL, M.R., in *Spiller* v. *Maude* (8). That case really brings out exactly the point which I mentioned a moment ago. There there was a society which had every mark of a purely personal association with no public element in it at all. It was ' . . . called the York Theatrical Fund Society . . . instituted in York by the voluntary association and sub-

> scriptions of the members of the York company of actors and actresses.' Under the rules no person save a member of the company was entitled to any benefit at all. The objects were [to provide] the funeral expenses of a contributor dying in indigent circumstances, the relief of orphan children of contributors, the supply of medical advice and medicines to sick contributors unable to pay, and granting annuities to contributors A on becoming incapacitated either by age, accident, or other infirmity, from exercising the duties of his or her profession as an actor or actress and not possessing an independent income of more than £50 per annum. It was a case which seems to me in every respect *prima facie* to lack any element of publicity and which could not in any sense be described as being for the benefit of a section of the public. It is true that the funds of the society B were augmented by subscriptions from non-members, but the important thing about the case is the way in which SIR GEORGE JESSEL, M.R., dealt with it. He went through the rules and came to the conclusion '. . . that the whole fund was charitable, but that the particular charity had failed. He thought that poverty was clearly an ingredient in the qualification of members who were to receive the benefits of the society.' It is perfectly C clear that he regarded poverty as the thing that saved it. I must confess, speaking for myself, that seems to me to be a very extreme decision, because the whole arrangement was of a personal nature. However, it was saved by the fact of poverty . . ."

MORTON, L.J., added these words (*ibid.*, 511):

> D "The third point is that there is no element of poverty in the present case. That, of course, does not prevent a trust from coming within the fourth head of LORD MACNAGHTEN'S classification in *Pemsel's* case (1), but the relevance of it in the present case is this: Where poverty is essential in the qualification for benefits under a particular fund, there have been cases where trusts which would appear to be of a private nature E have been held to be charitable. An example of this is *Spiller* v. *Maude* (8). The reason, as was suggested by LORD GREENE, M.R., in *Re Compton* (5), may be that the relief of poverty is regarded as being in itself beneficial to the community. That element being absent in the present case, the appellant cannot rely on these cases . . . But I do not feel inclined to extend the somewhat anomalous line of cases where poverty has been F held to take a trust out of the category of a private trust and into the category of a trust which is charitable in the legal sense."

The position, therefore, on the authorities is now that in the second, third, and fourth categories of charity as defined in *Pemsel's* case (1) there can be no doubt that a public object is essential, but there is at least a suggestion that this element is not necessary in the first category. I do not myself feel G able to adopt this suggestion. It seems to me that a public object is always necessary to make a trust legally charitable, and that the explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories. The law may well (as LORD GREENE, M.R., suggested in *Compton's* case (5)) consider that to relieve even one man's poverty is a benefit to the whole community while to relieve H his ignorance or to minister to his ungodliness is not such a benefit, and similarly with the miscellaneous objects in the fourth category. Viewed in this light, is the object here a public object or no ? I think it is. The Court of Appeal in both the cases referred to has expressly approved of the decision of EVE, J., in *Re Drummond* (9), where he held that a trust for the benefit of the workpeople of a certain company (not being poor people) was a private object. The court also disapproved *Re Rayner* (10) where the same judge (without any argument) held that, the promotion of education being a charitable object, the fact that it was confined to the employees of a single firm did not matter. First, be it noted that neither of these cases deals with poverty, and, secondly, both of them were concerned with the employees of a single firm. The present fund is devoted not only to employees, but also to ex-employees, and to the dependants of both classes, and also to the employees and ex-employees and dependants of subsidiary companies, and of agents of the company. This, as it seems to me, in a poverty case, and I say nothing about any other category, is a sufficiently wide class to constitute a public element, and accordingly I hold this to be a good charity. The class seems certainly to be wider than those mentioned in several of the reported cases dealt with recently in the Court of Appeal, for instance *Spiller* v. *Maude* (8) (members of the York Theatrical Fund Society); *Re Gosling* (11) (old and worn out clerks of a banking firm); *Re Buck* (12) (members of a friendly society and their widows and children).

This, then, being a valid charitable trust, was it competent to the company to revoke it as it purports recently to have done and withdraw the fund from its charitable purpose? In my judgment, it was not. It is true that property can be devoted to charity *sub modo* or conditionally on the happening of some event, but this fund consists merely of an accumulated proportion of the company's profits which ever since its incorporation has been under its articles devoted to a charitable purpose. I can see no right in the company to revoke this purpose, although it may put an end at any time by alteration of the articles, as it has done, to any obligation to subscribe to it in the future. Consequently, I hold that there was no power under cl. 15 of the deed of 1918 so to revoke it as to withdraw funds already devoted to the charitable object from that object.

Declaration accordingly. The matter referred to chambers for the settlement of a scheme. Costs of all parties to be paid out of the capital of the fund.

Solicitors: *Slaughter & May* (for all parties except the Attorney-General); *Treasury Solicitor.*

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

ROSE *v.* HURST.

[Court of Appeal (Lord Greene, M.R., Asquith and Denning, L.JJ.), May 5, 1949.]

Landlord and Tenant—New lease—Rent—Power of tribunal to fix rent above standard rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 1—*Landlord and Tenant Act,* 1927 (*c.* 36), *s.* 5 (2).

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1, the rent of any dwelling-house to which the Act applies is limited to the standard rent and any increase above that rent is irrecoverable by the landlord from the tenant. By the Landlord and Tenant Act, 1927, s. 5 (2), where a new lease is granted under the Act "the rent fixed by the tribunal as the rent payable under the new tenancy shall be such rent as the tribunal may determine to be the rent which a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises . . ."

In 1928 a dwelling-house and shop were let for a term of 21 years at a rent of £90 per annum. In 1939 the premises came within the Rent and Mortgage Interest Restrictions Act, 1939, and £90 became the standard rent. On an application for a new lease under the Landlord and Tenant

Act, 1927, s. 5 (1), a lease was granted by the county court for fourteen years at a yearly rent of £230. The tenant contended that the county court judge had no power to raise the rent above the standard rent.

HELD : as between the Landlord and Tenant Act, 1927, and the Rent Restrictions Acts in this regard the Act of 1927 must be taken to prevail, and, therefore, the rent had been properly fixed at £230.

[FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 1, and THE LANDLORD AND TENANT ACT, 1927, s. 5 (2), see HALSBURY'S STATUTES, Vol. 10, pp. 332, 381.]

APPEAL by the tenant from an order of His Honour JUDGE TUDOR REES, sitting at Uxbridge County Court, dated Dec. 16, 1948, granting a new lease at a rent higher than the standard rent of the premises. The Court of Appeal dismissed the appeal. The facts appear in the judgment of DENNING, L.J.

Stogdon for the tenant.
Astell Burt for the landlord.

LORD GREENE, M.R. : I will ask DENNING, L.J., to give the first judgment.

DENNING, L.J. : The question is whether a tribunal which awards a new lease under the Landlord and Tenant Act, 1927, s. 5 (1), can fix a rent in excess of the standard rent of the premises. In 1928, a dwelling-house and shop were let for a term of 21 years expiring in March, 1949. The rent was £90 a year, the premises were protected by the Rent Restrictions Acts, and the standard rent, therefore, was £90 a year. In due course, under the Landlord and Tenant Act, 1927, s. 5 (1), the tenant claimed a new lease of the premises. The landlords did not dispute that goodwill had become attached to the premises and said that they were willing and able to grant a renewal of the lease of the premises at such rent and for such term not exceeding fourteen years as the tribunal should consider reasonable. The matter was referred to a referee and eventually came before the county court judge who determined that the new lease should be for a term of fourteen years and that the rent should be £230 a year, that sum being, in his view, the rent which a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises.

The question is whether it was open to the judge to fix the sum of £230 a year having regard to the fact that the standard rent of the premises was £90 a year. It is said that it was impossible for him to do so because of the Rent Restrictions Acts. A new lease has, of course, very considerable advantages over a statutory tenancy. A statutory tenant has only a personal privilege. He cannot assign the premises, nor, indeed, has he full security of tenure, but under the Landlord and Tenant Act, 1927, if the tenant gets a new lease, he gets security for the term of the lease and he has a valuable asset of which he can dispose by assignment to a purchaser. Nevertheless, it is said that the rent payable for the new lease is limited to the standard rent. The matter depends on two statutes. On the one hand, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1, provides that the rent of any dwelling-house to which the Act applies is limited to the standard rent and any increase above it is irrecoverable. That applies not only to the original tenancy but also to any subsequent tenancy, and it applies notwithstanding any agreement which may be made between the parties, or any judgment which may be entered as between them. On the other hand, s. 5 (2) of the Landlord and Tenant Act, 1927, says that when a new lease is granted under the Act :

> " . . . the rent fixed by the tribunal as the rent payable under the new tenancy shall be such rent as the tribunal may determine to be the rent which a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises, having regard to

> the terms of the tenancy, but irrespective of any goodwill which may have become attached to the premises by reason of the tenant or his predecessors in title having carried on thereat a particular trade or business."

Those two sections cannot possibly apply at one and the same time to the self-same premises. Under the Landlord and Tenant Act, 1927, a tribunal has got to " determine " what the rent is to be. If it had already been fixed by the Rent Acts, there would be nothing for the tribunal to determine. Again, under the Landlord and Tenant Act the rent is to be that which a " willing " lessee would agree to give and a " willing " lessor would agree to accept, but, if the Rent Acts apply, the rent is fixed without regard to what either is " willing " to do. So the two provisions are inconsistent one with the other, and the task of this court is to say which provision is to prevail.

The Act of 1927 is later and more specific than the Act of 1920 and must be taken to prevail. The provisions of the Act of 1927 which I have read must, therefore, be read in this way : " Notwithstanding the provisions of the Rent Restrictions Acts, the rent fixed by the tribunal shall be such rent as the tribunal may determine to be one which a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept." If the later Act is read thus, it is plain that the rent to be fixed under the provisions of the Act of 1927 is not affected by the provisions as to the standard rent in the Act of 1920.

The second question is this. These premises were not controlled by the Act of 1920 but by the Rent and Mortgage Interest Restrictions Act, 1939, and when the Act of 1939 was passed, nothing was said about the Landlord and Tenant Act, 1927. If my interpretation of the Act of 1927 is correct, however, it follows that it is not affected by the Act of 1939. The Act of 1939 was a general Act referring to all premises below a certain value. In comparison with it the Landlord and Tenant Act, 1927, was a specific Act. On my interpretation the relevant provisions of the Act of 1927 opened with the words : " Notwithstanding anything in the Rent Restrictions Act, the rent shall be . . ." On that construction the Acts run together, and the rent fixed under the Act of 1927 is not limited to the standard rent. The result is that this tenant gets his new lease at the rent of £230 a year, and in return he has the benefit of a fourteen years' lease which he can assign. In these cases the tenant must elect between two inconsistent rights. He must elect either to remain on as a statutory tenant at the standard rent, or to take a new lease at a rent fixed as between a willing lessor and a willing lessee. He cannot have both the benefit of the new lease and of the standard rent. In this case he has elected to take a new lease, and so he must pay the rent of £230. For these reasons, I am of opinion that the county court judge came to a correct conclusion and the appeal should be dismissed.

ASQUITH, L.J. : I agree.

LORD GREENE M.R. : I agree. The Landlord and Tenant Act, 1927, s. 5 (2), leaves it to the tribunal to decide what the proper terms of a tenancy should be in the matter of rent, duration, and other provisions. On the face of the statute the power of the tribunal in fixing those terms is only limited by express words used in the relevant parts of the Act, but, if the argument addressed to us by the tenant were accepted, it would mean that, in addition to the very limited qualifications expressly imposed by the Act, there must also be applied a further restriction confining and restricting the tribunal's powers. The only way in which such a restriction can be read into the Act of 1927 is by construing it as being subject to the limitation regarding rent imposed under the Rent Restrictions Act, 1920, in respect of premises falling within that Act. Looking at it as a mere matter of construction, and having regard also to what Denning, L.J., has pointed out in relation to the entire difference of approach and the difference in the subject-matters of the two statutes, any such construction as the tenant contends for would lead to a most extravagant result. When I say "difference in subject-matter" I mean that the Act of 1927 is dealing, not with the personal right of occupation in relation to which a restricted rent under the Act of 1920 is payable, but with a totally different form of right, namely, the grant of an estate under a new lease. It would be an extraordinary result if the powers expressed in the widest terms in the Act of 1927 to do justice between the parties were to be limited by the provisions of an Act the whole theory and basis of which is statutory tenancy, as it is inaccurately called, or statutory right of occupancy, as I prefer to call it. On that basis, it seems to me that the Act of 1927 can only be construed as overriding the provisions of the Rent Restrictions Act, 1920. I have nothing to add to what DENNING, L.J., has said with regard to the effects on the Act of 1927, as so construed, on the later Rent Restrictions Acts, and, in my opinion, the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Stilgoes* (for the landlords); *Lawrence Dennis & Co.* (for the tenant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

MARSH *v.* MOORES AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Lynskey, JJ.), April 26, May 6, 1949.]

Street Traffic—Motor vehicle—Insurance against third-party risks—Using vehicle and permitting vehicle to be used on road without a policy of insurance being in force—Company's servant driving company's car on authorised journey—Instructing unlicensed person to drive—Road Traffic Act, 1930 (c. 43), *s.* 35 (1).

By the terms of an insurance policy a company owning a motor car was insured against liability for "death of or bodily injury to any person" (except a person employed by the company) and "damage to property" other than that of the company arising from an "accident caused by or through or in connection with" the specified car. By an exception clause the insurance company was not to be liable while the car was "being driven with the general consent of the insured by any person who to the insured's knowledge does not hold a licence to drive such a vehicle unless such person has held and is not disqualified for holding or obtaining such a licence." The policy also covered a person driving the car on the company's order or with its consent, provided that he held a driving licence or had held and was not disqualified for holding or obtaining such a licence.

The company authorised one of its servants, J.M., who held a driving licence, to drive the car on a certain journey. With the permission of the company J.M. was accompanied by his cousin, a girl of 17, who, to his knowledge, did not hold and had never held a driving licence. During the course of the journey, while the car was on the highway, he allowed his cousin to take the wheel and, while sitting beside her ready to operate the hand-brake, gave her a lesson in driving the car along the road. They were charged, respectively, under the Road Traffic Act, 1930, s. 35 (1), with permitting a car to be used on the road and with using a car on the road without there being in force in relation to the user a policy of insurance in respect of third-party risks as complied with the requirements of pt. II of the Act.

Held : (i) if a policy of insurance was in force covering the user of the car at the material time in respect of third-party risks, a policy covering the personal liability of the driver was not required under the Road Traffic Act, 1930, s. 35 (1).

John T. Ellis, Ltd. v. *Hinds* ([1947] 1 All E.R. 337), *followed.*

(ii) on the facts of the case, J.M. still retained the control and management of the car at the material time, and, therefore, he remained the driver of the car, and, in allowing his cousin to take the wheel under his directions, he was acting within the scope of his employment, although in an unauthorised and improper way. Therefore, if, while the car was being so driven, an injury had been caused to a third party as a result of the negligent driving of the car, the company would have been liable, as the negligence could have been attributed to its servant, J.M., acting within the scope of his employment.

(iii) the liability of the company to third persons injured by the negligence of one of its servants who was driving the car in the course of his employment was clearly covered by the operative words of the insurance policy, and, as J.M.'s cousin was not driving with the company's consent or knowledge, the insurance company's liability was not excluded by the terms of the exception clause. Therefore, a policy of insurance in respect of third-party risks, complying with the requirements of the Road Traffic Act, 1930, was in force in relation to the user of the car at the material time.

Reay v. *Young* ([1949] 1 All E.R. 1102), *distinguished.*

[For the Road Traffic Act, 1930, ss. 35, 36, see HALSBURY'S STATUTES, Vol. 23, pp. 636, 637.]

Cases referred to :

(1) *John T. Ellis, Ltd.* v. *Hinds*, [1947] 1 All E.R. 337 ; [1947] K.B. 475 ; [1947] L.J.R. 488 ; 176 L.T. 424 ; 2nd Digest Supp.

(2) *Booth* v. *Mister*, (1835), 7 C. & P. 66 ; 34 Digest 142, *1115*.

(3) *Beard* v. *London General Omnibus Co.*, [1900] 2 Q.B. 530 ; 69 L.J.Q.B. 895 ; 83 L.T. 362 ; 34 Digest 142, *1113*.

(4) *Canadian Pacific Ry. Co.* v. *Lockhart*, [1942] 2 All E.R. 464 ; [1942] A.C. 591 ; 111 L.J.P.C. 113 ; 167 L.T. 231 ; 2nd Digest Supp.

(5) *Ricketts* v. *Tilling (Thos.), Ltd.*, [1915] 1 K.B. 644 ; 84 L.J.K.B. 342 ; 112 L.T. 137 ; 34 Digest 142, *1114*.

(6) *Reay* v. *Young*, [1949] 1 All E.R. 1102.

Cases Stated by Cumberland justices.

At a court of summary jurisdiction sitting at Penrith on Oct. 12, 1948, informations under the Road Traffic Act, 1930, s. 35 (1), were preferred by the appellant, Walter Thomas Marsh, against the respondent, John Moores, charging him with having permitted a motor car to be used on a road when there was not in force in relation to the user of the car such a policy of insurance against third-party risks as complied with the requirements of the Act. The second respondent, Patricia Moores, was charged under the same section with having used the motor car at the same time and in like circumstances. The car was the property of John Moores' employers who were insured in respect of it and had authorised John Moores to drive it. At the material time, John Moores, while on the authorised journey, had allowed Patricia Moores, who had not got a driving licence, to take over the wheel of the car and was instructing her to drive it, while he himself retained control of the hand-brake. The justices dismissed the informations, and the Divisional Court now dismissed appeals from their orders on the ground that, on the facts of the cases, the user of the car at the material time was covered by the employers' policy of insurance, as John Moores was acting at the time within the scope of his employment, although in an unauthorised way. The facts appear in the judgment of LYNSKEY, J.

C. Q. Henriques for the appellant.
Blackledge for the respondents.

Cur. adv. vult.

A May 6. The following judgments were read.

LYNSKEY, J. : These were two appeals by way of Cases Stated by the Penrith petty sessional division of the county of Cumberland arising out of the same set of circumstances. In the first case Walter Thomas Marsh (hereinafter called the appellant) preferred an information under the Road Traffic
B Act, 1930, s. 35 (1), against John Moores for that he on Aug. 30, 1948, at Plumpton Head in the parish of Hesket did permit a private motor car FKD 14 to be used on a road without there being in force in relation to the user of the vehicle such a policy of insurance or such a security in respect of third party risks as complied with the requirements of pt. II of the Road Traffic Act, 1930. In the second case a similar information was preferred by the appellant against
C Patricia Moores with the variation that she was charged with having used the said motor car on the same date and at the same place and in the like circumstances. Both informations were heard by the justices on Oct. 12, 1948, and they dismissed both informations. The appellant, being dissatisfied, applied to the justices to state a Case in respect of each information and these Cases were accordingly stated.

D The facts proved or admitted before the justices as set out in the two Cases are hereinafter set out. A Morris 10 h.p. motor car, registered number FKD 14, (hereinafter called the " vehicle ") was the property of Littlewood's Mail Order Stores, Ltd., of Liverpool (hereinafter called " the company ") and was duly registered and licensed in the name of the company. The respondent, John Moores, was in the employ of the company, and his father was managing director
E of the company. The respondent, John Moores, on Aug. 30, 1948, was the duly appointed driver of the vehicle on a journey undertaken for social purposes on the instructions of his father as managing director of the company. John Moores was accompanied on the journey, with the knowledge and permission of his father, by his cousin, the respondent, Patricia Moores. The respondent, John Moores, was in possession of a current motor car driving licence, but the
F respondent, Patricia Moores, who was 17 years of age, was not in possession of and had not been issued with a motor car driving licence, and this fact was known to the respondent, John Moores. While the vehicle was on the highway at Plumpton Head, the respondent, John Moores, on his own initiative allowed Patricia Moores to take the wheel and whilst the vehicle still proceeded on the route of its authorised journey, and whilst sitting beside her ready to operate
G the hand-brake, he gave her a lesson in driving the vehicle along the said highway. Shortly after the lesson had commenced, the vehicle was overtaken by a police car and ordered to pull up. It was then ascertained by the police that Patricia Moores was not the holder of a driving licence.

For the purposes of the Road Traffic Act, 1930, the company was insured in respect of the use of the vehicle with the Palatine Insurance Co., Ltd.
H The policy of insurance was proved before the justices, and a copy was exhibited to the Cases. By the policy the company was covered in respect of the said motor vehicle (*inter alia*) for liability to third parties. The terms of this cover were :

> " The [insurance] company will indemnify the insured in the event of accident caused by or through or in connection with any motor car described in the schedule hereto in Great Britain, Ireland, the Isle of Man or the Channel Islands against all sums including claimants' costs

> and expenses which the insured shall become legally liable to pay in respect of (i) death of or bodily injury to any person except where such death or bodily injury arises out of and in the course of the employment of such person by the insured, and (ii) damage to property other than property belonging to the insured or held in trust by or in the custody or control of the insured."

The vehicle FKD 14 was one of the vehicles described in the schedule to the policy. The exception to this general cover, so far as it is material in these cases, was in the following terms :

> "The insurance company shall not be liable in respect of (i) any accident injury loss damage or liability caused sustained or incurred whilst any motor vehicle in respect of or in connection with which insurance is granted under this policy is (*a*) being used otherwise than in accordance with the 'description of use' contained in this policy (*b*) being driven by the insured unless he (i) holds a licence to drive such vehicle or (ii) has held and is not disqualified for holding or obtaining such a licence (*c*) being driven with the general consent of the insured by any person who to the insured's knowledge does not hold a licence to drive such a vehicle unless such person has held and is not disqualified for holding or obtaining such a licence."

The "description of use" contained in the policy was :

> "Use for social domestic and pleasure purposes and use for the business of the insured as stated in the schedule hereto."

The policy was also by its terms extended to cover drivers of the vehicles in certain circumstances. This extension cover reads :

> "In terms of and subject to the limitations of and for the purposes of this section (*i.e.*, liability to third parties) (i) the [insurance] company will indemnify any person who is driving such motor car on the insured's order or with his permission provided (*a*) that such person is not entitled to indemnity under any other policy (*b*) that such person shall as though he were the insured observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply (*c*) that such person holds a licence to drive such motor car or has held and is not disqualified for holding or obtaining such a licence."

The contention of the appellant in both cases was that the respondent, Patricia Moores, was driving and using the vehicle at the material time without the permission or the knowledge of the company, and that the respondent, John Moores, had no authority from the company to permit, as he did, the respondent, Patricia Moores, to drive the vehicle. In these circumstances, there would be no legal liability on the part of the company if third parties were injured as the result of her negligence, and the company's policy of insurance would not cover liability to such third parties. Further, the policy would not by its extension of cover operate to indemnify Patricia Moores as she was not driving the vehicle with the permission of the company and in any event did not hold a licence to drive such a motor and had not held such a licence as required by the conditions of the extension of cover. On the part of the respondents it was contended that, although it might be that the company was not liable for the negligence of Patricia Moores in causing injury to third parties, it was liable for the negligence of its servant, John Moores, in the driving, management and control of the vehicle, and that, if he permitted a driver whom he knew to be inexpert to drive the vehicle, whether under his supervision or not, that was a negligent act within the scope of his employment for which his employers would be liable. In such a case, it was said, the company's policy of insurance would cover its liability to third parties, and was a policy sufficient to comply with the requirements of the Road Traffic Act, 1930, although the personal liability of Patricia Moores was not covered by a policy of insurance.

The first question raised by these contentions is : What is the true construction of s. 35 (1) of the Road Traffic Act, 1930 ? Does that section require that there should be a policy of insurance in force which covers the personal liability
A of the driver, or is it sufficient that there should be a policy in force covering the then user of the car in respect of third party risks ? This question was considered by this court in *John T. Ellis, Ltd.* v. *Hinds* (1). In that case the appellants were the owners of a motor vehicle which was driven by their servant, McDonald, a boy under the age of 17 years who did not hold, and, because of his age, could not obtain, a driving licence. The motor vehicle came into
B collision with a motor omnibus while being driven by this boy. The appellants were summoned for unlawfully permitting the use of the vehicle on the road when there was not in force in relation to the user of the vehicle by the person using it a policy of insurance complying with the Road Traffic Act, 1930. In that case the appellants had no knowledge of the boy's age or of the fact that he held no driving licence. The appellants held a policy of
C insurance which did not cover the personal liability of the boy to third parties but did cover the liability of the appellants to such third parties while the boy was driving their vehicle. The appellants were convicted before the justices, but on appeal by way of Case Stated this court held that s. 35 (1) of the Road Traffic Act, 1930, did not require that there should be in force a policy which covered the driver's liability, and that, if at the material time the owners of
D the vehicle were within the cover of the policy in respect of the driving of the vehicle by the boy, there would be in force a policy in relation to the user of the vehicle by the boy driver, and, therefore, that no offence had been committed by the appellants. In his judgment, HUMPHREYS, J., said ([1947] 1 All E.R. 341) :

> " The reason, as I think, is that it is not any particular person who uses
> E the vehicle who is required by s. 35 to be insured. What is required is that the user on the road by the person or persons in fact using should be covered by insurance in respect of third party risks. In the present case, the appellants, as the owners, had a policy which indemnified them against any liability which might be incurred by them in respect of death or bodily injury to any person arising out of the use on the road of the vehicle.
> F The policy was, therefore, one which complied with the requirements of s. 36 (1) of the Act. The contention of counsel for the respondent is that something further is required by s. 35, namely, an insurance indemnifying the driver, McDonald. I find nothing in the section to support that contention. I think the true view of the section is that what must be covered by insurance in respect of third party risks is the use on the road of the
> G vehicle by the driver. On the facts stated in the Case, McDonald was driving the vehicle as the servant of the appellants, and was acting in the scope of his authority. The appellants, therefore, were plainly liable for the consequences of any negligence displayed by McDonald in the course of his driving."

As a result of this decision the question we have to consider in these cases
H is not whether Patricia Moores or John Moores was insured in respect of his or her personal liability, but whether, if a third party had sustained injuries as a result of the user of the car in the circumstances set out in the Cases, such third party could have recovered damages in respect of such injuries from the company and whether the company was indemnified in respect of such damages under its policy of insurance. John Moores was a servant of the company and as such was entrusted by the company with the control, management and driving of the vehicle in question on Aug. 30, 1948. It is well settled

law that a master is liable even for acts which he has not authorised provided that they are so connected with the acts which he has authorised that they may rightly be regarded as modes, although improper modes, of doing them. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible, for in such a case the servant is not acting in the course of his employment but has gone outside it: see A *Booth* v. *Mister* (2), *Beard* v. *London General Omnibus Co.* (3), and *Canadian Pacific Ry. Co.* v. *Lockhart* (4). In the course of the argument we were referred to *Ricketts* v. *Thomas Tilling, Ltd.* (5), which was an example of the application of these principles. In that case the driver of a motor omnibus allowed the conductor to drive the omnibus. The driver was sitting next to the conductor and could see what the latter was doing and he could control what was going B on. Phillimore, L.J., stated ([1915] 1 K.B. 649):

> "The question here really is, Was the driver still in charge of this omnibus, and did the accident happen because he neglected his duty?"

Pickford, L.J., summarised the position in these words (*ibid.*, 651):

> "It seems to me at any rate that there is evidence of negligence on C his part, he being there and still having the duty of the controlling and the driving of the omnibus, in allowing the omnibus to be negligently driven whereby the accident happened."

In that case, the only question before the court was whether there was evidence of negligence to go to a jury, and the court held that there was such evidence.

In all these cases it must be a question of fact whether an unauthorised D act by a servant is within the scope of his employment or outside his employment. In the cases we are now considering, the justices have found as facts that the respondent, John Moores, was the duly appointed driver of the vehicle, and that, while the vehicle was still proceeding on the route of its authorised journey, on his own initiative he allowed the respondent, Patricia Moores, to take the wheel and, while sitting beside her ready to operate the E hand-brake, gave her a lesson in driving the vehicle along the road. In acting as he did, was John Moores doing an unauthorised act within the scope of his employment or an unauthorised act outside his employment? In my view, he still retained the control and management of the vehicle. He still retained some power to control the driving of the vehicle by operating the hand-brake and in instructing Patricia Moores as to how she should drive. In these F circumstances, it seems to me that he still remained the driver of the car, and in allowing Patricia Moores to take the wheel under his directions he was acting within the scope of his employment, although in an unauthorised and improper way. If an injury was caused to a third party while the vehicle was being so driven as the result of the negligent driving of the vehicle, John Moores would be, at least in part, responsible for such negligence, and the company, G as his employer, would in turn be responsible vicariously for the negligence of its servant acting within the scope of his employment.

The final question remaining is whether the company would be entitled to be indemnified under its policy of insurance for this responsibility. By the policy the insurance company undertake to indemnify the company in the event of an accident caused by or through or in connection with the vehicle H against all sums which the company shall become legally liable to pay in respect of the death of or bodily injury to any person or damage to property. I have not quoted in full the operative words of the policy, but only such words as are material to the facts of these cases. The liability of the company to third persons injured whilst the vehicle was being driven in the circumstances described in the Cases are clearly covered by these words in the policy. The only relevant exception clause, (i) (c), does not operate to relieve the insurance company from its liability to indemnify the company under the general cover contained in the policy. The only person driving with the general consent of the company was John Moores who held a licence to drive the vehicle, and Patricia Moores, who did not hold and who had not held such a licence, was not driving with the consent of the company or with its knowledge. In the result, in my view the use of the vehicle on the road in the circumstances appearing in the Cases was a user in relation to which there was a policy of insurance in respect of third party risks which complied with the requirements of the Road Traffic Act, 1930. The justices were right in their decisions in these cases and these appeals should be dismissed.

LORD GODDARD, C.J. : I agree with the judgment of LYNSKEY, J., which he has just delivered, and I add a few words only for the purpose of pointing out to justices and the police the difference between this case and *Reay* v. *Young* (6). In the present case the company which is the owner of the car was insured under a policy which gave the widest possible cover to the company. It was indemnified in the event of accident caused by or through or in connection with the motor car described in the schedule against all sums which the company might become legally liable to pay in respect of damage sustained by a third person. The company was, accordingly, covered against any damages which it might be called on to pay in respect of the negligence of a servant of the company who was driving the car in the course of his employment, quite independently of the extension clause in the policy whereby the insurance company agreed to indemnify the driver against any liability which he personally might incur. The general exceptions have no application because no permission had been granted by the company to Patricia Moores to drive, nor could any knowledge that she was driving or was unlicensed be attributed to them. The question, therefore, is whether, had an accident occurred through the negligence or unskilful driving of Patricia Moores the company would have been liable ? In my opinion, it would. Her driving took place in the course of a journey which John Moores had been instructed by the company to take, and he was driving as its servant throughout. The driving of Patricia Moores took place in the course of an authorised journey and while the car was on its authorised route. If, then, she had injured a third person, negligence could be attributed to the driver either because he allowed an unskilful person to drive or because he himself did not take steps to avoid the accident. Had he departed from his route so that it could be said that he had gone off on what is usually called a frolic of his own in the course of which he allowed Patricia Moores to drive, the case might well have been different, but on the facts of this case I think it amounts to a servant doing an unauthorised act, but doing it during and in the course of his employment and, therefore, within the scope of his employment. In *Reay* v. *Young* (6) a husband, who was insured, allowed his wife, who was uninsured, to drive the car, he himself being present. She was not driving as his servant. There was no question, therefore, of her driving within the scope of any employment. As the husband knew that his wife did not hold a licence, the general exceptions clause, if he held a policy in the same form as the present, would have operated to exempt the insurance company from liability. The defendants in that case had both pleaded Guilty, and it is quite clear that they were right in doing so. I agree that the appeals should be dismissed.

BIRKETT, J. : I agree.

Appeals dismissed with costs.

Solicitors : *Sherwood & Co.*, agents for *G. N. C. Swift*, Carlisle (for the appellant) ; *Jaques & Co.*, agents for *North, Kirk & Co.*, Liverpool (for the respondents).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MACRAE *v.* MACRAE.

[Court of Appeal (Bucknill and Somervell, L.JJ., and Wynn-Parry, J.), May 6, 1949.]

Maintenance—Justices—Jurisdiction—Husband ordinarily resident in Scotland —Wife resident in England—Summary Jurisdiction (*Married Women*) *Act,* 1895 (*c.* 39), *s.* 4.

In June, 1948, the parties were living in Manchester where the husband had been working for three years. He then refused to continue living there, gave up his work, went to his parents' house in Inverness, and wrote to his wife saying that he had two rooms in the house which he would be able to "call his own." Later, he stated that he had obtained work at Inverness and intended to settle there. The wife thereupon took out a summons before the Manchester justices, alleging desertion. This summons was served on the husband in Inverness, and on July 22, 1948, the justices made an order against him.

Held: the husband being ordinarily resident out of the jurisdiction, the justices had no jurisdiction to make the order against him.

Forsyth v. *Forsyth* ([1947] 2 All E.R. 623), *applied.*

Decision of Divisional Court ([1949] 1 All E.R. 290), *affirmed.*

[As to Summary Jurisdiction of Justices in Matrimonial Causes, see HALSBURY, Hailsham Edn., Vol. 10, pp. 834-848, paras. 1336-1354; and for Cases, see DIGEST, Vol. 27, pp. 554-568, Nos. *6081-6264.*]

Cases referred to:

(1) *Forsyth* v. *Forsyth,* [1947] 2 All E.R. 623; [1948] P. 125; [1945] L.J.R. 487; 177 L.T. 617; 112 J.P. 60; 2nd Digest Supp.

(2) *Berkeley* v. *Thompson,* (1884), 10 App. Cas. 45; 54 L.J.M.C. 57; 52 L.T. 1; 49 J.P. 276; 3 Digest 393, *312.*

Appeal by the wife from a decision of the Divisional Court (Lord Merriman, P., and Hodson, J.) dated Dec. 14, 1948, and reported [1949] 1 All E.R. 290, setting aside an order of the Manchester city justices.

On July 22, 1948, the husband having left his wife in Manchester and returned to his parents in Inverness, the justices made an order against him on the ground of desertion. On appeal the Divisional Court held that, the husband being ordinarily resident in Scotland, the justices had no jurisdiction to make the order. The Court of Appeal now affirmed this decision. The facts appear in the judgment of Somervell, L.J.

Harris Walker for the husband.
John Mortimer for the wife.

BUCKNILL, L.J.: I will ask Somervell, L.J., to give the first judgment.

SOMERVELL, L.J.: This is an appeal by the wife from a decision of the Divisional Court which set aside an order made by the Manchester city justices against the husband on the ground that he had deserted his wife. The decision of the Divisional Court was based on the ground that the justices had no jurisdiction. The marriage took place in October, 1943. The husband, having been in the Royal Air Force for some 13 years, was demobilised in October, 1945, and the parties resided with the wife's parents in Manchester from that date till June, 1948, subject to a break in 1945 when there was a quarrel between the husband and the wife, and the husband left her and went for a time to Inverness where his parents lived. In June, 1948, he announced his intention of leaving his wife, and on June 24 or 25 he left the house where they had been living and went to Inverness. On July 1, a summons was taken out by the wife, but it was not served on the husband. Later the summons with which we are concerned was issued and was served on the husband in Inverness.

The relevant evidence consists, first, of a letter written by the husband to the wife which she received about the time when the summons was issued. It is written from Inverness. He says:

> A "I am writing to let you know that I have decided to have my home in Inverness. I have got the two rooms at the back which I will improve on. I will add a scullery and one or two other things on to it, which will make it independent of the main house, also I shall be running the garden. It can be made into a nice place and I shall have a place I can call my own. That is all I will say now. I shall leave the rest to you. Please let
> B me know what you intend to do as I would like to know one way or the other. I will close now, hoping to have an early reply."

When the matter came before the justices, the wife gave evidence of ill-treatment and desertion, and, so far as that letter was an offer by the husband to make a home for the wife in Inverness, the justices, apparently, did not regard it as a genuine offer or as in any way precluding them from finding, as they
C did, that the husband had deserted the wife. At the proceedings the husband was represented by a solicitor, and a precognition by the husband was read in which he said:

> "Things came to such a pass recently that I decided that it was essential that my wife and I should leave the house and I, accordingly,
> D made arrangements to move up to Inverness, where I had arranged to have a furnished accommodation in my mother's house at Thornbank, Clachnaharry. My wife refused to accompany me. I am living in two rooms in mother's house. These are quite separate from the rest of the house, in which also live my mother and one of my brothers. My father died recently. I have also taken up employment in Inverness and intend
> E settling down here."

Before the justices no submission as to jurisdiction was made, but when the appeal was taken to the Divisional Court the point was taken and the Divisional Court decided that the justices had no jurisdiction. The question is whether this case is covered by the decision of this court in *Forsyth* v. *Forsyth* (1). There the husband was domiciled and resident in Scotland, the
F wife complained that he had deserted her there by remaining there after she had come to England on the understanding that he would follow her, and it was held that, as the husband was not shown to have been in England at any material time, the justices had no jurisdiction to entertain the wife's complaint. That decision was based on the decision of the House of Lords in *Berkeley* v. *Thompson* (2).

G *Berkeley* v. *Thompson* (2) raised a question of the proper construction of the Summary Jurisdiction (Process) Act, 1881. Section 4 of that Act provided:

> "Subject to the provisions of this Act, any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England and endorsed by a court of summary jurisdiction
> H in Scotland, or issued by a court of summary jurisdiction in Scotland and endorsed by a court of summary jurisdiction in England, be served and executed within the jurisdiction of the endorsing court in like manner as it may be served and executed in the jurisdiction of the issuing court, and that by an officer either of the issuing or of the endorsing court."

There are further provisions with regard to process, and a special section as to bastardy, on which the decision in *Berkeley* v. *Thompson* (2) largely turned, and certain definitions. The headnote in *Berkeley* v. *Thompson* (2) is:

> "The Summary Jurisdiction (Process) Act, 1881, does not enable a bastardy summons to be issued by justices in England and served in Scotland upon the putative father domiciled and resident in Scotland; and if a summons is so served and the putative father does not appear before the justices they have no jurisdiction to make a bastardy order against him."

A In that case it was argued for the unsuccessful party (the woman) that s. 4. gave jurisdiction to serve a summons although the Bastardy Acts did not apply to Scotland and the court normally would not have had jurisdiction in respect of the putative father if he was resident in Scotland, but the House of Lords decided that s. 4 did not extend to jurisdiction in bastardy matters. In coming to that conclusion they largely relied on s. 6 of the Act which dealt B with bastardy proceedings. That is a decision of the House of Lords on the general scope of s. 4 of the Act of 1881, and it was applied by this court in *Forsyth* v. *Forsyth* (1).

In *Forsyth* v. *Forsyth* (1) there was no evidence that the husband had ever been in England. In the present case it is agreed that he was in Manchester until the time that he deserted his wife, and that makes a difference C on which, among other things, counsel for the wife relies. The Divisional Court in the present case considered *Forsyth* v. *Forsyth* (1) from that point of view. It was argued before them that *Forsyth* v. *Forsyth* (1) was decided as it was because the husband was domiciled in Scotland. On the other hand, it was argued that the judgment of BUCKNILL, L.J., which was the main judgment in *Forsyth* v. *Forsyth* (1), was based, not on domicil, but on the fact D that the husband was ordinarily resident in Scotland. I agree with what the Divisional Court said about that decision and the principles which it laid down. If, in the present case, the husband was ordinarily resident in Scotland at the time when the summons was issued, then, in my view, this case is covered by the decision in *Forsyth* v. *Forsyth* (1). That was the view which the Divisional Court took. Both LORD MERRIMAN, P., and HODSON, J., came to the conclusion E that at the material date the husband was ordinarily resident in Scotland. The learned President said:

> "From the moment he travelled to Inverness (and, in my opinion, there is nothing to displace the inference, as I have already said, that he did that on the day after he left his wife) it seems to me that all the evidence tends to show that he was ordinarily resident in Scotland. The only thing F we do not know is whether he actually got work in Inverness, but there is the letter about the flat in his parents' house, and the statement in his precognition that he would not have given up his work in Manchester but for the reason that he realised that life in Manchester was impossible, and other things of that sort, which all seem to me to tend in the same direction."

G It seems to me that that is the right conclusion. The justices found that this man had deserted his wife. The only matrimonial home that they had ever had was with her parents. The husband decided to leave the wife. He went to Scotland where his home and mother were, he said he intended to settle there, and he described in his letter the arrangements that he was H making to provide himself with a home there. In those circumstances only one conclusion is possible, namely, that he was ordinarily resident there at that time. The fact that the desertion took place in England and that he was ordinarily resident in England up to a short time before does not affect the matter. Ordinary residence is a thing which can be changed in a day. A man is ordinarily resident in one place up till a particular day. He then cuts the connection he has with that place—in this case he left his wife; in another case he might have disposed of his house—and makes arrangements to have his home somewhere else. Where there are indications that the place to which he moves is the place which he intends to make his home for, at any rate, an indefinite period, as from that date he is ordinarily resident at that place. For those reasons I think the facts relied on by counsel for the wife do not displace the conclusion to which the members of the Divisional Court came, that the husband was ordinarily resident in Scotland at the material date, and, therefore, applying *Forsyth* v. *Forsyth* (1), the justices had no jurisdiction, and this appeal fails.

Counsel for the husband raised a further argument. He submitted that the justices would have had no jurisdiction even though the presence of the husband in Scotland fell short of ordinary residence. I would require a good deal of argument on both sides before accepting that proposition. In considering these cases of jurisdiction it is important to distinguish two different aspects of the subject. Is one considering a case where the court would not have jurisdiction even if the defendant was in this country and could be served, or is the case one in which the court would obviously have jurisdiction provided the defendant could be served ? One can illustrate the distinction very easily from this branch of the law. The ordinary position in actions *in personam* is that, if the defendant can be found here and served, the plaintiff can proceed. Take the case, however, of a petition for the dissolution of a marriage. If this country is not the domicil of the parties, the court will not exercise jurisdiction although the husband or the wife is here and can be served with the petition. One, therefore, has to bear that distinction in mind, and it is not clear to me, either in general principle, or, in particular, from the wording of s. 6 of the Act of 1881, which deals with the somewhat similar position in bastardy, that the court here would not have jurisdiction to deal with a case of this kind where the husband, though in Scotland, was there in circumstances which fell short of ordinary residence. Those points can be left to be dealt with if and when they arise.

BUCKNILL, L.J. : I agree.

WYNN-PARRY, J. : I agree.

Appeal dismissed. No order as to costs.

Solicitors : *Mackrell, Ward & Knight* (for the husband) ; *Pritchard, Englefield & Co.*, agents for *Boote, Edgar & Co.*, Manchester (for the wife).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

ROBERTS *v.* COOMBS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Lynskey, JJ.), May 4, 1949.]

Medicine and Pharmacy -Drugs—Restrictions on supply—" Person acting in accordance with the directions " of a qualified practitioner—Shopkeeper supplying drug to doctor's prescription—Penicillin Act, 1947 (c. 29), *s.* 1 (1) (*a*), (*b*).

By the Penicillin Act, 1947, s. 1 : " (1) . . . no person shall sell or otherwise supply any substance to which this Act applies or any preparation of which any such substance is an ingredient or part unless (*a*) he is a duly qualified medical practitioner, a registered dental practitioner or a registered veterinary surgeon, or a person acting in accordance with the directions of any such practitioner or surgeon, and the substance or preparation is sold or supplied for the purposes of treatment by or in accordance with the directions of that practitioner or surgeon ; or (*b*) he is a registered pharmacist or an authorised seller of poisons, and the substance or preparation is sold or supplied under the authority of a prescription signed and dated by any such practitioner or surgeon as aforesaid."

The respondent, a shopkeeper carrying on the business of selling by retail drugs and surgical appliances, who was not one of the qualified or registered persons specified in s. 1 (1) of the Act of 1947 nor an authorised seller of poisons, sold ointment containing penicillin to a customer who presented a prescription signed and dated by a qualified medical practitioner.

Held : the words "a person acting in accordance with the directions of any such practitioner or surgeon" in s. 1 (1) (*a*), meant a person acting on the direct order of the practitioner or surgeon, such as a dispenser, and, therefore, the respondent did not fall within those words ; a prescription by a medical practitioner could only be made up by a registered pharmacist or authorised seller of poisons under s. 1 (1) (*b*) ; and, accordingly, the respondent had committed a breach of the section.

Quaere whether a substance to which the Act applies could ever be supplied "in accordance with the directions" of a practitioner or surgeon within s. 1 (1) unless the person supplying was a dispenser employed by the practitioner and surgeon.

[For the Penicillin Act, 1947, s. 1 (1), see HALSBURY'S STATUTES, Vol. 40, p. 608.]

Case Stated by Middlesex justices.

At a court of summary jurisdiction sitting at Feltham on Dec. 21, 1948, informations were preferred by the appellant, an inspector appointed by the Pharmaceutical Society under the Pharmacy and Poisons Act, 1933, s. 25, charging the respondent with having on four occasions sold penicillin in the form of an ointment, contrary to s. 1 (1) of the Penicillin Act, 1947, he not being a person mentioned in that sub-section. The justices found that the respondent carried on a business in a shop which included the sale by retail of drugs and surgical appliances. He was not a qualified medical practitioner, registered dental practitioner, veterinary surgeon, pharmacist or authorised seller of poisons, but the ointment was supplied in each case under the purported authority of a prescription in writing signed and dated by a medical practitioner. The justices held that the respondent was a person acting in accordance with the directions of a duly qualified practitioner and the penicillin was supplied in accordance with such directions within the meaning of s. 1 (1) (*a*) of the Act of 1947 and dismissed the informations. The appellant appealed, and the Divisional Court now allowed the appeal.

Glyn-Jones, K.C., and *T. Dewar* for the appellant.
L. R. Miller for the respondent.

LORD GODDARD, C.J. : This is a Case stated by Middlesex justices before whom the respondent, who keeps a shop at which he sells by retail drugs and surgical appliances, was charged on four informations with offences against s. 1 of the Penicillin Act, 1947, in that he supplied on four different occasions penicillin ointment to persons who had doctors' prescriptions. Section 1 of the Act provides :

> " . . . no person shall sell or otherwise supply any substance to which this Act applies or any preparation of which any such substance is an ingredient or part unless (*a*) he is a duly qualified medical practitioner, a registered dental practitioner or a registered veterinary surgeon, or a person acting in accordance with the directions of any such practitioner or surgeon, and the substance or preparation is sold or supplied for the purposes of treatment by or in accordance with the directions of that

> practitioner or surgeon; or (*b*) he is a registered pharmacist or an authorised seller of poisons, and the substance or preparation is sold or supplied under the authority of a prescription signed and dated by any such practitioner or surgeon as aforesaid."

Therefore, if a person is a registered pharmacist or seller of poisons he may supply the penicillin provided he does it under the authority of a prescription. A If it is said that notwithstanding that, any person can supply penicillin if he can produce a doctor's prescription, what was the object of including para. (*b*), which provides that a registered pharmacist may supply the drug provided he does so in accordance with a prescription? As counsel for the appellant has pointed out, if we were to give the wide meaning to para. (*a*) which is contended for, the registered pharmacist would be at a disadvantage B because as a registered pharmacist he could only supply on a doctor's prescription, whereas if he were not a registered pharmacist, he could supply the drug if a doctor directed it to be supplied. It is clear that to give an intelligent meaning to both these paragraphs we must read "a person acting in accordance with the directions of any such practitioner or surgeon" as meaning a person acting on the direct order, for instance, C a dispenser employed by a doctor. If the doctor tells his dispenser: "Make up a penicillin prescription and give it to one of the patients," the dispenser is acting under the directions of the doctor. If, however, the doctor gives a prescription to a person, in my opinion, the only intelligible meaning we can give to the words is that that prescription must be dispensed by a registered pharmacist. The reason is to keep the supply and storing of this D drug under the control of qualified persons. A doctor can supply the drug, or cause it to be supplied by somebody acting under his directions, and a registered pharmacist can supply it if he is given a prescription by a doctor. The plain meaning of the section, if a meaning is to be given to para. (*b*) as well as to para. (*a*), is that an unregistered person is not entitled to supply on the prescription of a doctor. An unregistered person cannot supply unless E that person is in the employment of a doctor or in some way actually under the direct orders of the doctor. I doubt if it could ever be said that penicillin could be supplied in accordance with the directions of a practitioner or surgeon unless it was by a doctor's own dispenser, but I do not think it is necessary to decide that. In the circumstances, I think the case must go back to the justices with an intimation that the offences were proved in each case.

F **BIRKETT, J.:** I am of the same opinion. The Penicillin Act, 1947, is "An Act to control the sale and supply of penicillin and certain other substances." By s. 1 (1) the method of control, as I read the statute, is that in para. (*a*) a specific class of persons is designated:

> G "... a duly qualified medical practitioner, a registered dental practitioner or a registered veterinary surgeon, or a person acting in accordance with the directions of any such practitioner or surgeon ..."

Then the concluding words of the paragraph are important:

> "... and the substance or preparation is sold or supplied for the purposes of treatment by or in accordance with the directions of that practitioner or surgeon."

H That is the first class. The second class is:

> "... a registered pharmacist or an authorised seller of poisons, and the substance or preparation is sold or supplied under the authority of a prescription signed and dated by any such practitioner or surgeon as aforesaid."

Therefore, the method of control was clearly to designate the classes of persons who were authorised by law to sell or supply penicillin. The only arguable point taken by counsel for the respondent is that if a duly qualified medical practitioner, for example, gives a prescription containing penicillin to a patient and an unregistered or unqualified person makes up that prescription, he was then a person acting in accordance with the directions " of any such practitioner or surgeon." I cannot read the statute in that way. To a large extent any such reading would defeat the control which was designed and laid down in the sub-section. Further, the word " prescription " is universally known. It is, indeed, used in para. (*b*) : " under the authority of a prescription signed and dated by any such practitioner." When the prescription signed and dated by the medical practitioner or the surgeon comes into being, it can only be made up by a registered pharmacist or an authorised seller of poisons. It is clear that, if it had been intended that any such prescription signed by any such practitioner might be made up by anybody, the statute would have been able to say so. That is an additional reason for my thinking that the words " or a person acting in accordance with the directions of any such practitioner or surgeon " cannot possibly be an unauthorised practitioner. For these reasons I agree with the conclusion announced by my Lord.

LYNSKEY, J. : I agree. In my view, s. 1 (1) (*a*) of the Act deals with directions given by a practitioner or surgeon for the purposes of treatment by or in accordance with his directions, and they must be directions given to the person who is supplying or selling the substance. If such directions are given to that person particularly by the doctor, so that he is acting under the doctor's immediate orders, it may be that, whether qualified or not, he comes within the protection of sub-s. (1) (*a*). Sub-section (1) (*b*) deals with written prescriptions, and written prescriptions as a rule are not directed to any particular person. It is difficult to say in those circumstances that the pharmacist would be acting under the directions of the doctor in the actual supply for the purposes of treatment. The directions are given to the patient to enable him to obtain a supply of the material. In my view, whatever else " in accordance with the directions of any such practitioner or surgeon " in para. (*a*) may mean, having regard to the presence of para. (*b*) such a direction cannot be contained in the prescription. In those circumstances, the case ought to go back to the justices to say that the offences were proved.

Appeal allowed. Costs not asked for by the prosecutor.

Solicitors : *A. C. Castle* (for the prosecutor) ; *Freeborough & Co.*, agents for *Garner & Hancock*, Hounslow (for the defendant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

R. *v.* CLUCAS.

[Court of Criminal Appeal (Lord Goddard, C.J., Oliver, Birkett, Lynskey and Sellers, JJ.), May 10, 1949.]

Criminal Law—False pretences—Bookmaker induced to accept bet by false pretence as to identity—Money paid on winning horse—Conspiracy—Larceny Act, 1916 (*c.* 50), *s.* 32 (1).

The appellant was convicted with one R. of conspiracy to defraud bookmakers, and, on further counts, of obtaining money from bookmakers by false pretences. The two men induced the bookmakers to bet with them by representing that they were commission agents acting on behalf of a number of workmen who were placing small bets on horse races, whereas, in fact, they were making large bets on their own account.

Some of these bets they won and in respect thereof they received money from the bookmakers. On one of the bookmakers being unwilling to pay money to R. on a winning bet, R. invited him to telephone to a certain number (as being that of the place of employment of the workmen in question) to obtain confirmation of R.'s story. In fact, the number was that of a public telephone near which the appellant was waiting to answer A the telephone of the bookmaker should he communicate with the number.

HELD: (i) a person who induced a bookmaker to bet with him by making false pretences as to his identity or as to the capacity in which he was making the bets did not obtain money by false pretences if he backed a winning horse and so received money from the bookmaker, the effective cause of his obtaining the money being, not the false pretences, but his B having made a winning bet, and, therefore, the convictions of the appellant on the counts charging false pretences must be quashed.

R. v. *Button* ([1900] 2 Q.B. 597), *distinguished.*

(ii) even without the evidence relating to R.'s giving the bookmaker the number of the public telephone, there was abundant evidence of the conspiracy charged, and the conviction of the appellant on that count C would be affirmed.

[AS TO FALSE PRETENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 564-575, paras. 955-985; and FOR CASES, see DIGEST, Vol. 15, pp. 980-1009, Nos. *10,975-11,335.*]

Cases referred to:

D (1) *R.* v. *Leon,* [1945] 1 All E.R. 14; [1945] K.B. 136; 114 L.J.K.B. 140; 172 L.T. 28; 109 J.P. 58; 2nd Digest Supp.

(2) *R.* v. *Button,* [1900] 2 Q.B. 597; 69 L.J.Q.B. 901; 83 L.T. 288; 64 J.P. 600; 15 Digest 993, *11,120.*

APPEAL against conviction and sentence.

The appellant was convicted at Norwich Assizes before HALLETT, J., on charges E of conspiracy to defraud and obtaining money by false pretences and was sentenced to two years' imprisonment. The court dismissed the appeal on the charge of conspiracy, but quashed the convictions on the charges of obtaining by false pretences, and the sentence was reduced to one year's imprisonment. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

F *Honig* for the appellant.
Boileau for the Crown.

LORD GODDARD, C.J.: The appellant was convicted with a man named Revell before HALLETT, J., at the Norfolk Assizes on six counts of an indictment which charged, in the first count, a conspiracy between the two prisoners to defraud a bookmaker named Gamble by falsely pretending that Revell was G employed at the Suttonbridge aerodrome and was in a position to act or was acting as a commission agent for the collection of bets by workmen at the aerodrome. The third count alleged a similar conspiracy to defraud a bookmaker named Cranmer by the same and some additional false pretences. In the fourth count both prisoners were charged that with intent to defraud they attempted to obtain from Gamble a sum of money by falsely pretending that some third H person had asked them to place bets on a horse and that they were acting as agents in placing that bet. The fifth count charged them that with intent to defraud they obtained from Cranmer a sum of money by making the same or similar false pretences, and the seventh count charged the appellant alone "with intent to defraud obtained from S. C. Cranmer & Co., a valuable security, namely a banker's cheque for £123 6*s.* 7*d.*" by means of substantially the same false pretences.

The evidence showed that these two men, who obviously were dishonest, induced bookmakers to bet with them by representing that they were commission agents acting on behalf of a large number of workmen who were making small bets on various races, whereas, in fact, they were making bets in considerable sums of money for themselves alone. The main question which arises on all the counts except count 1, in respect of which there are particular circumstances, can be stated in this way. Does a man who induces a bookmaker to bet with him by making false pretences as to his identity or as to the capacity in which he is making the bets obtain money by false pretences if he is fortunate enough to back a winning horse and so receives money from the bookmaker ? In the opinion of the court it is impossible to say that there was here an obtaining of the money by the false pretences which were alleged, because the money was obtained, not by reason of the fact that the accused persons falsely pretended that they were somebody or acting in some capacity which they were not, but because they backed a winning horse as a result of which the bookmaker paid them the sums obtained. No doubt, the bookmaker might never have opened an account with these men if he had known the true facts, but we must distinguish between a contributing cause and the effective cause which led the bookmaker to pay the money, namely, the fact that these men had backed a winning horse. It is true that in *R.* v. *Leon* (1) it was held that, as bets on horse races are null and void, a charge will not lie against a backer for fraudulently obtaining credit from the bookmaker because the credit he obtains is in respect of a null and void bet, but, granted here that originally these two men induced the bookmaker to bet with them by means of a false pretence, that false pretence was not the false pretence which led to the payment of the money. What led to the payment of the money was the fact that the men backed a winning horse. They had put themselves in the position that if they backed the horse and lost they had to pay the bookmaker and if they backed the horse and won they were entitled to receive the money. In the opinion of the court, therefore, it cannot be said that the money was obtained by false pretences within the meaning of the Larceny Act, 1916, s. 32 (1).

Counsel for the Crown has called the attention of the court to certain cases, the nearest one to the present being *R.* v. *Button* (2). In that case the accused, by representing that he was a person of the name of Sims, who was a moderate performer in athletic sports and was not known as a likely winner of races, managed to obtain from the committee of some athletic sports which were to be held at Lincoln a substantial start in a race. He was, in fact, a man who had won a great many races, and, if the truth had been known, he would have received either no start at all or a very moderate one. The court held that by falsely representing himself to be someone he was not and thereby obtaining a substantial start, he obtained the prize by false pretences because the pretence in question was a matter directly connected with the winning or not winning of the prize. By the false pretence he obtained for himself a winning chance which otherwise he would not have had and thereby enabled himself to win the race. In our view, that case on the facts is clearly distinguishable from the present case.

With regard to the charge of conspiracy the facts were these. Having already made the false pretence with regard to their identity and the capacity in which they were betting, the two men backed a horse that won a race. Revell then went to collect the money, but the bookmaker had a suspicion that all was not right and he was unwilling to pay over the money without obtaining further assurances that Revell was the man he pretended to be. Revell repeated the false pretence and went so far as to tell the bookmaker, Gamble, that he could telephone to a certain number which would be the number of the aerodrome where these people were supposed to be working and get confirmation of the story that Revell had told him. All this time the appellant was loitering in the neighbourhood of the telephone kiosk which bore the telephone number given to Gamble, so that he could answer the telephone if the call came through. That shows these two men were conspiring together. They conspired, in the first place, to tell lies to the bookmaker, and, even without the evidence about the telephone kiosk, there was abundant evidence on which the jury could find that Revell, in going to collect the money and repeating the story, was acting in pursuance of the conspiracy. Therefore, what he did was evidence against his co-conspirator. It is true that there was substantially no direction to the jury on this point or on those lines, but both the prisoners gave evidence admitting the telling of the lies to the bookmakers and the putting on of bets in assumed names. Therefore, the absence of any direction could not have made any difference because no reasonable jury could have come to any other conclusion on the evidence of the prisoners themselves than that they had conspired together to cheat the bookmaker of this sum of money. Therefore, with regard to count 1 the conviction of the appellant must stand. With regard to the other counts against the appellant, the conviction must be quashed. Having quashed the conviction on several of the counts, we think that a reduction in sentence must be made, and we reduce the appellant's sentence to one of twelve months' imprisonment.

Sentence reduced.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Peacock & Goddard,* agents for *Jackson & Walton,* King's Lynn (for the Crown).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

Distinguished. Re GARTSIDE. [1949] 2 All E.R. 546. *Reversed.* C.A. *post* p. 774.

Re KELLNER'S WILL TRUSTS. BLUNDELL *v.* ROYAL CANCER HOSPITAL AND OTHERS.

[CHANCERY DIVISION (Harman, J.), April 27, May 11, 1949.]

Charity—Hospital—Teaching hospital—Institution taken over by State between death of testatrix and grant of probate—Gift of share of residue—Disposition of gifts—Provisions for arbitration—Jurisdiction of court—"Endowment" of hospital—"Right acquired for carrying on business of hospital"—Interest in unadministered residue—Lapse of gift—National Health Service Act, 1946 (*c.* 81), *ss.* 6 (1), 7 (1), (10), 60 (1) (*a*), 78 (1) (*c*)—*National Health Service* (*Apportionment and Transfer*) *Regulations,* 1948 (*S.I.,* 1948, *No.* 888), *reg.* 30.

By pt. II of the National Health Service Act, 1946, which came into force on July 5, 1948, hospitals and their property were taken over by the State. By s. 6 (1) of the Act: "Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister . . . all interests in or attaching to premises forming part of a voluntary hospital . . . and in . . . movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section." By s. 7 (1): "Where any voluntary hospital to which the last foregoing section applies is, before the appointed day, designated by the Minister under this Part of this Act as a teaching hospital . . . all endowments of the hospital held immediately before the appointed day shall on that day . . . be transferred to and vest in the board of governors constituted under the following provisions of this Part of this Act for the teaching hospital." Section 7 (10) defined "endowment" in relation to a voluntary hospital as "property held by the governing body of the hospital or by trustees solely for the purposes of that hospital, being A property of the following descriptions (*a*) interests in or attaching to land . . . (*b*) shares, stocks . . . and other securities, and any other personal property held by way of an investment; (*c*) money, including any credit in a banking account; (*d*) rights under any bill of exchange, promissory note or gratuitous covenant for the payment of money: Provided that an equitable interest held for the purposes of a voluntary B hospital in trust property in which there are other equitable interests shall not be deemed to be an endowment of that hospital." By s. 79 the word "property" included rights. By s. 60 (1): "Where property, other than property transferred to the Minister or to the board of governors of a teaching hospital or to a hospital management committee under s. 6 or s. 7 of this Act, is held on trust immediately before the appointed C day, and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose D of making payments, whether of capital or income (*a*) in the case of a hospital designated as a teaching hospital . . . to the board of governors of that teaching hospital." By reg. 30 of the National Health Service (Apportionment and Transfer) Regulations, 1948 (S.I., 1948, No. 888), made under ss. 6 (5), 7 (9), and 9 (8) of the Act: "Any question as to whether any property or liability will be or has been transferred under E the provisions of pt. II of the Act relating to the transfer of property and liabilities, or as to whether any property or liability falls to be apportioned under these regulations or as to the person to whom it will be or has been transferred shall, in default of agreement, be determined by arbitration."

By her will, dated June 18, 1948, the testatrix gave her property to her trustee on the statutory trusts for realisation and directed him to F divide her residuary estate into eight equal shares and to pay one such share to the Royal Cancer Hospital (Free) and another to the Cancer Research Institute, which was owned and controlled by the hospital, both the hospital and the institute being charitable institutions. The testatrix died on June 23, 1948, and probate of the will was obtained on July 31, 1948 (*i.e.*, after the National Health Service Act, 1946, had G come into force). By the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 (S.I., 1948, No. 979), made under s. 11 (8) of the Act, the Royal Cancer Hospital (Free) was designated as a teaching hospital, and from July 5, 1948, the affairs of the hospital and the institute were conducted by a board of governors. It was contended by the board that the shares of the residue given by the will to the hospital and the H institute vested in them under s. 7 (1) of the Act, or, alternatively, that the trustee was required to apply the shares in paying the capital and income thereof to them under s. 60 (1). The Minister of Health claimed the shares under s. 6 (1).

Held: (i) the jurisdiction of the court was not ousted by the provisions for arbitration in the Act and regulations made under it, as the subject-matter of an arbitration under the regulations had to be fact and not law, and, if and so far as reg. 30 of the National Health Service (Apportionment and Transfer) Regulations, 1948, purported to refer to arbitration the type of question the court had to consider, it was *ultra vires.*

(ii) while the estate remained undistributed, the interest of the hospital and the institute under the will was "an equitable interest held for the purposes of a voluntary hospital in trust property in which there are other equitable interests" within the proviso to s. 7 (10) of the Act, and therefore, this interest was excluded from the category of "endowments," and the shares did not vest in the board of governors under s. 7 (1).

(iii) an interest in an unadministered residue was not a right acquired for the purpose of carrying on the business of the hospital, and, therefore, the shares did not vest in the Minister of Health under s. 6 (1).

(iv) section 60 (1) did not apply, as its language was wholly inappropriate to the gifts in question.

(v) the fact that, under s. 78 (1) (*c*), the charitable institutions had ceased to exist on July 5, 1948, could not bring about a lapse, as they were still in existence when the testatrix died: *Re Slevin* ([1891] 2 Ch. 236) *followed*; and, therefore, the next of kin had no rights, and the gifts must be applied by Sign Manual under the principles applicable thereto.

[For the National Health Service Act, 1946, see HALSBURY'S STATUTES, Vol. 39, p. 515.]

Cases referred to:

(1) *Crosfield (Joseph) & Sons, Ltd.* v. *Manchester Ship Canal Co.*, [1904] 2 Ch 123; 90 L.T. 557; 68 J.P. 421; *on appeal*, [1905] A.C. 421; 42 Digest 740, *1637*.

(2) *Re Slevin*, [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 8 Digest 346; *1404*.

Adjourned Summons to determine *inter alia* whether on the true construction of the will of the testatrix and of the National Health Service Act, 1946, (*a*) the right to receive shares of the residuary estate of the testatrix bequeathed by her will to the Royal Cancer Hospital (Free) and the Cancer Research Institute (i) was vested in the Minister of Health under s. 6 of the Act, or (ii) was vested in the board of governors under s. 7 of the Act; or (*b*) the trustee of the will was required to apply the shares in paying the capital and income thereof to the board of governors under s. 60 of the Act; or (*c*) the shares (i) were held on some other, and, if so, what, charitable trusts, or (ii) were undisposed of and passed as on the testatrix's intestacy. Harman, J., held that the jurisdiction of the court was not ousted by the provision in the Act for arbitration. He further held that neither s. 6, nor s. 7, nor s. 60 applied to the legacies in question, and that they were outside the scope of the Act, but that there was no lapse as the charitable institutions to which the legacies had been given were in existence when the testatrix died, and, accordingly, he directed that the legacies be applied by Sign Manual under the principles applicable thereto. The facts and the relevant sections of the Act appear in the judgment.

By reg. 30 of the National Health Service (Apportionment and Transfer) Regulations, 1948 (S.I., 1948, No. 888), (made under ss. 6 (5), 7 (9) and 9 (8) of the Act):

> "Any question as to whether any property or liability will be or has been transferred under the provisions of pt. II of the Act relating to the transfer of property and liabilities, or as to whether any property or liability falls to be apportioned under these regulations or as to the person to whom it will be or has been transferred shall, in default of agreement, be determined by arbitration."

J. A. Armstrong for the plaintiff (the executor and trustee of the will).

Ungoed-Thomas, K.C., and *H. E. Francis* for the Board of Governors of the Royal Cancer Hospital.

Tonge for the defendant, Norah Cox (one of the persons interested on an intestacy).

Danckwerts for the Minister of Health and the Attorney-General.

Cur. adv. vult.

May 11. **HARMAN, J.**, read the following judgment. Mabel Alicia Kellner made her will on June 18, 1948. She appointed the plaintiff, Alfred Blundell, a solicitor, to be her executor and trustee. She bequeathed a number of pecuniary legacies, and devised and bequeathed all the rest of her property to her trustee on the statutory trusts for realisation and directed him to stand possessed of her residuary estate on trust to divide it equally between eight well-known charitable institutions, two parts going respectively to the Cancer Research Institute and the Royal Cancer Hospital (Free), Fulham Road. The testatrix died on June 23, 1948, and at that date no difficulty or doubt could have arisen about the destination of the two shares of residue to which I have referred. The Royal Cancer Hospital (Free) was the well-known hospital carried on in the Fulham Road under that name. It was incorporated by Royal Charter in 1910. Besides the hospital it owned and controlled a research institute housed in the old Freemasons Hospital in the Fulham Road. This was conducted under its own directors and staff and was commonly known as the Cancer Research Institute. It was manifestly the object of the testatrix's bounty to the extent of one-eighth of her residue. Probate of the will was obtained on July 31, 1948, but before that event there was brought into force, by Order in Council, pt. II of the National Health Service Act, 1946, the appointed day being July 5, 1948. Under this Part of the Act, broadly speaking, the hospitals of the country and their property were taken over by the State. The control of hospitals differs according to whether they were or were not designated by the Minister under s. 11 (8) of the Act as teaching hospitals. Such a designation was, in fact, made in the case of the Royal Cancer Hospital (Free) by the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 (S.I., 1948, No. 979), and, as a result, a board of governors constituted in accordance with sched. III, pt. III, to the Act has been, since the appointed day, conducting the affairs of the hospital and of the Cancer Research Institute in obedience to s. 12 (3) and s. 16 (2) of the Act. The board is the first defendant to the summons and claims the benefit of the testatrix's bounty.

Bequests of legacies or shares of residue in favour of hospitals are, or were until the springs of charity were dried by a crippling taxation, the commonest form of charitable bounty, and I confess that I approached the problem here posed in the confident expectation that I should find direct guidance in the Act as to the destination of such gifts. It was, indeed, with some surprise that I heard that conflicting claims were preferred by the board of governors, by the Minister of Health, by the Attorney-General, and by the next of kin. My attention was drawn by counsel, section by section, to the provisions of the Act, and I read them with a bewilderment which ripened finally into despair when the conclusion was forced on me, from which I see no escape, that by some mischance the legislature has so framed the clauses of this Act as to leave outside it charitable legacies of the nature here in question. The Act in this respect is almost a miracle of ineptitude. I propose to examine it to show how I have felt obliged to come to the melancholy conclusion to which I have referred and to hold that this is, indeed, an extraordinary instance of *casus omissus*.

Before I deal with the sections under which the conflicting claims are made, I must dispose of a suggestion, properly made to me, that the Act has provided a statutory form of arbitration for the resolution of the type of questions with which I am confronted and has thus ousted the jurisdiction of the court. That an arbitration clause in a statute may have this effect is illustrated by *Joseph Crosfield & Sons, Ltd.* v. *Manchester Ship Canal Co.* (1). It would be a further surprise to find that the legislature has, by what would seem to be an inadvertence, shut out the hospitals from access to the courts on questions A of construction of the Act, but that result, if it emerges from the language used, must be accepted. Part II of the Act, with which I am here concerned, contains a number of provisions for arbitration. Thus ss. 6 and 7, which are the main sections effectuating the transfer of hospital assets to the State, both contain arbitration provisions, but both of these, broadly speaking, are framed to decide questions of apportionment between assets partly transferred and B partly not, and they have no bearing on the present question. Section 9, however, which is described as containing "Supplementary provisions relating to transfer of hospital property and liabilities," contains the following sub-section :

> "(8) Regulations may make such provision supplementary to or consequential on the foregoing provisions of this Part of this Act relating to C the transfer of property and liabilities as appears to the Minister to be necessary or expedient, and in particular, but without prejudice to the generality of this sub-section, regulations may provide (*a*) for the determination by arbitration, in default of agreement, of any question arising as to whether any property or liability will be or has been transferred under the said provisions or as to the person to whom it will be or has D been transferred."

The language of s. 9 (8) (*a*) seems appropriate to the present question, but the provision to be made by the regulations must be "supplementary to or consequential on" ss. 6 and 7, thus limiting questions which can be dealt with by regulation to matters ancillary to the sections. This presupposes that the property in question is of a nature coming within the transfer clauses if E owned by a hospital of one of the kinds indicated. It does not, in my judgment, extend to questions of the meaning and effect of the sections themselves. In other words, the subject-matter of an arbitration under the regulations must be fact and not law. I hold, therefore, that the jurisdiction of the court is not ousted, and I need not consider the National Health Service (Apportionment and Transfer) Regulations, 1948 (S.I., 1948, No. 888) made by the F Minister under ss. 6 (5), 7 (9) and 9 (8) of the Act, beyond saying that reg. 30 of these regulations, if and so far as it purports to refer to arbitration the type of question which I have here to determine, is *ultra vires*.

I now turn back to the main question and first deal with s. 7 on which the first defendants, the board of governors, mainly rely. Section 7 (1) is in the following terms :

G

> "Where any voluntary hospital to which the last foregoing section applies is, before the appointed day, designated by the Minister under this Part of this Act as a teaching hospital or is one of a group of hospitals so designated, all endowments of the hospital held immediately before the appointed day shall on that day, by virtue of this Act, be transferred to and vest in the board of governors constituted under the following H provisions of this Part of this Act for the teaching hospital".

If, then, this be an "endowment," the first defendants are right. That word is explained in s. 7 (10) in these terms :

> "In this section the expression 'endowment,' in relation to a voluntary hospital, means property held by the governing body of the hospital or by trustees solely for the purposes of that hospital, being property of the following descriptions (*a*) interests in or attaching to land . . . (*b*)

> shares, stocks, bonds, debentures and other securities, and any other personal property held by way of an investment; (*c*) money, including any credit in a banking account; (*d*) rights under any bill of exchange, promissory note or gratuitous covenant for the payment of money: Provided that an equitable interest held for the purposes of a voluntary hospital in trust property in which there are other equitable interests shall not be deemed to be an endowment of that hospital." A

By s. 79, unless the context otherwise requires, the word "property" includes rights. Now the rights of the residuary legatees are rights to have the estate of the testatrix administered according to law, either by the personal representatives or by the court, and on completion of the administration to have the balance remaining in the executors' hands distributed in due proportions. The residuary legatees, while the estate remains undistributed, have no right B to any particular asset or item of property, but merely an equitable interest in the estate of the nature I have mentioned. It seems to me that this is "an equitable interest held for the purposes of a voluntary hospital in trust property in which there are other equitable interests," and, if so, the proviso to s. 7 (10) clearly excludes this interest from the category of endowments. Even if that be not so, I cannot find any words in s. 7 (10) which could cover C this share. It was suggested that this was "personal property held by way of an investment," but that it clearly is not, and there are no other words which are even faintly appropriate. It follows that I must hold that s. 7 (1) has no application. Before leaving this section, I should add, perhaps, that it contains one extremely odd feature in that provision is made for an endowment given after the passing of the Act and before the appointed day in the D case of a non-teaching hospital, but omits a similar provision in the case of a teaching hospital. I cannot understand this caprice, but it is irrelevant, as I must hold this not to be an endowment.

I turn back, therefore, to s. 6 under which the Minister of Health prefers his claim. If this succeeds the money will go to the Exchequer under s. 52 (2) of the Act. Section 6 provides: E

> "(1) Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, F being interests held immediately before the appointed day by the governing body of the hospital . . . and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part G thereof, but not including any endowment . . . within the meaning of the next following section . . ."

The last words are satisfied if I am right about s. 7. Section 6 (2) deals with the transfer of the property of hospitals vested in a local authority, but for some inscrutable reason entirely different language is used, though one would suppose that property of the same nature was being transferred in each case. H It, therefore, affords no help. Section 6 (1) starts by transferring interests in what are called by the inappropriate word "premises," by which I suppose immovable property to be meant. The section proceeds to deal secondly with movable property, and thirdly with rights, which include rights acquired solely for the purpose of carrying on the business of the hospital, but not including an endowment within s. 7. It was suggested to me that, if s. 7 did not apply, the words of s. 6 (1) which I have just quoted do catch this interest, but I cannot think that an interest in an unadministered residue can be described even in this Act as a right acquired for the purpose of carrying on the business of the hospital. Accordingly, I reject this suggestion.

Further, it was suggested that, if neither s. 6 nor s. 7 embraced the interest in question, it was yet caught by s. 60. This section is to be found in pt. VI of the Act, which is described as "General," and in a fasciculus of sections A described as "Administrative Provisions." The side-note to s. 60 reads as follows:

> "Power of trustees to make payments to regional hospital boards and boards of governors."

This section, therefore, may be described as *tabula in naufragio.* It would B clearly rescue the first defendants only by an accident. The section provides:

> "(1) Where property, other than property transferred to the Minister or to the board of governors of a teaching hospital or to a hospital management committee under s. 6 or s. 7 of this Act, is held on trust immediately before the appointed day, and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply C any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose of making payments, whether of capital or income (*a*) in the case of a hospital designated as a teaching hospital or included D in a group of hospitals so designated, to the board of governors of that teaching hospital . . ."

The context of this section requires that the word "property" should not here include rights, for that which is dealt with is something to be applied for the benefit of (among others) a board of governors. The rights vested in the board of governors here cannot be applied by someone else for their E benefit. In this section, therefore, the expression "the trust property" means the residue of the estate, and the question is whether the terms of the trust instrument (*i.e.*, the will) require the trustees (*i.e.*, the plaintiff) to apply a part of the capital for the purposes of the Cancer Hospital. In my judgment, this language is wholly inappropriate, and the section has nothing to do with the case.

F What, then, is to happen to this bequest? Is it undisposed of and payable, therefore, to the next of kin? I cannot think so. When the testatrix died, there was in existence a charity identifiable as the object of her bounty, and capable of taking advantage of her bequest. The fact that this charity has ceased to exist, as, in fact, it has under s. 78 (1) (*c*) of the Act, cannot bring about a lapse, on the ordinary principle that there can be no lapse where the G legatee survives the testator. The principle is clearly stated in *Re Slevin* (2). Accordingly, I must hold that the next of kin have no rights, and that the bequest should be applied by Sign Manual under the principles applicable thereto.

This leaves the question of costs. This is not a case where a difficulty has been caused by the language which the testatrix has used. It is true that she H made her will after the passing of the Act of 1946, but, though ignorance of the law is no excuse, there is no presumption that a citizen knows the law. Accordingly, I am not bound to attribute a knowledge of pt. II of the Act to the testatrix or her advisers. The difficulty has been brought about by the astonishing ineptitude with which pt. II is drawn, and I see no reason why the charities who take the other six-eighths of the residue should pay for the omissions of the legislature. I may add that this summons was taken out at the suggestion of the Ministry of Health, which confessed itself unable to under-

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stand the Act, and desired its elucidation for its own convenience. I do not think that I ought to order the Minister to pay the costs, but I shall order that they be paid as between solicitor and client out of the two-eighths of the residue as to which alone these questions have arisen.

Declaration accordingly. Costs to be paid as between solicitor and client out of the shares of residue concerned.

Solicitors: *Blundell, Baker & Co.* (for the trustee); *Farrer & Co.* (for the hospital); *Vandercom, Stanton & Co.* (for one of the next of kin); *The Solicitor, Ministry of Health*; *The Treasury Solicitor.* A

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

Affirmed. C.A. *post*, p. 1021. B

MARRIAGE *v.* EAST NORFOLK RIVERS CATCHMENT BOARD.

[King's Bench Division (Byrne, J.), May 4, 5, 6, 9, 10, 12, 1949.] C

Land Drainage—Catchment board—Cleansing watercourse—Damage to plaintiff's bridge—Dredgings deposited on bank—Diversion of flood waters—Action for nuisance by plaintiff—Competence—Land Drainage Act, 1930 (c. 44), *s.* 34 (1), (3), *s.* 38 (1).

Public Authority—Limitation of action—Catchment board—Cleansing watercourse—Dredgings deposited on bank—Plaintiff's bridge destroyed three years later owing to diversion of flood waters—Date on which cause of action accrued—Limitation Act, 1939 (*c.* 21), *s.* 21 (1). D

By the Land Drainage Act, 1930, s. 34 (1), a catchment board were empowered to maintain and improve existing works and to construct new works, and by s. 38 (1) they were allowed to deposit on the banks of a watercourse any matter removed in the course of dredging that watercourse. By s. 34 (3): "Where injury is sustained by any person by reason of the exercise by a drainage board of any of its powers under this section, the Board shall be liable to make full compensation to the injured person, and in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Lands Clauses Acts." E F

In pursuance of their statutory powers a catchment board deposited on the south bank of a river dredgings taken from the river, thereby raising the bank from one to two feet, this work being completed on Jan. 6, 1944. In December, 1946, the river flooded, and, as the flood waters were prevented by the deposited dredgings from escaping over the south bank as they had formerly done, they ran through a by-pass on the north of the river and swept away a bridge leading across it to a mill. On Nov. 5, 1947, the owner of the bridge issued the writ in an action for nuisance against the catchment board. G

Held: (i) where a plaintiff had a legal right of action but for the powers which the catchment board had under s. 34 (1) he had sustained an "injury" within the meaning of s. 34 (3), and no action based on nuisance would lie against the Board, the plaintiff's only remedy being to claim compensation under sub-s. (3). H

(ii) where there was a dispute with regard to compensation, the function of the arbitrator was to determine not merely the *quantum* of compensation, but also whether there was an injury which would have given a right of action but for the statute.

(iii) even if an action for nuisance did lie, the Board were not the owners of the land on which they had deposited the dredgings ; in view of the provisions of s. 38 (1) of the Act there was no duty on them to remove the dredgings and their only wrongful act was the actual depositing ; that was completed on Jan. 6, 1944, and so the cause of action accrued on that day : *Nicholls* v. *Ely Beet Sugar Factory, Ltd.* ([1936] Ch. 343) and A *Harrop* v. *Hirst* (1868) (L.R. 4 Exch. 43), *applied* ; and, therefore, there was no continuing act, neglect or default within the meaning of the proviso to the Limitation Act, 1939, s. 21 (1), and the action, being against a public authority, was barred under that sub-section since it was not brought within one year of the date on which the cause of action accrued.

[FOR THE LAND DRAINAGE ACT, 1930, s. 34, see HALSBURY'S STATUTES, B Vol. 23, p. 554.]

Cases referred to :

(1) *Rhodes* v. *Airedale Drainage Comrs.*, (1876), 1 C.P.D. 402 ; 45 L.J.Q.B. 861 ; 35 L.T. 46 ; 44 Digest 62, *447*.

(2) *Hall* v. *Bristol Corpn.*, (1867), L.R. 2 C.P. 322 ; 36 L.J.C.P. 110 ; 15 L.T. 572 ; 31 J.P. 376 ; 33 Digest 14, *38*.

C (3) *Gerrard* v. *Crowe*, [1921] 1 A.C. 395 ; 90 L.J.P.C. 42 ; 124 L.T. 486 ; 44 Digest 84, *652*.

(4) *R.* v. *Pagham, Sussex Sewers Comrs.*, (1828), 8 B. & C. 355 ; 2 Man. & Ry. K.B. 468 ; *sub nom., R.* v. *Bognor Sewers Comrs.*, 6 L.J.O.S.K.B. 338 ; 36 Digest 219, *608*.

(5) *Menzies* v. *Breadalbane*, (1828), 3 Bli. N.S. 414 ; 44 Digest 29, *218*.

D (6) *Bickett* v. *Morris*, (1866), L.R. 1 Sc. & Div. 47 ; 14 L.T. 835 ; 30 J.P. 532 ; 44 Digest 14, *65*.

(7) *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343 ; 105 L.J.Ch. 279 ; 154 L.T. 531 ; Digest Supp.

(8) *Harrop* v. *Hirst*, (1868), L.R. 4 Exch. 43 ; 38 L.J. Ex. 1 ; 19 L.T. 426 ; 33 J.P. 103 ; 44 Digest 27, *193*.

E ACTION for damages for nuisance.

The plaintiff was a miller who owned Limbourne Mill on the River Waveney at Wortwell, near Harleston, in the county of Norfolk, and also a bridge leading to the mill across a by-pass channel on the north side of the river below a weir. The defendants were the East Norfolk Rivers Catchment Board, a F public authority whose area included the River Waveney. In December, 1946, when the river was in flood, the plaintiff's bridge collapsed and BYRNE, J., now found as a fact that the collapse occurred because, from Oct. 1, 1943, until Jan. 6, 1944, the catchment board, while engaged in dredging the river, had deposited the dredgings on the south bank, thereby raising it from one to two feet, with the result that the flood waters were unable to escape over the south bank, as they had done in previous years, and ran instead through G the by-pass channel, scouring the channel and undermining the buttresses of the bridge. The plaintiff claimed damages for nuisance in the loss of the bridge. The catchment board contended that the plaintiff's sole remedy was a claim for compensation under the Land Drainage Act, 1930, s. 34 (3), and that, in any event, the action was statute-barred under the Limitation Act, 1939, s. 21 (1), as it was an action against a public authority commenced more than H one year after the cause of action arose. BYRNE, J., gave judgment for the catchment board on both issues.

Fortune for the plaintiff.

Diplock, K.C., and *R. A. Macdonald* for the catchment board.

Cur. adv. vult.

May 12. **BYRNE, J.**, [after stating the facts and his findings thereon] : I now turn to the law. This action is based on nuisance, and it is contended on behalf of the catchment board that the action is misconceived. It is said that no such action lies against the Board, and that the plaintiff's only remedy is to seek compensation under the Land Drainage Act, 1930, s. 34 (3). By s. 34 (1) the Board have power to maintain and improve existing works, and to construct new works. The sub-section provides that the Board

> " . . . shall have power (*a*) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work : (*b*) to improve any existing works, that is to say, to deepen, widen, straighten or otherwise improve any existing watercourse, or remove mill dams, weirs or other obstructions to watercourses, or raise, widen, or otherwise improve any existing drainage work : (*c*) to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act not hereinbefore referred to, required for the drainage of the area comprised within their district."

The Board are, therefore, plainly given power to violate private rights, and, indeed, without that power, the statute would be rendered nugatory. Section 34 (3) provides :

> " Where injury is sustained by any person by reason of the exercise by a drainage board of any of its powers under this section, the Board shall be liable to make full compensation to the injured person, and in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Lands Clauses Acts."

I take the word " injury " in that sub-section to connote a legal right of action but for the powers which the catchment board have under this statute, and, in my view, that sub-section means that, if that which is complained of would have been actionable at common law but for the statute, there is a right to compensation.

The sub-section goes on to provide that :

> " . . . in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Lands Clauses Acts."

It has been argued on behalf of the plaintiff that that sub-section is concerned only with the *quantum* of compensation, but in reply to that argument *Rhodes* v. *Airedale Drainage Comrs.* (1) and *Hall* v. *Bristol Corpn.* (2) were cited. Those cases appear to me to establish the proposition that, in a case in which there is a dispute with regard to compensation, an arbitrator is to determine, first, whether there was injury which would have given a right of action but for the statute, and, secondly, if there was, the appropriate amount of compensation.

Section 38 (1) provides :

> " A drainage board, without making payment therefor or giving compensation in respect thereof, may appropriate and dispose of any shingle, sand, clay, gravel, stone, rock or other matter removed in the course of the execution of any work for widening, deepening or dredging any watercourse, and may deposit any matter so removed on the banks of the watercourse or use it in any other manner for the maintenance or improvement of those banks or for the purposes of the execution of any other work which the drainage board have power to execute."

The effect of ss. 34 and 38, in my view, is as follows :—(i) that the Board had power to do that which is complained of in this case, *i.e.*, to raise the height of the south bank of the river by placing thereon the dredgings from the river ; (ii) that, assuming that the effect of what the Board did was to cause damage to the plaintiff which would have been actionable at common law but for the statutory authority conferred on the Board, the plaintiff's only remedy is to claim compensation under s. 34 (3), the amount of compensation, in case of dispute, being fixed by arbitration under the Lands Clauses Acts. A riparian owner is entitled to erect or heighten the banks on his land, although the effect of doing so is to divert flood water from his land to the land of another person, and the person to whose land the flood water is diverted has no cause of action at common law: see *Gerrard* v. *Crowe* (3) and *R.* v. *Pagham, Sussex, Sewers Comrs.* (4). By s. 34 of the Land Drainage Act, 1930, a catchment board are entitled to do the same thing without any liability for damage caused. On the other hand, if what was done can be regarded as an interference with a regular flood channel which formed part of the bed of the river, then in the case of a riparian owner such action would render him liable at common law: see *Menzies* v. *Breadalbane* (5) and *Bickett* v. *Morris* (6). On the facts I have come to the conclusion that the catchment board, by their act, diverted the ordinary flood course of the river, and thus did an act which, had it been done by a riparian owner, would have rendered that riparian owner liable to an action, but, having regard to the terms of the statute, I am of opinion that no action based on nuisance will lie against the Board, and that the plaintiff's only remedy is under s. 34 (3) of the Land Drainage Act, 1930.

Assuming, however, that I am wrong about that, and that an action based on nuisance will lie against the catchment board, the remaining question is whether this action is barred by the Limitation Act, 1939. Section 21 (1) of that Act provides that the action must be commenced within one year of the cause of action, and then there is a proviso:

> " . . . that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued . . . until the act, neglect or default has ceased."

The wrongful act alleged here is the depositing of dredgings on the south bank of the river. That work was completed on Jan. 6, 1944, and thus that was the day on which the cause of action arose: see *Nicholls* v. *Ely Beet Sugar Factory, Ltd.* (7) and *Harrop* v. *Hirst* (8). No positive act is alleged after that date, and the writ was not issued until Nov. 5, 1947. The catchment board were not the owners of the land on which the dredgings were placed by them under their statutory powers. Hence the only thing that can be said against the Board after Jan. 6, 1944, is that they did not exercise the powers which they had under s. 34 (1) to remove the dredgings. In my view, however, there was no duty on them to do so, and thus it follows that this action is barred, in my view, by the Limitation Act, 1939, s. 21 (1). Thus, although the conduct of this catchment board leaves, in my opinion, much to be desired, for those reasons this action fails, and there must be judgment for the Board.

Judgment for the defendants with costs as between solicitor and client.

Solicitors: *Butt & Bowyer*, agents for *Daynes, Keefe & Co.*, Norwich (for the plaintiff); *Church, Adams, Tatham & Co.*, agents for *Sprake & Chadwick*, Norwich (for the catchment board).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Affirmed. C.A. *post* p. 1079.

KITCHEN'S TRUSTEE *v.* MADDERS AND ANOTHER.

[Chancery Division (Harman, J.), May 11, 12, 1949.].

Bankruptcy—Set off—Set off of amount of damages recovered from bankrupt against claim by trustee in bankruptcy for rent—Rent accrued before and after bankruptcy—Bankruptcy Act, 1914 (*c.* 59), s. 31.

A. was the owner of a hotel which she mortgaged to a building society, the mortgage deed providing that A.'s powers of leasing were to be exercised only with the consent of the building society. In April, 1947, A. orally agreed to sell the goodwill of the hotel and its contents to M., who also agreed to take a lease of the hotel for a term of seven years. M. paid £2,000 down and gave A. a bill of sale on the furniture for the balance of the purchase money. On May 9, 1947, A., without the consent of the building society, purported to grant to M. a lease of the hotel for seven years at a rent of £500 a year payable quarterly. On going into possession M. found that he had been defrauded by A., and on Aug. 11, 1947, he issued a writ for damages for fraud. Thereafter M. paid no rent. On Dec. 9, 1947, A. became bankrupt and at that date two quarters' rent was owing by M. On Jan. 2, 1948, M. recovered judgment in default of defence against A. for damages for fraud (the amount to be assessed) and for the setting aside of the bill of sale. In August, 1948, A.'s trustee in bankruptcy obtained a stay of M.'s action, and M. issued a summons to have the stay removed. On Oct. 15, 1948, an order was made removing the stay on M.'s undertaking not to prove his claim in A.'s bankruptcy. Subsequently, the building society issued an originating summons for foreclosure. After the issue of the writ in the present action by the trustee against M. for the two instalments of rent which had accrued due prior to the date of bankruptcy and for three instalments which had accrued thereafter up to the date of the writ, the building society amended this originating summons by asking for possession of the hotel and striking out all other claims. It was common ground in the present action that that summons could not be proceeded with because the relief asked for could in the circumstances (the defendants being treated in the proceedings as strangers and not tenants) only be given in an action started by writ. On Nov. 4, 1948, M.'s damages for A.'s fraud were assessed at £5,500 and M. now claimed to set off those damages against the trustee's claim.

Held : (i) the instalments of rent accruing after the date of A.'s bankruptcy were never due to A., and there was, therefore, no mutuality and there could be no set off.

Alloway v. *Steere* (1882) (10 Q.B.D. 22), *applied.*

(ii) as regards the instalments due before the bankruptcy, M. was precluded by his undertaking from proving in the bankruptcy in respect of the damages for fraud and, therefore, could not bring himself within the Bankruptcy Act, 1914, s. 31 (which provides in effect that for set off to apply there must be mutual dealings between the debtor (A.) and any person proving or claiming to prove a debt under a receiving order), and there could be no set off.

Jack v. *Kipping* (1882) (9 Q.B.D. 113), *distinguished.*

(iii) the defendants were not entitled to protection against the possibility of having to pay rent twice, *viz.*, to both the trustee and the building society, because, since the building society's action for possession was bound to fail and they had not otherwise recognised the lease or demanded possession or required the rent to be paid to them, they had not intervened to an extent which demanded that such protection be given.

[As to Set-off, see HALSBURY, Hailsham Edn., Vol. 2, pp. 281-287, paras. 373-379 ; and for Cases, see DIGEST, Vol. 4, pp. 389-415, Nos. *3561-3749.*]

Cases referred to :

(1) *Jack* v. *Kipping* (1882), 9 Q.B.D. 113 ; 51 L.J.Q.B. 463 ; 46 L.T. 169 ; 4 Digest 402, *3662*.

(2) *Re Daintrey, Ex p. Mant,* [1900] 1 Q.B. 546 ; 69 L.J.Q.B. 207 ; 82 L.T. 239 ; 4 Digest 389, *3562*.

(3) *Alloway* v. *Steere,* (1882), 10 Q.B.D. 22 ; 52 L.J.Q.B. 38 ; 47 L.T. 333 ; 47 J.P. 55 ; 4 Digest 394, *3609*.

A (4) *Moss* v. *Gallimore,* (1779), 1 Doug. K.B. 279 ; 35 Digest 323, *678*.

(5) *Moore* v. *Ullcoats Mining Co., Ltd.,* [1908] 1 Ch. 575 ; 77 L.J.Ch. 282 ; 97 L.T. 845 ; 31 Digest 477, *6238*.

(6) *Woolwich Equitable Building Society* v. *Preston,* [1938] Ch. 129 ; 107 L.J.Ch. 63 ; *sub nom., Woolwich Equitable Building Society* v. *Oriston,* 158 L.T. 216 ; Digest Supp.

B

ACTION by a trustee in bankruptcy to recover arrears of rent.

The defendants' claim to set off damages awarded them against the bankrupt for fraud was rejected by HARMAN, J., who gave judgment for the trustee. The facts appear in the judgment and are summarised in the headnote.

C *Aronson, K.C.,* for the trustee in bankruptcy.
Michael Browne, for the defendants.

HARMAN, J. : This is an action by the trustee in bankruptcy of one Hilda Kitchen on a specially endorsed writ for arrears of rent against the defendants who are admittedly in possession of a property called " Roslyn Private Hotel " at Blackpool under a lease created by the bankrupt for a term of seven D years from May 9, 1947, at a rent of £500 a year payable quarterly. Before the date of the lease the bankrupt had mortgaged the hotel to a building society, and the lease is said to have been granted without the consent of the mortgagees, the leasing power of the mortgagor having been limited by the mortgage document to leases granted with the mortgagees' consent.

The facts are not easy to ascertain, but, so far as I can make them out, relations E started with an oral contract made in April, 1947, by the defendants in this action agreeing with the bankrupt to buy from her the goodwill and certain of the contents of the Roslyn Private Hotel for £5,000, and to take a lease of the premises from her for seven years, which part of the contract was carried out by the lease of May 9, 1947. It appears that the defendants paid £2,000 down, and gave a bill of sale on the furniture for the balance of £3,000. It also appears F that, having gone into possession, they discovered that they had been defrauded by the bankrupt, and on Aug. 11, 1947, they issued a writ in the King's Bench Division claiming damages for fraud. In those circumstances, though they remain in possession of the hotel, they have not paid any rent. On Dec. 9, 1947, the bankrupt went bankrupt. At that time there were two quarters' rent owing by the defendants to the bankrupt under the lease. On Jan. 2, G 1948, the defendants recovered judgment against the bankrupt for damages for fraudulent misrepresentation, the damages to be assessed, and they got the bill of sale on the furniture set aside. They obtained that judgment on motion in default of defence and without the learned judge taking any notice of the bankruptcy which had already supervened. In August, 1948, the trustee obtained a stay of that action in the usual way, and the defendants took out H a summons in the action to have the stay removed. Immediately after the first hearing of that summons, the writ in the present action was issued by the trustee for the two quarters' rent due before the bankruptcy supervened and the three quarters' rent thereafter down to the date when the writ was issued, which was Aug. 19, 1948. On Oct. 15, 1948, the judge in chambers made an order in the King's Bench action removing the stay, but he made it on the terms that : " . . . the plaintiffs by their counsel undertaking not to prove their claim the subject-matter of this action in the bankruptcy."

So the price they paid for getting the stay removed was their undertaking not to prove their claim in the bankruptcy. I take that at its face value. Shortly after that the matter was further complicated by the mortgagees issuing an originating summons for foreclosure. That it was an action for foreclosure is clear because the second and third mortgagees were joined as defendants to the proceedings. The mortgagees obtained, I suppose, leave to exercise that remedy before they started their action—at least, nobody A has taken any objection. So far as I can make out, the mortgagees in that action did not recognise the lease or the defendants as tenants under it. On Nov. 4, 1948, the registrar at Blackpool assessed the damages for the fraudulent misrepresentation by the bankrupt at some £5,500 so that the defendants' claim was quantified. This action now comes on for trial, the defendants having obtained leave to defend. On Feb. 8, 1949, after delivery of defence B in this action, the mortgagees amended their proceedings by asking for possession of the mortgaged premises, and striking out all other claims. It is clear that that claim cannot succeed for it is a claim for possession against the defendants treating them as strangers and not as tenants, and must be made in an action started by writ. It is admitted that the summons which is still on foot must be abandoned. C

The defendants here take two different points. First, having against the bankrupt a claim for £5,500 for damages, they ask that they may set that off against the accruing claims for rent under the lease. It is admitted on behalf of the trustee that, apart from the undertaking to which I have referred, that would be a good claim so far as concerns the two instalments of rent due before the bankruptcy. The authority for that proposition is *Jack* v. *Kipping* (1), D of which I need only read the headnote :

> "A claim for unliquidated damages for a fraudulent representation made by a bankrupt on the sale of a chattel is within the mutual credit clause (s. 39) of the Bankruptcy Act, 1869, and consequently may be set off in an action brought by the trustee for the unpaid price—such fraudulent representation not being a mere personal tort, but a breach of the obligation arising out of the contract of sale." E

Except that the damage has been quantified here, that exactly applies. As to those two instalments, therefore, the trustee relies merely on the undertaking. As to the instalments of rent which have accrued due between the bankruptcy and the date of the writ, the trustee says that there was no mutuality. He F says that this was not money which was ever due to the bankrupt at all because, at the date of the bankruptcy, the rent had not accrued due and instalments of rent due in the future are not moneys that are due to the bankrupt at the date of the bankruptcy. These sums became due, he says, to the trustee as landlord and, therefore, there was no mutuality. That point, it seems to me, is a good one. It is said by counsel for the defendants that that is not right G because once it is admitted that there was a right of set off and the bankruptcy supervened, the moneys later accruing due can be treated as an addition to one side of the account which has to be taken where there is a set off. I agree that, if these were moneys due at the date of the bankruptcy, but payable later, that would be right. I think that that is illustrated by *Re Daintrey* (2) where there was a contract between two firms of solicitors under which, at the H date of the bankruptcy in question, a sum of money, then unquantified, was owing but payable at a future date, and when the future date came it was held to be a good subject-matter of set off. That, however, does not seem to me to apply to rent which had not accrued due at the date when the bankruptcy supervened and was, therefore, not a debt due to the bankrupt at all. On the other hand, it does seem to me that *Alloway* v. *Steere* (3) is in point. The headnote to that case is :

> "A debtor, who was tenant from year to year of a farm upon the terms that, at the expiration of the tenancy, he should be paid by the landlord allowances for tillages and cultivation according to the custom of the country, filed a petition for liquidation of his affairs under the Bankruptcy Act, 1869, and a trustee was appointed, who did not disclaim the tenancy, but carried on the business of the farm for the benefit of the creditors until the tenancy A was determined by notice to quit. The debtor's estate was sufficient to indemnify the trustee against any personal liability in respect of the tenancy. In an action to recover the value of tillages and cultivation by the trustee during his tenancy, according to the custom :—*Held*, that the landlord was not entitled to set off rent, accrued due from the debtor before the liquidation proceedings, against the trustee's claim."

B That seems to me to be almost exactly the converse of the present case. I hold, therefore, that there can be no set off as to the three instalments of rent accruing due since the bankruptcy.

As to the instalments before the bankruptcy, counsel for the trustee, as I have said, was driven to rely on the undertaking. The right of set off in bankruptcy is the creature of statute and arises under the Bankruptcy Act, 1914, C s. 31, under the terms of which the persons between whom there must be mutual dealings are the debtor, on the one side, and any other person proving or claiming to prove a debt under the receiving order, on the other. The present defendants, having regard to their undertaking, cannot either prove or claim to prove a debt under the receiving order, and, therefore, they do not come within s. 31. To that argument I see no answer, and, therefore, I am of opinion that there D is no right of set off either for the pre-bankruptcy or the post-bankruptcy amount of rent.

A further point taken by the defendants, raises a most difficult question. They say : "We are in peril of having to pay the rent twice. You, the trustee, claim through the mortgagor and the mortgagor may at any moment be put out by the mortgagees, and then she would have no further right to sue for the E rent." The Law of Property Act, 1925, s. 98 (1), provides :

> "A mortgagor for the time being entitled to the possession or receipt of the rents and profits . . . thereof, may sue for such possession, or for the recovery of such rents or profits . . ."

Counsel for the defendants agrees that the trustee is in the shoes of the mortgagor, but he says he is not entitled to sue because notice has been given by the F mortgagees of their intention to take possession. He relies on *Moss* v. *Gallimore* (4), which is still good law and appears in SMITH'S LEADING CASES. The sidenote in *Moss* v. *Gallimore* (4) is this :

> "A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear G at the time of the notice, as well as to what accrues afterwards . . ."

If there has been an effective notice by the mortgagees, they can give a good receipt for the accruing rent, and, therefore, it is said that the defendants are in peril of having to pay the rent twice.

The lease, however, is not being recognised by the mortgagees. If the mortgagees had given notice to the defendants, as tenants, to pay the rent to them, H the trustee, claiming through the mortgagor, would clearly be out of court. If the mortgagees had made an unequivocal entry into possession or issued a writ which amounted to an unequivocal demand for possession, I think the same thing would be true, but here they have not done either of those things. They do not want to recognise the lease, and, therefore, they do not demand that the rent shall be paid to them. The proceedings for possession must be counted as a nullity because it is admitted that they cannot be effective, and I cannot think that the issuing of admittedly ineffective proceedings amounts to an unequivocal demand for possession. It is not unequivocal because on the facts it is bound to fail. Therefore, it does not seem to me that the mortgagees have intervened to an extent which demands that the defendants be given protection against the possibility of having to pay rent twice over. In those circumstances that defence cannot succeed and the trustee is entitled to judgment for the instalments of rent which he asks by his writ, and I propose to give judgment for £625, with costs. A

Order accordingly.

Solicitors : *Sidney Pearlman* (for the plaintiff) ; *Gibson & Weldon*, agents for *Knowles & Foxcroft*, Blackpool (for the defendants).

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

B

Affirmed. C.A. [1950] 1 All E.R. 171.

HARRISON *v.* NATIONAL COAL BOARD.

[Leeds Assizes (Jones, J.), April 27, 28, May 9, 1949.]

Mine—Coal mine—Safety—Shot firing—Breach of statutory duty by servant of mine owner—Liability of mine owner—General Regulations, dated July 10, 1913 (*S.R. & O.*, 1913, *No.* 748), *reg.* 1, *made under Coal Mines Act*, 1911 (*c.* 50), *s.* 86 (1)—*Explosives in Coal Mines Order*, 1934 (*S.R. & O.*, 1934, *No.* 6), *cl.* 2 (*e*) (*as amended by S.R. & O.*, 1937, *No.* 1049, *and S.R. & O.*, 1938, *No.* 1409). C

By the Coal Mines Act, 1911, s. 90 : "If any person who is bound to observe the regulations of any mine, acts in contravention of or fails to comply with any of them, he shall be guilty of an offence against this Act, and also the owner, agent, and manager of such mine shall each be guilty of an offence . . . unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the regulations, to prevent such contravention or non-compliance." Regulation 1 of the General Regulations (dated July 10, 1913) made under s. 86 (1) of the Act provides : "It shall be the duty of the manager and under-manager to carry out and to the best of their ability enforce the provisions of every Order in force under the Act regulating the . . . use . . . of explosives, and it shall be the duty of all persons employed in or about the mine to comply with the provisions of the said Orders." By cl. 2 (*e*) of the Explosives in Coal Mines Order, 1934 (as amended) : "The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter, and he shall also take suitable steps to prevent any person approaching the shot." D E F

The plaintiff, who was employed by the defendants in their coal mine, was injured as a result of a breach of cl. 2 (*e*) of the Order of 1934 by a shot firer, S., who was also an employee of the defendants. The plaintiff was driving a drift from one seam to another and, it being necessary to loosen some stone, requested S. to fire a shot which he did without warning the plaintiff or ensuring that the plaintiff was in a place of safety. The defendants had taken all reasonable means, by publishing the regulations, to enforce and secure compliance with the regulations. In a claim by the plaintiff for damages for breach of statutory duty by the defendants, their servants or agents. G H

Held : in the circumstances and on the true construction of reg. 1 of the General Regulations, 1913, and of cl. 2 (*e*) of the Order of 1934, there was no duty imposed on the defendants to carry out the provisions of cl. 2 (*e*) the failure to comply with cl. 2 (*e*) was that of S. ; and the plaintiff's claim must fail.

Dictum of DU PARCQ, L.J., in *Yelland* v. *Powell Duffryn Associated Collieries, Ltd.* ([1941] 1 All E.R. 284, 285), *applied.*

[AS TO REGULATIONS GOVERNING THE CASE OF EXPLOSIVES IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, p. 803, para. 1656 ; and FOR CASES, see DIGEST, Vol. 34, pp. 301-303, 744, 745, Nos. *2498-2505*, *1190-1195*.]

A Cases referred to :

(1) *David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146 ; 78 L.J.K.B. 659 ; 100 L.T. 678 ; *affmd.*, [1910] A.C. 74 ; 79 L.J.K.B. 153 ; 101 L.T. 833 ; 34 Digest 741, *1168*.

(2) *Yelland* v. *Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278 ; [1941] 1 K.B. 154 ; 110 L.J.K.B. 401 ; 164 L.T. 401 ; 2nd Digest Supp.

B (3) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E.R. 628 ; [1938] A.C. 57 ; 106 L.J.P.C. 117 ; 157 L.T. 406 ; Digest Supp.

(4) *Wilson* v. *Merry*, (1868), L.R. 1 Sc. & Div. 326 ; 19 L.T. 30 ; 32 J.P. 675 ; 34 Digest 211, *1747*.

(5) *Black* v. *Fife Coal Co., Ltd.*, [1912] A.C. 149 ; 81 L.J.P.C. 97 ; 106 L.T. 161 ; 5 B.W.C.C. 217 ; 34 Digest 740, *1166*.

C (6) *Groves* v. *Wimborne (Lord)*, [1898] 2 Q.B. 402 ; 67 L.J.Q.B. 862 ; 79 L.T. 284 ; 34 Digest 218, *1815*.

(7) *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C. 1 ; 102 L.J.P.C. 123 ; 149 L.T. 526 ; 26 B.W.C.C. 463 ; Digest Supp.

ACTION tried by JONES, J., without a jury.

D The plaintiff claimed damages from his employers, the National Coal Board, for injuries sustained on Jan. 27, 1948, and alleged to be due to negligence, breach of common law duty and breach of statutory duty, under cl. 2 (*e*) and (*h*) of the Explosives in Coal Mines Order, 1934, by the defendants, their servants, or agents. The defendants pleaded that the negligence (if any) was the negligence of a shot firer in common employment with the plaintiff and that the E statutory duty was only imposed on the shot-firer and not the defendants. They also alleged contributory negligence by the plaintiff. JONES, J., held that there was no breach of statutory duty by the defendants.

McLusky for the plaintiff.
Wrangham for the defendants.

F *Cur. adv. vult.*

May 9, 1949. **JONES, J.,** read the following judgment. The plaintiff's claim is for damages for personal injuries alleged to have been caused by the negligence and breach of statutory duty of the defendants, their servants, or agents, in the management and control of the North Gawber Colliery which is owned, occupied, and worked by the defendants, the National Coal Board. G [HIS LORDSHIP referred to the circumstances in which one, Spence, a shot-firer in the defendants' mine, negligently and in breach of his statutory duty caused injury to the plaintiff, and continued :] The question I have to decide is whether the defendants, as well as Spence, have been guilty of a breach of statutory duty. The defence of common employment is an answer to the plaintiff's claim based on negligence, but it cannot be relied on by the defendants H if they have been guilty of a breach of statutory duty. I find that all precautions had been taken by the manager and under-manager of the mine to ensure that shot-firing should be carried out with care, and that the defendants took all reasonable means, by publishing the regulations, to secure compliance with them. I further find that the only person in default was Spence and that the only fault of which he was guilty was failure to give a warning that he was about to fire the shot and failure to make certain that the plaintiff had come out of the drift to a place of safety before the shot was fired. The question for decision, therefore, is whether the duty to fire the shot carefully was a duty imposed on the defendants, as owners of the mine, as well as on Spence the shot-firer.

Section 61 of the Coal Mines Act, 1911, empowers the Secretary of State, by Order to regulate the use of explosives at any mine. In exercise of this power, the Secretary of State made the Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6) which (as amended by S.R. & O., 1937, No. 1049, and S.R. & O., 1938, No. 1409), is still in force. Clause 2 (*a*) of that Order prescribes how a charge shall be placed in a hole, and provides :

> " . . . It shall be the duty of the person firing the shot to satisfy himself that these requirements are fulfilled before he fires the shot."

There was no breach of that duty in this case. Clause 2 (*e*) imposes on the shot-firer the duty of seeing that all persons in the vicinity have taken shelter. This is the duty that was not performed by Spence. Clause 6 was referred to by both counsel, but there was no evidence of any breach of the duty imposed by that paragraph which requires that the appointment of persons qualified to be, or allowed to be, shot-firers should be in writing. Spence was a competent person and had been appointed a shot-firer by the manager in writing.

Regulation 1 of the General Regulations of 1913 (S.R. & O., 1913, No. 748), made under s. 86 of the Act of 1911, provides :

> " It shall be the duty of the manager and under-manager to carry out and to the best of their ability enforce the provisions of every Order . . . regulating the . . . use . . . of explosives."

Therefore, it is the duty of the manager and under-manager to carry out and enforce to the best of their ability para. 2 (*e*) of the Order of 1934. The question is whether this duty is imposed on the owners also. Section 89 of the Act of 1911 makes the General Regulations and any special regulations the regulations for each particular mine. By s. 90 :

> " If any person who is bound to observe the regulations . . . fails to comply with any of them, he shall be guilty of an offence . . . and also the owner, agent, and manager . . . shall each be guilty of an offence . . . unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the regulations, to prevent such . . . . non-compliance."

Counsel for the plaintiff relied on *David* v. *Britannic Merthyr Coal Co.* (1), a decision of a majority of the Court of Appeal that was affirmed by the House of Lords. It appears from the short report of the hearing in the House of Lords that some of their Lordships did not approve of some of the reasons given by the majority of the Court of Appeal for their decision, but they did not say which were the reasons of which they did not approve. It was a decision on regulations and other provisions in the Coal Mines Regulation Acts, 1887 and 1896, which differ from the regulations now in force, but the decision was that the duty thrown on a mine-owner by the general rules as to the use of explosives in a mine contained in the Coal Mines Regulation Acts and the special statutory rules made thereunder was an absolute duty and not merely a duty to take all reasonable means to prevent their contravention. In his judgment FLETCHER MOULTON, L.J., said ([1909] 2 K.B. 157) : " The sole question to ask is whether or not the statute has imposed the duty on the employer." Later, he says (*ibid.*, 158) :

> " It follows, therefore, that our decision in this case must turn upon our answer to the question, Do the Coal Mines Regulation Acts, including the general and special rules made under them, and which have statutory force, impose on the defendants the duties the non-performance of which led to the death of the workman ? "

BUCKLEY, L.J., appears to have considered that the provisions of s. 50 of the Act of 1887 created in the owner liability in a civil action, and this is important as the provisions of s. 50 are very like the provisions of s. 90 of the Coal Mines Act, 1911. Another case relied on by counsel for the plaintiff was *Yelland* v. *Powell Duffryn Associated Collieries, Ltd.* (2) where it was held that under reg. 117 of the General Regulations of 1913 it is the duty of the owners of a mine, A not only to enforce, but also to comply with, those regulations. A limited company can only act in certain respects by its agents or servants, and if it delegate the performance of its statutory duty to a servant, a breach of that duty by the servant is in law the company's own breach and it cannot avail itself of the doctrine of common employment as against claims by other servants or their representatives. Moreover, s. 102 (8) of the Act of 1911 is not applicable B in such circumstances, for it is not possible for the company to say that it was not reasonably practicable to avoid or prevent a deliberate breach by the servant or agent to whom it has specially delegated the duty. DU PARCQ, L.J., said ([1941] 1 All E.R. 284, 285) :

> "The first question upon which the decision of this appeal depends is whether or not, in the circumstances of the case, and on the true construction C of the statute, there was a breach of statutory duty by the defendants, the mine-owners . . . If it is right to say that the defendants failed to comply with reg. 132 (*e*), and not merely that one of their workmen failed to comply with it, then the defendants were guilty, subject to any defence they may have under ss. 90 and 102, of a breach of statutory duty . . . It is plain that the Act imposes a duty on the mine-owner himself to comply with some D at least of the regulations as to electricity. Otherwise reg. 117 would limit the duty of the mine-owner to the 'enforcing' of the regulations."

That decision of the Court of Appeal that the duty was imposed on the mine-owner seems to have been based mainly on the fact that reg. 117 contained the words : "It shall be the duty of the mine-owner, agent and manager to comply with and enforce the . . . regulations," though MACKINNON, L.J., does not E seem to have based his decision only on the words of the regulation. DU PARCQ, L.J., however, said (*ibid.*, 285) :

> "The mine-owner's duty, however, is not merely 'to enforce.' It is 'to comply with and enforce'."

Wilsons and Clyde Coal Co., Ltd. v. *English* (3), *Wilson* v. *Merry* (4), and *Black* F v. *Fife Coal Co.* (5) were also referred to by counsel.

In the present case the material provisions are reg. 1 of the General Regulations, 1913, and cl. 2 (*e*) of the Explosives in Coal Mines Order, 1934. No duty is expressly imposed on the mine-owners by any of these regulations as in the case of reg. 117, and that is a point of distinction between this case and *Yelland's* case (2). Applying the test suggested by DU PARCQ, L.J., in *Yelland's* G case (2) I hold that in the circumstances of the case and on the true construction of the material regulations there was not a duty on the mine-owners to carry out the provisions of para. 2 (*e*) of the Order of 1934, and that there was no breach of statutory duty by them.

Judgment for the defendants with costs.

Solicitors : *Raley & Pratt*, Barnsley (for the plaintiff) ; *C. M. H. Glover*, H Doncaster (for the defendants).

[*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

Overruled. CHANDRIS *v.* ISBRANDTSEN
MOLLER CO. INC. [1950] 2 All E.R. 618.

PODAR TRADING CO., LTD., BOMBAY *v.* FRANCOIS TAGHER, BARCELONA.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Birkett and Lynskey, JJ.), May 3, 12, 1949.]

Arbitration—Award—Interest as from date of award—Power to award—Arbitration Act, 1934 (*c.* 14), *s.* 11—*Law Reform* (*Miscellaneous Provisions*) *Act,* 1934 (*c.* 41), *s.* 3 (1).

Contract—Contract subject to rules of Liverpool Cotton Association—Failure of cotton crop—" Timely fulfilment of contract . . . rendered impossible owing to . . . force majeure "—Contract closed by being invoiced back—Difference payable by sellers—Rules of Liverpool Cotton Association, rr. 48, 53, 227 (8).

By a contract in writing, the sellers sold to the buyer 5,000 bales of cotton equal to type 21 Bilas new crop from Bombay c.i.f. Barcelona. The contract was subject to the rules of the Liverpool Cotton Association, Ltd., r. 48 of which provided : " If owing to any circumstances whatsoever any such contract has not been or is not to be performed it shall not be treated as cancelled but shall be closed by being invoiced back to the seller in accordance with the rules in force at the date of the contract." By r. 227 (8) the invoicing back price was to be based on the exporting value of the cotton on the date appropriate in the appropriate market. Rule 53 provided : " Should the seller be able to produce satisfactory evidence that the timely fulfilment of any contract for the purchase or sale of cotton was rendered impossible owing to unforeseen obstruction to traffic, strike, lock-out, riot, war, quarantine, or *force majeure*, or should the buyer be unable to take delivery of the cotton owing to such unforeseen contingencies . . . then the arbitrators shall take such facts into consideration in making their award." The Arbitration Act, 1934, s. 11 provides : " A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt." By s. 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934 : " In any proceedings tried in any court of record for the recovery of any debt or damages, the court may . . . [award] interest . . . on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

Due to a failure of the crop, the sellers were unable to make delivery of the cotton, and, the question of their liability to the buyer having been submitted to arbitration, the arbitrators stated a Case for the opinion of the High Court, asking, *inter alia,* whether the sellers were relieved from responsibility by virtue of r. 53, and, if not, whether the arbitrators had power to award interest on the difference between the invoicing back price and the contract price until the date of their final order.

HELD : (i) the reference to " timely fulfilment of any contract " in r. 53 dealt with a failure to fulfil a contract within the contract time and not with a case where the subject of the contract had wholly failed, and, therefore, the arbitrators were not bound to take into account the circumstances which prevented the sellers from fulfilling the contract.

(ii) under r. 227 (8) of the rules of the association the price at which the contract should be invoiced back must be based on the exporting value in the market on the appropriate date and not the spot value, and the buyer was entitled to an award of the difference between the price of invoicing back and the contract price, subject to adjustment of c.i.f. and other charges.

(iii) although the Arbitration Act, 1934, s. 11, provided for the payment of interest on the sum awarded from the date of the award, in view of the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), an arbitrator can now only give interest in circumstances in which it was recoverable at common law, namely, by agreement or by mercantile custom, and, there being no agreement or custom in the present case, interest could not be awarded.

[FOR THE ARBITRATION ACT, 1934, ss. 9 (1) (*a*) and 11, see HALSBURY'S A STATUTES, Vol. 27, p. 32 ; and FOR THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934, s. 3 (1) (2), see HALSBURY'S STATUTES, Vol. 27, pp. 222, 223.]

Cases referred to :

(1) *Howell* v. *Coupland*, (1876), 1 Q.B.D. 258 ; 46 L.J.Q.B. 147 ; 33 L.T. 832 ; 40 J.P. 276 ; 12 Digest 381, *3149*.

B (2) *Taylor* v. *Caldwell*, (1863), 3 B. & S. 826 ; 2 New Rep. 198 ; 32 L.J.Q.B. 164 ; 8 L.T. 356 ; 27 J.P. 710 ; 12 Digest 371, *3093*.

(3) *Adair & Co., Ltd.* v. *Birnbaum*, [1938] 4 All E.R. 775 ; [1939] 2 K.B. 149 ; 108 L.J.K.B. 452 ; 160 L.T. 244 ; Digest Supp.

(4) *Lebeaupin* v. *Crispin (R.) & Co.*, [1920] 2 K.B. 714 ; 89 L.J.K.B. 1024 ; 124 L.T. 124 ; 12 Digest 381, *3152*.

C (5) *Eddowes* v. *Hopkins*, (1780), 1 Doug. K.B. 376 ; 17 Digest 56, *606*.

(6) *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, [1893] A.C. 429 ; 63 L.J.Ch. 93 ; 69 L.T. 637 ; 58 J.P. 36 ; 17 Digest 239, *555*.

(7) *Re Badger*, (1819), 2 B. & Ald. 691 ; 2 Digest 434, *836*.

(8) *Edwards* v. *Great Western Ry. Co.*, (1851), 11 C.B. 588 ; 21 L.J.C.P. 72 ; 2 Digest 473, *1176*.

D SPECIAL CASE stated by arbitrators under the Arbitration Act, 1934, s. 9 (1) (*a*).

The arbitrators asked, *inter alia*, whether they had power to award interest on damages for breach of contract up to the date of the award. The Divisional Court answered the question in the negative.

E *Nelson, K.C.*, and *A. J. Hodgson* for the buyer.

Sir William McNair, K.C., and *J. Robertson Crichton* for the sellers.

Cur. adv. vult.

May 12. **LORD GODDARD, C.J.**, read the following judgment of the court. This is a Special Case stated by the directors of the Liverpool Cotton Association, Ltd., acting as an appeal tribunal from the decision of an umpire F to whom the dispute between the parties was referred. The Case is in unusual form. The tribunal state that they decided to make an award in alternative form, first, in the form of a Special Case under s. 9 (1) (*a*) of the Arbitration Act, 1934, and, secondly, in the form of a final and conclusive award which, they say, is to be effective unless either party gives notice within a certain time, as the sellers have done, that they desire to take the opinion of the court on the G question of law raised, and in that event they say that they make their award in the form of a Special Case. It is clear, however, that, as stated, the Case is one of a consultative nature and not an award in the form of a Special Case. The arbitrators ask certain questions of the court, and on the answers given they will have to make an award in accordance therewith. They have not made any alternative award as is usual where the award is put in the form of a Special H Case. The court treats the matter entirely as a consultative case under s. 9 (1) (*a*).

By a contract in writing dated Jan. 17, 1948, the sellers sold to the buyer 5,000 bales of cotton equal to type 21 Bilas new crop at 18.25*d.* per lb. net c.i.f. Barcelona shipment February/March, 1948, subject to steamer and freight available. The price was inclusive of export duty at the rate of 20 rupees per bale, any difference at the time of shipment to be for the account of the buyer. The contract was subject to the rules and regulations of the Liverpool Cotton Association. The case sets out Orders of the Government of India made in November, 1947, and on Jan. 19, 1948, under which the export of certain Indian cottons was prohibited. It does not appear to be material to consider those Orders for the purpose of deciding whether there was a breach of contract or not, because the appeal tribunal has found that there was, in fact, no cotton to be had in India equal to type 21 Bilas of the new season's crop. Consequently, there was a failure to deliver and arbitration was claimed.

The first point taken by counsel for the sellers was that, as no cotton answering the contract description was grown, the case fell exactly within the decision of *Howell* v. *Coupland* (1). In that case the defendant agreed to sell 200 tons of potatoes grown on his land. The crop failed owing to blight so he could only deliver 80 tons. The plaintiff having brought an action for the non-delivery of the other 120 tons, it was held that the principle of *Taylor* v. *Caldwell* (2) applied, and, as performance was impossible from the perishing of the goods agreed to be sold without his default, the defendant was excused from performance. While there is no finding on this point in the present case we will assume that, had there been an action brought at common law for failure to deliver, the sellers would have had a defence, but, as the contract was subject to the rules of the Liverpool Cotton Association, we have to look at those rules to see what consequences arise from a failure either to deliver or take delivery. Rule 48 is the material rule, and it provides :

> " If owing to any circumstances whatsoever, any such contract has not been or is not to be performed it shall not be treated as cancelled but shall be closed by being invoiced back to the seller in accordance with the rules in force at the date of the contract."

There have been several cases before the courts with regard to a rule of produce associations in this or a similar form, and in spite of the remarkable results which sometimes follow from its application (see for instance *Adair & Co., Ltd.* v. *Birnbaum* (3)), there is no doubt, according to the existing authorities, that both arbitrators and the courts must give effect to it. The sellers having made default, it then became the duty of the appeal tribunal to invoice back the cotton to them in accordance with the rules.

Rule 53 provides :

> " Should the seller be able to produce satisfactory evidence that the timely fulfilment of any contract for the purchase or sale of cotton was rendered impossible owing to unforeseen obstruction to traffic, strike, lock-out, riot, war, quarantine, or *force majeure*, or should the buyer be unable to take delivery of the cotton owing to such unforeseen contingencies, and should the buyer and seller be unable to come to a mutual agreement, then the arbitrators shall take such facts into consideration in making their award."

Counsel for the sellers contended that the tribunal was bound to take into account the fact that the crop had failed, as he put it, from natural causes, and that that would amount to *force majeure* which, he submitted, meant any circumstance beyond the control of the sellers. The expression "*force majeure*" is not a term of art in English law though the effect of those words in a contract has often had to be considered. In our opinion, however, r. 53 has no application to the facts of this case even on the assumption that the doctrine of *Howell* v. *Coupland* (1) would apply. The rule refers to " the timely fulfilment of any contract " and the word " timely " indicates clearly that the rule is dealing with a failure to fulfil a contract within the contract time. This is reinforced by the specific matters mentioned in the rule, obstruction to traffic, strike, lock-out, riot, war and quarantine. All those matters may delay the fulfilment of a contract. Obstruction to traffic or a strike may prevent the shipment or the delivery in due time, and, in our opinion, the expression "*force majeure*" must also be construed with regard to the words which precede or succeed it and must, we think, be limited, at any rate, to something preventing in time the fulfilment of the contract : see on this point *Lebeaupin* v. *Richard Crispin & Co.* (4). It, therefore, follows that, in making their award, the arbitrators were not bound to take into account the circumstances which prevented the sellers from obtaining cotton to fulfil the contract.

The next question is whether the amount of the difference which the sellers A have to pay to the buyer has been properly calculated. It is not altogether clear to the court on what principle the appeal tribunal has acted, but they seem to have fixed the price at which the cotton is to be invoiced back at the spot price prevailing in Bombay on Mar. 31, 1948, and to have deducted therefrom the spot price ruling on Jan. 17, in each case making an allowance for c.i.f. charges and an additional duty of 92 points. The appeal tribunal must invoice B back the cotton according to the rules, and r. 227 (8) provides that :

> " In cases where a contract made subsequent to June 12, 1947, is to be closed by invoicing back, the invoicing back price for such purpose shall be based upon the ascertained exporting value of the cotton contracted for on the appropriate date in the market appropriate to the country of origin of such cotton, translated to the value at the port of destination and subject C to any variation that may have taken place in the costs of freight and insurance and in the rates of exchange, import and export duty."

In order to fulfil this rule it is necessary that the cotton should be invoiced back at the export value and not at the spot value. The difficulty which, no doubt, arises in the present case is that, as at the date of the breach there was no exportable cotton, it may be said that there is no exporting value which can D be ascertained, but the same is also true of spot value, for, if this crop entirely failed, there can be no spot cotton of this particular staple. We would also point out that it does not appear to us that exporting value is by any means necessarily the same as spot value. Indeed, in many cases it is unlikely to be so. A merchant who knows that he has got to export cotton at a particular date would be unlikely to wait until the last minute and then buy cotton on the E spot. It seems more probable that he would make his purchase in advance at the cheapest price at which he could get it, and that price together with his profit would be export value. No doubt, the spot price of cotton would include some element of profit and one could well visualise a case in which an exporter had made a forward contract to sell at 18.25*d.* per lb. and had been able to buy it, say, at 15*d.* per lb. while the spot price of cotton at the time when he had F to ship it might be 17*d.* per lb. The difficulties of ascertaining the exporting value in the circumstances of this case are obvious, but, as this has to be done in every case where the contract has not been performed owing to any circumstances whatsoever, we think that the tribunal must arrive at the value on such material as is available to them. It may be they can do it by ascertaining the value of comparable cotton in previous years, making allowance for the G upward or downward trend of the market. It may be that they can obtain figures showing the exporting value of other cotton of this staple, but of a different description, and that they will know what allowance should be made for the difference in description. At any rate, they must ascertain the value in the best manner that is open to them, but it must be emphasised that it is the exporting value and not the spot value which has to be ascertained. The H tribunal have evidently been able to ascertain a spot value which, in the absence of actual cotton, would seem to be a notional value, and, therefore, it would seem possible for them to ascertain in the same way an exporting value, which is what the rule requires. It then appears that the tribunal considered the spot value of the cotton at the time of the contract, but that is not the value they must take for the purpose of calculating the difference. They must take the contract price. They are in effect awarding damages, and the damages are the difference between the contract price and the exportable value at the time of the breach, and it is the contract price, therefore, which is material. Having ascertained, in the way we have indicated, the exporting value for the purpose of invoicing back, they must award the difference between the price at which they invoice back and the contract price. Of course, in ascertaining the price at which the cotton is to be invoiced back, they must add the c.i.f. charges, duty and so forth and to the contract price will also be added the 92 points which would have been added in any case to the sellers' invoice if one had been sent.

The other point which falls for decision is whether the appeal tribunal are entitled to award interest on the amount of the difference which they find to be due from the sellers to the buyer. This raises a point of general importance in relation to arbitrations, which, curiously enough, has never fallen for decision since the passing of the Law Reform (Miscellaneous Provisions) Act, 1934. The Case tells us that any sum payable under the rules in respect of a contract which falls to be closed by being invoiced back carries interest under the usual practice of the association from the date of such invoicing back to the date of final award, but there is no provision in the rules for the award of interest, and, as the parties to this contract are not found to be members of the association, and were, in fact, not members, they cannot be bound by any practice of the association, but only by the rules. The question, therefore, is whether arbitrators have any power by common law or by statute to award interest. There is no doubt that *prima facie* the duty of an arbitrator is to act in accordance with the law of the land. Parties can, no doubt, agree to accept the decision of an arbitrator on a question of law or agree that he may do what he thinks fair in any particular case, and, if an arbitrator makes an award which is not bad on its face and no application has been made to him for a Special Case, or he does not seek the guidance of the court or put his award in the form of a Special Case, the court will not review his finding although he may have proceeded on a wrong principle of law, but if he seeks the guidance of the court either by a consultative Case or by awarding in the form of a Special Case the court must see that the rules of law are applied.

Before the Civil Procedure Act, 1833, it is clear that a court could only award interest if there was an agreement to that effect, express or implied, as, for instance, if it were adjudicating on a contract which in terms provided for the payment of interest, or if by mercantile practice the particular transaction on which it was adjudicating was one which carried interest. A common instance is afforded by bills of exchange which always carried interest, apart, we believe, from the express provision now contained in the Bills of Exchange Act, 1882. As Lord Mansfield put it (1 Doug. K.B. 376) in *Eddowes* v. *Hopkins* (5):

> " . . . though by the common law, book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade ; or of a special agreement . . ."

That case was cited in *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (6). The power to give interest, therefore, at law was very limited until the Civil Procedure Act, 1833. Under s. 28 of that Act interest could be awarded if a debt or sum certain was payable by virtue of a written instrument at a certain time. Interest by way of damages was also allowed on all other debts or sums certain if a written demand for payment was made on the debtor giving him notice that interest would be claimed from the date of demand until payment, but interest on damages was only allowed by the statute in a very limited class of actions which we need not set out in detail for they do not include breach of contract. There are to be found in the books certain cases both at law and equity in which in regard to special cases interest was allowed by way of damages, but it is by no means clear whether those cases can now be reconciled with *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (6) in which it was held that interest was only payable in three cases, by statute, by agreement, or by mercantile custom. Before the Law Reform (Miscellaneous Provisions) Act, 1934, there is no case which holds that arbitrators are in any different position from the courts so far as awarding interest is concerned. *Re Badger* (7) is no exception when it is properly understood. In that case it was held that an arbitrator was not bound by the practice of the Court of Chancery in the method in which he took certain accounts which had A been referred to him. In taking accounts in equity interest was not allowed on either side. The arbitrator in *Badger's* case (7) did allow interest on both sides of the account and the court refused to set aside his award because they said he was not bound by a rule of practice but could take the accounts in what he considered to be the fair and proper way. The case which would seem to be directly in point is *Edwards* v. *Great Western Ry. Co.* (8). In that case the court B approved of the allowance of interest by an arbitrator because it was allowable in the circumstances of that case by the provisions of the Civil Procedure Act, 1833. Accordingly, we think we must take it to be the law that before the Law Reform (Miscellaneous Provisions) Act, 1934, an arbitrator had the same powers as the court with regard to the award of interest, but no greater power.

The Law Reform (Miscellaneous Provisions) Act, 1934, was passed on July C 25, 1934, and the Arbitration Act, 1934, was then already law, having been passed on May 17 of that year. The only reference to interest in the latter Act is in s. 11 which provides that :

> " A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt."

D In the Law Reform Act it is provided by s. 3 that :

> " (1) In any proceedings tried *in any court of record* for the recovery of any debt or damages, the court may, if it thinks fit, [award] interest . . . on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

E

By sub-s. (2) of that section the provisions of the Civil Procedure Act, 1833, which deal with interest, namely, ss. 28 and 29, are repealed. So, although in the Arbitration Act, 1934, a provision is made for interest but only on the amount of the award from the date of the award, s. 3 of the Law Reform Act gives no power to an arbitrator to give interest either on debt or damages. F Moreover, as ss. 28 and 29 of the Civil Procedure Act are repealed, we feel driven to hold that not only have arbitrators no power to give interest on damages, but they have been deprived of the powers which they had so long as the sections of the Civil Procedure Act were in force and can now only give it in circumstances in which it was recoverable at common law. It may well be that this was overlooked when the Act was passed, but, if it was a *casus omissus* or if the power G was taken away *per incuriam*, it must be put right by the legislature. No doubt, the association could amend their rules and provide that interest could be awarded. Then those persons who have made contracts which are subject to the rules and regulations of the association would be bound by an award which gave interest because as a matter of contract they would have agreed to pay if the award was against them. We feel obliged to hold in this case that there H was no power to award interest as there is no provision in the rules for it.

Case remitted. Parties to pay their own costs.

Solicitors : *Layton & Co.* (for the buyer) ; *Simpson, North, Harley & Co.* (for the sellers).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re READING'S PETITION OF RIGHT.

[COURT OF APPEAL (Tucker, Asquith and Singleton, L.JJ.), April 1, 4, 11, May 19, 1949.]

Master and Servant—Profits obtained by a servant dishonestly by virtue of employment—Right of master to profits—Soldier—Bribes by civilian—Right of Crown thereto. A

A sergeant in the army stationed at Cairo on several occasions, while in uniform, boarded a private lorry and escorted it through Cairo, thus enabling it to pass the civilian police without being inspected. The lorry was loaded with cases, the contents of which were unknown. On each occasion the sergeant received from a civilian a large sum of money of which the military authorities later took possession. B

HELD : the sergeant was entrusted with a uniform to be used solely in the course of his employment for the benefit of the Crown, his master ; a fiduciary relation existed between the Crown and the sergeant regarding the use of the uniform ; the sergeant's use of the uniform was in breach of the duty he owed to the Crown ; he obtained the sums in question by that breach of duty; and, therefore, the Crown was entitled to the money. C

Per curiam : The principles of law applicable to such a case as the present would seem to be the following. When a servant or agent by a breach of duty damnifies his master or principal, the latter can recover in an ordinary action for breach of contract for any loss he has actually suffered, but there is a well established class of cases in which he can so recover whether or not he has suffered any detriment in fact. These are D cases in which the servant or agent has realised a secret profit, commission or bribe in the course of his employment, and the amount recoverable is a sum equal to such profit. In most of these cases it has been assumed that the plaintiff, in order to succeed, must prove that a " fiduciary relation " existed between himself and the defendant and that the defendant acted in breach of this relation, but the term " fiduciary E relation " in this connection is used in a very loose, or, at all events, a very comprehensive sense. If a servant or agent so acts, he is bringing his duty to the plaintiff and his own interest into conflict, in derogation of the fiduciary bond, and cannot be heard to say that duty prevailed and the plaintiff suffered no loss. The plaintiff, whether actually harmed or scatheless, is conclusively presumed not only to have been damnified, F but to have been damnified to an extent measured by the amount of the secret profit received by the defendant. This amount the plaintiff can recover either as money had and received to his use or as an equitable debt.

Decision of DENNING, J. ([1948] 2 All E.R. 27), *affirmed.*

G

[AS TO RECEIPT OF BRIBES BY AGENT OR SERVANT, see HALSBURY, Hailsham Edn., Vol. 1, p. 252, para. 426 ; and FOR CASES, see DIGEST, Vol. 1, pp. 480-483, Nos. *1601-1627.*]

Cases referred to :

(1) *A.-G.* v. *Goddard,* (1929), 98 L.J.K.B. 743 ; Digest Supp.

(2) *Sinclair* v. *Brougham,* [1914] A.C. 398 ; 83 L.J.Ch. 465 ; 111 L.T. 1 ; H 35 Digest 167, *8.*

(3) *Shallcross* v. *Oldham,* (1862), 2 John. & H. 609 ; 5 L.T. 824 ; 1 Digest 476, *1577.*

(4) *Lister & Co.* v. *Stubbs,* (1890), 45 Ch.D. 1 ; 59 L.J.Ch. 570 ; 63 L.T. 75 ; 1 Digest 482, *1623.*

(5) *Powell & Thomas* v. *Jones & Co.,* [1905] 1 K.B. 11 ; 74 L.J.K.B. 115 ; 92 L.T. 430 ; 1 Digest 483, *1627.*

(6) *Parker* v. *McKenna*, (1874), 10 Ch. App. 96 ; 44 L.J.Ch. 425 ; 31 L.T. 739 ; 20 Digest 237, *44*.

(7) *Boston Deep Sea Fishing & Ice Co.* v. *Ansell*, (1888), 39 Ch.D. 339 ; 59 L.T. 345 ; 1 Digest 484, *1632*.

APPEAL by the suppliant from a decision of DENNING, J., dated May 10, 1948,
A dismissing a petition of right filed by the suppliant for the restitution of money alleged to have been had and received by the Crown to his use, or for the payment to the suppliant of money taken possession of on behalf of the Crown. The suppliant was at all material times in the service of the Crown as a soldier in the regular army. In 1944 he was serving in Cairo as a sergeant in the Royal Army Medical Corps. The Crown contended that the suppliant was a servant
B of the Crown and that the monies in question represented bribes which he had received for accompanying loaded lorries in and about Cairo while wearing His Majesty's uniform, thus enabling the lorries to escape police inspection. DENNING, J., held that the wearing by the suppliant of the uniform of the Crown and his position as a servant of the Crown was the sole cause of his obtaining the money, which he did dishonestly, and, although the Crown had suffered
C no loss, the money belonged to the Crown as his master.

Salmon, K.C., *Pearson, K.C.*, and *H. F. Cassel* for the suppliant.

The Attorney-General (*Sir Hartley Shawcross, K.C.*), *Barry, K.C.*, *H. L. Parker* and *H. A. P. Fisher* for the Crown.

Cur. adv. vult.

D May 17. **ASQUITH, L.J.**, read the following judgment of the court. The suppliant, Charles Henry Reading, was, in 1944, serving in Cairo as a sergeant in the Royal Army Medical Corps, where he was in charge of medical stores. In March of that year it was discovered that large sums of money were standing to his credit at banks in Egypt, in his flat were notes to the value of several thousand pounds, and he was possessed of a valuable motor car.
E He was questioned as to these monies and he made a statement which was the foundation of the case for the Crown at the trial before DENNING, J. This trial resulted in the dismissal of his petition of right in which he sought to recover a sum of about £13,000, being the balance of the aforementioned sums which had been seized by the military authorities consequent on his statement. It was conceded that the onus lay on the Crown to establish a right to the retention
F of these monies, or, if the suppliant was entitled to them, a right to set off an equal sum against his claim. This the Crown sought to do on the basis that the suppliant was at all material times a servant of the Crown and that the monies in question represented bribes which he had received for accompanying loaded lorries in and about Cairo while wearing His Majesty's uniform and thus enabling the lorries to escape police inspection. The suppliant gave no evidence
G at the trial, and, accordingly, the facts or inferences of fact had to be deduced from the statement which he had made. The learned judge inferred from this statement that the suppliant had received in all some £20,000 from a man named Manole in the following circumstances. A lorry used to arrive loaded with cases, the contents of which were unknown. The suppliant, in full uniform, boarded the lorry, and escorted it through Cairo, so that it was able to pass
H the civilian police without being inspected. When it reached its destination, it was unloaded, or the contents were transferred to another lorry. Later, the suppliant was handed an envelope containing notes varying in value from £2,000 to £3,000 for each journey. The learned judge stated that it was plain that he received this money because he was a sergeant in the British army and while in uniform was escorting these lorries through Cairo, and that he was clearly violating his duty in so doing. Later in his judgment he said that the use of the facilities provided by the Crown in the shape of the uniform and the use of his

position in the Army were the sole reasons why the suppliant was able to get this money. It was solely on that account that he was able to sit in the front of these lorries and give them a safe conduct through Cairo. We agree that the above statement represents the proper inferences of fact to be drawn from the material placed before Denning, J. The only question is as to the law applicable to these facts.

With regard to the law Denning, J., said ([1948] 2 All E.R. 28): A

> "In my judgment, it is a principle of law that, if a servant takes advantage of his service and violates his duty of honesty and good faith to make a profit for himself, in the sense that the assets of which he has control, the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money as distinct from merely affording the opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money, then he is accountable for it to his master." B

Later, after referring to *A.-G.* v. *Goddard* (1), he said (*ibid.*, 29):

> "There was not, in this case, a fiduciary relationship. The suppliant was not acting in the course of his employment. In my opinion, however, those are not essential ingredients of the cause of action. The uniform C of the Crown and the position of the suppliant as a servant of the Crown were the only reasons why he was able to get this money, and that is sufficient to make him liable to hand it over to the Crown."

Counsel for the suppliant contends that this statement of the law goes beyond the authorities and that it appears from the judgment as a whole to be based on the principle of "unjust enrichment" which he contends forms no part D of our law. He argues that *Sinclair* v. *Brougham* (2) has established that such a claim as that made by the Crown in the present case must be on the basis of money had and received which requires the imputation of a promise and that the court will not impute such a promise where it involves a participation in the fruits of an illegal transaction.

The principles of law applicable to such a case as the present would seem E to be the following. When a servant or agent by a breach of duty damnifies his master or principal, the latter can, of course, recover in an ordinary action for breach of contract for any loss he has actually suffered, but there is a well established class of cases in which he can so recover whether or not he has suffered any detriment in fact. These are cases in which the servant or agent has realised a secret profit, commission or bribe in the course of his employment, F and the amount recoverable is a sum equal to such profit. In most of these cases it has been assumed that the plaintiff, in order to succeed, must prove that a "fiduciary relation" existed between himself and the defendant and that the defendant acted in breach of this relation, but the term "fiduciary relation" in this connection is used in a very loose, or, at all events, a very comprehensive, sense. A consideration of the authorities suggests that for the present purpose G a "fiduciary relation" exists (*a*) whenever the plaintiff entrusts to the defendant property tangible or intangible (as, for instance, confidential information) and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorised by him and not otherwise: for instance, *Shallcross* v. *Oldham* (3) and *A.-G.* v. *Goddard* (1); and (*b*) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the H negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available: for instance, *Lister & Co.* v. *Stubbs* (4) and *Powell & Thomas* v. *Jones & Co.* (5). In such cases the defendant may accept a secret profit from a third person in consideration, for instance, of hiring out the plaintiff's chattel or giving away the plaintiff's secret or awarding the plaintiff's contract to such a third person, or, indeed, may make such a profit by himself masquerading as a third person and selling to, or buying from, the plaintiff in that guise. If he does so, he is bringing his duty to the plaintiff and his own interest into conflict in derogation of the fiduciary bond, and cannot be heard to say that duty prevailed and the plaintiff suffered no loss. The plaintiff, whether actually harmed or scatheless, is conclusively presumed not only to have been damnified, but to have been damnified to an extent measured by the amount of the secret profit received by the defendant : see *per* JAMES, L.J., in *Parker* v. *McKenna* (6) (10 Ch. App. 124). This amount the plaintiff can recover, either as money had and received to his use, or as an equitable debt : see *per* BOWEN, L.J., in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (7) (39 Ch.D. 367). It is not very clear why ROWLATT, J., in *A.-G.* v. *Goddard* (1) held that the sum claimed could be recovered in equity only, and not as money had and received at common law, for he cites the passage from BOWEN, L.J., in the *Boston* case (7).

As regards money had and received, it was argued for the suppliant that the law cannot impute to the defendant a fictitious promise which, if actually made, would have been void. No doubt, an actual promise in advance of the event by A to B to pay over any bribe A might receive as the result of breaking the local criminal law would have been void for illegality, but an actual promise made by A, after he has, without B's knowledge or privity, received such a bribe, to pay it over to B, would not be void on this ground, and it is to that point of time, in our view, that the law refers the imputed promise. *Sinclair* v. *Brougham* (2) relied on under this head is not in point. It deals with lack of capacity to contract, not with illegality of consideration, and it decides nothing as to the point of time at or from which the imputed promise must be considered as operating. In the present case the master, the Crown, entrusts to its servant a uniform, to be used for the master's interest and benefit, and not otherwise. It is not the soldier's property. He may not sell it, but it is, in our view, in the course of his employment to wear it. That is one of the class of acts which *qua* soldier he is employed to do. He must wear it at the time and place and in the manner and/or for the purpose which the master prescribes, or, in the absence of specific directions, for the benefit and in the interests of his master and not otherwise. The master's interest in the circumstances of this case included the maintenance and promotion of harmonious relations with the Egyptian government, with which the Crown was allied against Germany and Italy, an interest which would hardly be advanced if the soldier systematically abetted violations of the Egyptian criminal code. A uniform is in one aspect a physical object, but it is also the vehicle of certain intangible adjuncts—authority, prestige, immunities of various kinds, a certain status and standing. *Inter alia* it carries with it facilities for imparting a veneer of officialism and legality to transactions which, without its imprimatur, would arouse suspicion. These facilities attached to the uniform the suppliant was bound to use for his master's benefit. It seems not only a natural but also an almost inevitable inference from the facts of this case that it was precisely these facilities which the suppliant sold and Manole bought. He had no more right to do this than to sell the uniform itself. The suppliant consciously used his uniform to disarm the suspicions of the Egyptian police—to divert their suspicion from what he must have known to be an illegal enterprise in the traffic of drugs or drink, and he made a fortune by doing so. This use of the uniform was not only in breach of Egyptian criminal law, but flagrantly in breach of the duty the suppliant owed to the Crown. Assuming a fiduciary relation is necessary to enable the Crown to recover, we are of opinion, differing in this respect from the learned trial judge, that in the wide sense in which the term is used in the relevant cases such a relation subsisted in this case as to the user of the uniform and the opportunities and facilities attached to it, and that the suppliant obtained the sums claimed by acting in breach of the duties imposed by that relation. The inference of a fiduciary relation is certainly not weakened by the circumstance that the suppliant was a non-commissioned officer on active service in a foreign country allied with His Majesty, but we do not wish to be taken as holding that, if the fiduciary relation were absent, the appeal would necessarily succeed. We are of opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Lewis & Lewis & Gisborne & Co.* (for the suppliant); *the Treasury Solicitor* (for the Crown).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Explained and applied. Wilson *v.* Inyang. [1951] 2 All E.R. 237.

YOUNGHUSBAND *v.* LUFTIG.

[King's Bench Division (Lord Goddard, C.J., Oliver, Birkett, Lynskey and Sellers, JJ.), May 9, 17, 1949.]

Medicine—Medical practitioner—Falsely pretending to be a registered person—Use of title "doctor of medicine"—Doctor of medicine of Berlin University—Need to prove wilful falsity—"M.D., BLN."—Medical Act, 1858 (c. 90), *s.* 40.

By the Medical Act, 1858, s. 40: "Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding £20." Persons entitled to be registered are set out in sched. (A) to the Act.

The respondent, a qualified doctor of medicine of Berlin University, carried on in England the practice of consultant on eye troubles, but he was not registered, and was not entitled to be registered, under the Act of 1858, nor had he applied for registration under the Medical Practitioners and Pharmacists Act, 1947. On his notepaper and on a professional plate fixed to the door of his premises, the letters "M.D., BLN." appeared after his name. Until 1944 he had described himself as "M.D., Berlin," but after certain unpleasant incidents he had abbreviated "Berlin" to "BLN." to conceal the fact that his degree was obtained in Germany. On his being charged with offences against s. 40 of the Act of 1858 in that he had wilfully and falsely used the title of doctor of medicine and the description "M.D.", thereby implying that he was registered under the Act, the justices dismissed the informations on the grounds that he had not wilfully and falsely used the title of doctor of medicine and that the use of the letters "M.D., BLN." did not imply that he was registered under the Act of 1858. On appeal to the Divisional Court,

Held: a person did not commit an offence under s. 40 if he honestly believed on reasonable grounds that he was within his rights in describing himself as he did; to commit an offence under the section a person must be shown to have acted wilfully and falsely; it was for the justices to decide whether or not he had done so; the justices had found that the respondent had not so acted and had not implied that he was registered under the Act; there was evidence on which they could properly so find; and, therefore, the appeal must be dismissed.

Ladd v. *Gould* (1860) (1 L.T. 325); *Ellis* v. *Kelly* (1860) (6 H. & N. 222);

Steel v. *Ormsby* (1894) (10 T.L.R. 483) ; *R.* v. *Lewis* (*Stipendiary Magistrate*) *& Frickhart, R.* v. *Same & Bridgwater* (1896) (60 J.P. 392) ; and *Hunter* v. *Clare* ([1899] 1 Q.B. 635), *applied.*

Whitwell v. *Shakesby* (1932) (147 L.T. 157) and *Jutson* v. *Barrow* ([1936] 1 K.B. 236), *distinguished.*

[AS TO UNLAWFUL USE OF TITLE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 313-315, para. 593 ; and FOR CASES, see DIGEST, Vol. 34, pp. 554, 555, Nos. *112-128.*]

Cases referred to :

(1) *Whitwell* v. *Shakesby,* (1932), 147 L.T. 157 ; 96 J.P. 307 ; Digest Supp.
(2) *Huddersfield Police Authority* v. *Watson,* [1947] 2 All E.R. 193 ; [1947] K.B. 842 ; 177 L.T. 114 ; 111 J.P. 463 ; 2nd Digest Supp.
(3) *Young* v. *Bristol Aeroplane Co., Ltd.,* [1944] 2 All E.R. 293 ; [1944] K.B. 718 ; 113 L.J.K.B. 513 ; 171 L.T. 113 ; *affimd.,* [1946] A.C. 163 ; 2nd Digest Supp.
(4) *Jutson* v. *Barrow,* [1936] 1 K.B. 236 ; 105 L.J.K.B. 106 ; 154 L.T. 185 ; 100 J.P. 4 ; Digest Supp.
(5) *Ladd* v. *Gould,* (1860), 1 L.T. 325 ; 24 J.P. 357 ; 34 Digest 555, *130.*
(6) *Ellis* v. *Kelly,* (1860), 6 H. & N. 222 ; 30 L.J.M.C. 35 ; 3 L.T. 331 ; 25 J.P. 279 ; 34 Digest 554, *113.*
(7) *Andrews* v. *Styrap,* (1872), 26 L.T. 704 ; 34 Digest 546, *43.*
(8) *Carpenter* v. *Hamilton,* (1877), 37 L.T. 157 ; 41 J.P. 615 ; 34 Digest 554, *114.*
(9) *Davies* v. *Makuna,* (1885), 29 Ch.D. 596 ; 54 L.J.Ch. 1148 ; 53 L.T. 314 ; 50 J.P. 5 ; 34 Digest 553, *109.*
(10) *R.* v. *Baker, etc., JJ. & Clarke,* (1891), 66 L.T. 416 ; 56 J.P. 406 ; 34 Digest 555, *122.*
(11) *Steel* v. *Ormsby,* (1894), 10 T.L.R. 483 ; 34 Digest 555, *126.*
(12) *R.* v. *Lewis* (*Stipendiary Magistrate*) *& Frickhart, R.* v. *Same & Bridgwater,* (1896), 60 J.P. 392 ; 34 Digest 554, *115.*
(13) *Hunter* v. *Clare,* [1899] 1 Q.B. 635 ; 68 L.J.Q.B. 278 ; 80 L.T. 197 ; 63 J.P. 308 ; 34 Digest 554, *119.*

CASES STATED by Brighton justices.

On June 11, 1948, at a court of summary jurisdiction for the county borough of Brighton, informations were preferred by the appellant, a representative of the Medical Defence Union, charging the respondent with wilfully and falsely using the title of doctor of medicine, contrary to the Medical Act, 1858, s. 40, and wilfully and falsely using the description "M.D.", thereby implying that he was registered under the Act, contrary to s. 40 thereof. The justices dismissed the informations on the grounds that the respondent had not wilfully and falsely used the title of doctor of medicine and that the letters "M.D., BLN." did not imply that he was registered under the Medical Act, 1858. The appeal, which was heard before a full court, was now dismissed. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

Havers, K.C., and *Harold Brown* for the appellant.
D. E. Evans for the respondent.

Cur adv. vult.

May 17. **LORD GODDARD, C.J.,** read the following judgment of the court. The respondent was charged before a court of summary jurisdiction for the county borough of Brighton, first, for that he on Apr. 1, 1948, did wilfully and falsely use the title of doctor of medicine, contrary to the Medical Act, 1858, s. 40, and, secondly, that on the same day he did wilfully and falsely use the description "M.D.", thereby implying that he was registered under the Medical Act, 1858, contrary to s. 40 of the said Act. There were also two similar summonses alleging the same offences on May 25, 1948. The two offences charged on each day are, in fact, alternative and in respect of each day to which they relate the respondent, if convicted, would only be liable to one penalty. The informations were dismissed.

On Apr. 2, the appellant, a representative of the Medical Defence Union, received from the respondent a reply to a letter which the appellant had written requesting an appointment. The letter from the respondent bore on the left-hand corner the words "William Luftig, M.D., BLN." It was written from 44, Preston Park Avenue, Brighton, where the respondent lives and carries on the practice of consultant on eye troubles. On May 25, there was fixed to the door of these premises a professional plate bearing the words and letters "William Luftig M.D., BLN." The respondent's name appeared in the telephone directory for Brighton with the same letters after his name, but in that directory full stops appear after each of the letters, while on the letter paper and plate there were no stops. The justices find that the stops in the directory were a printer's error and were not on the entry form completed by the respondent. In Kelly's Directory for the district his name is given as "William Luftig M.D. Berlin." The justices found that the respondent used the abbreviation "BLN" on his plate and notepaper since coming to Brighton in 1944 and that he had not used the word "Berlin" because he had received threatening letters and swastikas had been marked on the wall of his house. The respondent had studied medicine in Germany and passed his final examination in June, 1913. In August, 1914, he had been granted by the Minister of the Interior "approval as a physician," and in November, 1914, the Frederick Wilhelm University of Berlin conferred on him "the immunities and privileges, ornaments and honours, of doctor of medicine." The diploma was produced and there is no doubt that the justices considered that it was a diploma granted by a genuine university.

It would be convenient here to say what the true implication is that attaches to the use of the expression "doctor of medicine" or its recognised abbreviation, "M.D." The term "doctor" is now commonly used to mean any medical practitioner, but, when that word is used in conjunction with some particular branch of learning, it means one who in any faculty has attained to the highest degree conferred by a university. We take this from the OXFORD DICTIONARY. Thus, a person who describes himself as a doctor of medicine represents that he has had this degree conferred on him by a university as the result of competent examination. That there are bogus concerns masquerading as universities who sell bogus degrees may well be true, and, if the only title of a person who describes himself as a doctor of medicine is a piece of parchment and a hood which he has bought and paid for from some commercial concern, the courts will know how to deal with such an imposture.

It was further found by the justices that in January, 1940, the secretary of the Medical Defence Union had written to the respondent drawing his attention to the London Telephone Directory in which he was described as "Luftig, William, M.D. Berlin, Physn." The letter informed the respondent that the use by him of the title "physician" was a direct infringement of the Medical Act, 1858, and rendered him liable to penalties. The letter went on to say:

> ". . . *Whitwell* v. *Shakesby* (1) had decided that it was illegal for any person to make use of the word 'physician' associated with any qualifications of any kind unless he be an individual whose name appears on the Medical Register."

Whether that is an altogether accurate description of the decision in *Whitwell* v. *Shakesby* (1) is one of the matters which we shall have to consider in the present case, but, having received that letter, the respondent answered it saying that he would take the necessary steps to see that the offending word "physician" or its abbreviation did not appear again in the directory, and it appears that thereafter he did not describe himself as a physician. The respondent is not registered under the Medical Act, 1858. The justices dismissed the informations and have stated their opinion in these terms :

> " We, being of the opinion that the respondent had not wilfully and falsely used the title of doctor of medicine, held that the informations alleging that offence should be dismissed, and, as the respondent had used the description " M.D., BLN." and not " M.D." simply as stated in the summons, we held that the letters " M.D., BLN." did not imply that he was registered under the Medical Act, 1858."

On an application being made to the justices to state a Case they refused to state one, but this court directed them to do so. They, apparently, considered that the application was frivolous and that their decision raised a question of fact alone. The justices may be surprised to know that on the Case coming before the court it appeared to present features of such difficulty and importance that it was ordered to be re-argued before a full court. While not imputing any contumacy to the Bench, their refusal to state a Case when requested to do so is to be regretted, as it has involved the parties in considerable extra expense.

Before considering the law applicable to the case, we think it well to emphasise that a Divisional Court of five judges has no greater powers than one of three or even two. This court is bound by its own decision as is the Court of Appeal, whatever the number of judges that may constitute it : see *Huddersfield Police Authority* v. *Watson* (2). The principles of *Young* v. *Bristol Aeroplane Co., Ltd.* (3), apply equally to this court. It was there held by the Court of Appeal ([1944] 2 All E.R. 300) :

> " The only exceptions to this rule . . . are . . . (i) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam.*"

That is to say, the court is not bound by a decision of its own if a case or a statute had not been brought to the attention of the court and the decision had been given in ignorance or forgetfulness of the existence of that case or statute. The case most relied on by the appellant here was *Jutson* v. *Barrow* (4), and it was because the court before which the case which is now before us came in the first instance thought that there were certain *dicta* in *Jutson* v. *Barrow* (4) which might be in conflict with or go beyond certain earlier decisions, which were apparently not cited, that they directed a re-argument, and when re-argument is directed it is often desirable that it should take place before a full court.

We now turn to a consideration of the relevant statutes. The Medical Act, 1858, is entitled " An Act to regulate the qualifications of practitioners in medicine and surgery " and the preamble states that :

> " . . . it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners."

The Act then sets up a general council [s. 3] and provides for the registration of medical practitioners [s. 15]. Schedule (A) sets out the persons who are entitled to be registered and under para. 11 of sched. (A) a doctor of medicine of a foreign university could only claim to be registered if he had been practising in the United Kingdom before Oct. 1, 1858. By s. 34 it is provided that the words :

> " ' Legally qualified medical practitioner ' or ' duly qualified medical practitioner ' or any words importing a person recognised by law as a medical practitioner or member of the medical profession, when used in any Act of Parliament, shall be construed to mean a person registered under this Act."

Section 40, which is the material section in this case, provides :

> "Any person who shall wilfully and falsely pretend to be or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding £20."

The qualifications for registration were extended by the Medical Act, 1886, s. 12, which entitled a person to be registered if he held a recognised foreign diploma granted in a foreign country to which the Act might be applied by Order in Council [s. 17], but no question arises under this Act as it was never applied to Germany. Provision has been made by the Medical Practitioners and Pharmacists Act, 1947, enabling the council to register certain foreign medical practitioners if they see fit and subject to certain conditions which it is unnecessary to set out as no application for registration under this Act had been made by the respondent.

Now, the Medical Acts do not prohibit any person from practising medicine or surgery. The Act of 1858 confers certain privileges on registered persons, *e.g.*, that none but a registered person can recover his fees in a court of law [s. 32] or sign a certificate required to be signed by a medical practitioner [s. 37]. Unregistered persons are prohibited from holding appointments at hospitals, infirmaries or dispensaries which are not supported wholly by voluntary contributions [s. 36], from which it is clear that an unregistered medical man may hold an appointment in a voluntary hospital. What is prohibited by s. 40 of the Act is the use of certain titles, such as physician, doctor of medicine and so forth, which of themselves imply, or are to be taken to imply, that the person using it is registered, or the use of any name, title, addition or description which would give rise to a similar implication. It is the opening words of this section that have given rise to much of the difficulty which surrounds the question. They are : "Any person who shall wilfully and falsely pretend to be or take or use the name or title . . ." and it is certainly significant, as counsel for the respondent pointed out, that Acts dealing with other professions, such as solicitors, veterinary surgeons and dentists, do not contain the words "wilfully and falsely." Counsel for the appellant contended, first, that the title "doctor of medicine" could only be used by a person who was registered. If that be so, it would follow that it would be an offence for the Regius Professor of Medicine at one of our great universities who might not have taken steps to get himself registered, having the intention of leading an academic life and not of practising, to describe himself as a doctor of medicine. If he wrote a treatise, he could not so describe himself, nor could a professor of international reputation who came to this country and read a paper before various learned medical societies and afterwards published it describe himself as an "M.D.", though that degree had been conferred on him by the University of Paris, Vienna, Harvard or any other of the great teaching institutions of the world. An alternative submission by counsel for the appellant was that the Act at least prevented a man from using the title unless he was qualified to be registered, but we can find no words in the statute which would support that contention. A man can only be registered if he possesses certain qualifications, but, if he uses a title which would imply that he is registered, it appears to us that he would commit an offence if, in fact, he is not registered, however qualified he might be.

The first question that we have to decide is whether a person on whom the degree of doctor of medicine has been conferred by a genuine, and not a bogus, university is entitled to describe himself as a doctor of medicine with or without some qualification which would indicate the origin of his doctorate and would not imply that it was one which would qualify him for registration in this country, or whether, not being registered in this country, he is absolutely prohibited from so styling himself. In *Jutson* v. *Barrow* (4), the authority most relied on by the appellant, LORD HEWART, C.J., said ([1936] 1 K.B. 243) :

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> " . . . the effect of this section is to prohibit the use of any of these named and well-known descriptions except in cases where they are lawfully employed . . . If one of those well-known professional descriptions is employed, I think a defendant cannot be heard to say . . . that the name which he employed did not imply that he was registered or recognised in the sense described by the statute."

B By " recognised," His Lordship, apparently, meant " qualified." HUMPHREYS, J., in the same case said (*ibid.*, 248) :

> " It appears to me that the prohibition against the use of the named words and titles or of any other titles having the same implication is absolute."

C These are two of the passages which led the court, when the case was first opened, to think that a close examination of the authorities was necessary. Neither of the judgments to which reference has just been made deal with the words " wilfully and falsely," though SINGLETON, J., did refer to those words in his judgment. The one matter which distinguishes *Jutson* v. *Barrow* (4) from this case is that the practitioner in that case was not only unregistered, but had no D medical qualification or degree at all. We have had the advantage, through the industry of counsel for the respondent, of being referred to several cases which were not apparently cited, or, at any rate, considered, by the court in *Jutson's* case (4), and it is necessary for the court to review them all for the purpose of deciding the present case.

We now turn to the authorities and it would be convenient to take them in E chronological order. The first is *Ladd* v. *Gould* (5). In that case the defendant called himself a " surgeon and mechanical dentist," and the court held that it was for the justices to decide, as a question of fact and not of law, whether the use of the word " surgeon " coupled with the words " mechanical dentist," or such like titles, was an offence against the statute. The justices dismissed the information and COCKBURN, C.J., said that he should have come to the F same conclusion, but the important thing from the point of view of this case is that the LORD CHIEF JUSTICE said (1 L.T. 326) :

> " I do not think there was any falsehood, or any intention to deceive, which was necessary in order to bring the case within the Act. That was also the opinion of the magistrates, though they might have come to a different opinion."

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Ladd v. *Gould* (5), it will be observed, was heard within two years of the passing of the Act, and the court held that it was necessary that there should be falsehood or the intention to deceive.

Ellis v. *Kelly* (6) was heard later in the same year in the Court of Exchequer. The remarkable feature of that case is that it is reported in several reports, H but the reports of the judgment of BRAMWELL, B., differ very materially. A perusal of those reports, however, enables the court to see the *ratio decidendi*, and it is that which is binding and not the expressions used. In that case the respondent was a member of the Royal College of Surgeons and a licentiate of the Society of Apothecaries. He was possessed of a German medical diploma, and called himself " Dr. Kelly " and it was said that that was tantamount to using the title of doctor of medicine and, therefore, was an offence under the Act, as he was not registered as such. It is difficult to believe that in these days when, as we have already said, the term "doctor" is commonly used to denote a medical practitioner without regard to his particular qualifications, there would be a prosecution in such circumstances, but the importance of the case is that it is clear that the reason why the court held that there was no offence was that, as the respondent believed that he was entitled to use the title of doctor, the justices were justified in finding that he had not done so wilfully and falsely. That is clear from the judgment of BRAMWELL, B., whichever report is looked at, and WILDE, B., said that the only question was the meaning of the words "wilfully and falsely." He said (6 H. & N. 227) :

> "The defendant had a German diploma, which he might reasonably believe entitled him to describe himself as he did . . . it was a question of fact for the magistrates whether [he] used the particular description, knowing he was not entitled to it and with intent to deceive the public."

Then comes *Andrews* v. *Styrap* (7). There a druggist added the letters "M.D." after his name in the bills that he sent in for professional attention and medicine. He was purporting to practise medicine and he claimed to describe himself as an M.D. on the ground that he had a diploma from an American university. He had never been in America nor undertaken any examination in order to obtain the diploma. The court upheld the conviction and obviously did so on the ground that this was a bogus degree. MARTIN, B., said (26 L.T. 707) that there was ample evidence that the appellant acted "wilfully (for he did it on purpose) and falsely (because he pretended thereby to be on an equal footing with any regularly bred and registered physician or M.D. in England)" and he must have known that his diploma was in fact "utterly worthless and valueless as an indication of the possessor's merit." In *Carpenter* v. *Hamilton* (8), the defendant kept a shop where he habitually dispensed medicine and gave advice. He exhibited in his window a diploma in which he was described as a doctor of medicine of the Metropolitan Medical College of New York in the United States of North America. Of the validity of the diploma, beyond production, he gave no further proof. The magistrate dismissed the information, holding that the respondent did not wilfully and falsely pretend to use the name of doctor of medicine contrary to s. 40, as he only represented himself to be, and used the name of, doctor of medicine of this New York college. The court upheld the dismissal, CLEASBY, B., saying (37 L.T. 158) :

> ". . . how is it possible to make out a charge of falsely pretending to be something, when the only evidence is that the man pretends to be what he really is ?"

To reconcile these two cases, we think that in the latter the magistrate must have considered that the college was a genuine, and not a bogus, concern. In *Davies* v. *Makuna* (9), s. 40 had to be considered in connection with an action between the defendant, a duly qualified medical practitioner, who had agreed with the plaintiff, who was not duly qualified, to serve the plaintiff as an assistant. PEARSON, J., in the course of his judgment, said (29 Ch.D. 601) :

> "No doubt it is difficult to understand the exact limit of s. 40, and I do not mean to say that I am absolutely certain what is the proper construction of it. But, looking at the preamble of the Act and at s. 32, I think the meaning is, that in order to incur the penalty a person must wilfully and falsely take or use one of the names or titles therein mentioned in such a manner as is calculated to deceive the public."

When that case went to the Court of Appeal, COTTON, L.J., appears to have agreed with that construction.

In 1891 came *R.* v. *Baker, etc., JJ., and Clarke* (10), which raised the question whether a medical practitioner, qualified and registered as licentiate of the Society of Apothecaries, London, was entitled to describe himself as a physician or M.D. He contended that he possessed a diploma from some institution in Indianapolis, U.S.A., and so the court said that he was an L.S.A. with an American degree. The court held that he was properly convicted, holding that the letters M.D. would imply that he was registered under the Act, and considered that he had used those letters wilfully and falsely. In 1894 *Steel* v. *Ormsby* (11) was again a prosecution for unlawfully assuming the title of M.D. The defendant was a miner who had visited sick persons and supplied them with medicine. He signed death and other certificates, adding the letters " M.D. " and " B.C." after his name, and claimed to be entitled to do it by reason of a certificate granted by a joint stock company called the General Council of Safe Medicine, Ltd., which purported to train and educate its members in medical botany and organic magnetism. The justices found that the defendant had wilfully and falsely taken the title of " M.D.", thereby implying that he was registered. WRIGHT, J., in giving judgment, said (10 T.L.R. 484) that the section " required a statement to be made by the defendant false in fact and known by him to be so," and held that there was evidence that the man had falsely described himself as M.D. COLLINS, J., concurred and said that some doubt raised by expressions of BRAMWELL, B., in *Ellis* v. *Kelly* (6) had been removed by later cases. It was a question of fact. The defendant having signed certificates which could only lawfully be given by medical practitioners and describing himself as M.D. and having no diploma or degree but only some certificate given by a bogus institution, there was evidence on which the justices could find as they did.

The next case, in 1896, is *R.* v. *Lewis* (*Stipendiary Magistrate*) *& Frickhart, R.* v. *Same & Bridgwater* (12). These were rules calling on the stipendiary magistrate at Cardiff to state Cases. The magistrate had dismissed summonses against each of the defendants for using the letters M.D., and he had refused to state Cases on the ground that the applications were frivolous as he had dismissed the summonses on questions of fact only. Eliza Frickhart was an M.D. of Zurich University. Her name had been on the Medical Register, but had been removed therefrom for professional misconduct. The informant who was a retired medical man knew that she was not registered when he consulted her, and the magistrate dismissed the information. In *Bridgwater's* case (12), the defendant described himself as " Dr. Bridgwater, M.D., U.S.A.", and in the consulting room was hung up what purported to be a diploma of some American university. The magistrate dismissed the summons on the ground that there was no proof of a false pretence for the defendant merely held himself out to be what he was, an M.D. of some American university. The court discharged the rules in both cases. In *Frickhart's* case (10) COLLINS, J., said (60 J.P. 393) that " there was no proof before the magistrate of a false pretence." In *Bridgwater's* case (10) GRANTHAM, J., said (*ibid.*) that no case yet had gone so far as to decide that the use of the letters " M.D." with other letters constituted a holding out that the defendant was a registered M.D., and, as the magistrate had negatived any false pretence, there was no ground for granting the rule. COLLINS, J., concurring, said (*ibid.*) :

> " . . . the learned magistrate has found that the defendant did not in point of fact pretend that he had a registrable degree, and if so, the magistrate would be perfectly right in the conclusion at which he has arrived . . . On the cases as they now stand there is a complete fog. It is impossible to say whether this is a question of law or of fact."

In *Hunter* v. *Clare* (13) a licentiate of the Society of Apothecaries of London, duly registered, described himself as a physician and surgeon and was prosecuted for wilfully and falsely pretending to be, and taking and using the name and title of, physician contrary to s. 40 of the Act of 1858. The court quashed the conviction and CHANNELL, J., having said that he thought, though not without doubt, that the word "physician" was used in s. 40 in a technical sense and that in that sense the appellant was not a physician, went on to say ([1899] 1 Q.B. 641):

A

> "Then, did the appellant 'wilfully and falsely' describe himself as a physician? On that point *Ellis* v. *Kelly* (6) is a distinct authority."

He said that the difference between *Ellis* v. *Kelly* (6) and *Andrews* v. *Styrap* (7) was that, in the former case, there was a foreign qualification, but a genuine one, and, in the latter, only a bogus diploma. He thought that the conviction should be quashed for, although the appellant incorrectly described himself B as a physician, he did not do so "wilfully and falsely" on the grounds explained by the court in *Ellis* v. *Kelly* (6). He concluded his judgment by saying (*ibid.*, 642):

> "The justices ask us two questions: the first, 'Whether or not the appellant holding the title of L.S.A. and being registered as such is authorised C to take and use the name and title of physician in the manner the appellant so used it?' we answer in the negative. To the second, 'Whether on the facts stated we were right in finding that the appellant so described himself wilfully and falsely within the meaning of [the Medical Act, 1858] s. 40?' we say that the justices were wrong, and on that ground we quash the conviction."

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From these cases it will be seen that there is an unbroken line of authority from 1860 to 1899, supported in the later part of that period by judges of the eminence of R. S. WRIGHT, J., HENN COLLINS, J., and CHANNELL, J., that to commit an offence a defendant must have acted wilfully and falsely and that it is for the justices to decide whether he has done so, and, also, that he does not commit an offence if he honestly believes that he was within his rights in des- E cribing himself as he did. He must, of course, have a reasonable ground for his belief. A person who has passed no examination and has received no qualification from a genuine teaching body cannot adopt one of the titles mentioned in s. 40 of the Act of 1858 and be heard to say that he believed he had such skill as would entitle him so to describe himself. We can sum up this part of the case by saying that there must be *mens rea* and the presence or absence F of that state of mind must be tested on ordinary principles and in the light of common sense. *Actus non facit reum, nisi mens sit rea* is a cardinal doctrine of the criminal law. No doubt, the legislature can create offences which consist solely in doing an act, whatever the intention or state of mind of the actor may be. Common instances are provided by many of the offences created by the Defence (General) Regulations, 1939. It was an offence, for instance, to G be found within a prohibited area. It was no defence for a person found there to say that he did not know, or even that, at the time, he had no means of knowing, that his presence was prohibited. Overriding considerations of safety placed on citizens the duty of finding out whether a place was a prohibited area or not. Of late years the courts have been so accustomed to dealing with a host of offences created by regulations and Orders independent of guilty H intention that it is desirable to emphasise that such cases should be regarded as exceptions to the rule that a person cannot be convicted of a crime unless it is shown not only that he has committed a forbidden act or default but also that a wrongful intention or blameworthy condition of mind can be imputed to him. *Whitwell* v. *Shakesby* (1), is not, we think, in any way in conflict with the decisions that we have quoted. The respondent there had described himself as an osteopathic physician and surgeon. He was an honorary member of the

Incorporated Association of Osteopaths, Ltd. and the holder of a certificate from that company, but there was no evidence as to what, if any, examination had to be passed in order to obtain the grant of a certificate. The magistrate had refused to convict on the ground that the respondent did not use the title falsely within the meaning of the Act. It seems to us that the decision of the court, who allowed the appeal and found an offence proved, turns on the point that the respondent, knowing that he had no qualification as a physician or surgeon, must be held to have used that description falsely. That case was much relied on by the court in *Jutson* v. *Barrow* (4). We are not expressing any doubt as to the correctness of the decision in the latter case because there again the respondent had no medical training, nor was there anything in the case to show that he could have believed that he was entitled to use the word "surgeon," though we are not in agreement with all the *dicta* used in the judgments.

We have now to apply the law so far as we can gather it from these many cases to the present. The respondent holds a genuine degree of doctor of medicine granted by a foreign university. There is no reason, therefore, why he should not use that title, and the justices were amply justified in finding that he did not use it wilfully and falsely, but he must not use that title so as to imply that he is registered in this country, because, in our opinion, s. 40 of the Act of 1858 contemplates that the use of the words doctor of medicine, physician, surgeon, or other titles specifically mentioned in the first part of the section, carry the necessary implication that the title is one of those mentioned in sched. (A) to the Act. If, therefore, the respondent described himself, as he at one time did, as "M.D., Berlin," we think that it is clear on the authorities that he committed no offence and that he is entitled to use that description. He is describing himself there as what he is and the addition of the word "Berlin" shows that he is not claiming to be possessed of one of the degrees mentioned in sched. (A) to the Act and does not, therefore, represent that he is registered. The real difficulty in this case is that at Brighton he used the abbreviation "BLN" and he did so on his own admission for the purpose, apparently, of concealing the fact, or, at any rate, of diverting attention from the fact, that his degree was obtained in Germany. The cases, however, oblige us to hold that it is for the justices to consider whether in so doing he has acted wilfully and falsely, and we must take it that they have held he did not, and they have further held that "M.D., BLN." does not imply that he was registered. They might have decided the latter point the other way and it is to be hoped that the respondent will not in future use that abbreviation. He may well incur penalties if he does so. For the reasons given we think that on this point we are bound by the findings of the justices and, as we cannot say that there was no evidence on which they could find as they did, it follows that the appeal must be dismissed. In conclusion, we may express our concurrence with what COLLINS, J., said in *R.* v. *Lewis and Bridgwater* (12), *viz.*, that the cases are in "a complete fog." We hope that this review may tend, to some extent, towards dissipating it, and we venture to think that the time has come when the position might be clarified by further legislation.

Appeal dismissed with costs.

Solicitors: *Hempsons* (for the appellant); *D. Edgar Rodwell & Co.* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DONOVAN *v.* CAMMELL LAIRD & CO. AND OTHERS.

[Liverpool Assizes (Devlin, J.), February 14, 15, 16, 17, 18, 21, 22, April 12, 1949.]

Dock—Dry dock—Ship under repair—Employee of repairers injured—Liability of dockowners and shipowners—"Occupier"—Notional occupier—Several repairers engaged on work on ship at same time—Shipbuilding Regulations, 1931 (*S.R. & O.*, 1931, *No.* 133), *reg.* 10.

Costs—Defendants reasonably joined—Plaintiff succeeding against one defendant, but not against others—Costs of successful defendants awarded against plaintiff—Whether unsuccessful defendant should be ordered to pay costs awarded against plaintiff.

The Shipbuilding Regulations, 1931, provide under the heading "*Duties*": "It shall be the duty of the occupier to comply with Parts I to VIII of these regulations. Provided that, when a ship is being repaired in public dry dock, the person who contracts with the owner of the ship or with his agent to execute the work of repair shall be deemed to be the occupier for the purposes of Parts I to VIII and it shall be his duty to comply with the said Parts, except as follows: . . . (*b*) Where the control of the ship apart from the work of repair remains with the shipowner, it shall be the duty of the shipowner, master, or officer in charge, to provide the protection specified in reg. 10 in so far as concerns those hatches or openings which are not required to be used for the purposes of the repairs, but if such protection be removed by any person or persons in the employment of the occupier or at his or their request, the occupier shall be responsible for its replacement as soon as practicable."

By reg. 10 (in Part I) it is provided: "All openings in decks and tank tops shall be securely protected. Such protection shall be maintained in position and when necessarily removed in the course of work shall be replaced as soon as practicable."

On Jan. 25, 1947, the plaintiff, an employee of the first defendants, was injured while engaged in repairing a ship which belonged to the Crown, but was managed on behalf of the Crown by the third defendants. At the time of injury, the ship was in a public dry dock owned by the second defendants. The dry dock was also accommodating at the material time another vessel undergoing repairs. On Dec. 31, 1946, the third defendants had been notified that the ship was to be transferred to the French government and the repairs being carried out by the first defendants were being effected on behalf of the French government. Other work was being executed on the ship at the material time by the third defendants, who were bound to arrange for all necessary repairs under their agreement with the Crown. There was also work being carried out on behalf of the third defendants by two firms of sub-contractors, and a further firm was engaged on disarming the ship on behalf of the Admiralty. The court held that the first defendants were liable to the plaintiff for failing to provide a safe working system. As to the liability of the second and third defendants under the regulations of 1931,

Held: (i) the effect of the section headed "*Duties*" was to impose on a notional occupier the duty of complying with reg. 10 which would otherwise be on the actual occupier, in this case the second defendants, but in the present case there were more than a single repairer, which was a possibility not contemplated by the regulations, and, while the duty was not imposed by the regulations on anyone else, by necessary implication it had been lifted from the shoulders of the second defendants.

(ii) although literally para. (*b*) of the "*Duties*" section of the regulations would impose liability on the third defendants, who were for this purpose the shipowners and retained control of the ship, the assumption underlying the paragraph was that wherever there was a main repairer (as opposed to a sub-contractor) he would be "the occupier" referred to in the paragraph, but that assumption broke down in the present case because the first defendants, although main repairers, were not under contract to the third defendants and it was impossible to say that the literal application of para. (*b*) would achieve the result intended. It could not, therefore, be applied to render the third defendants liable. A

Judgment having been given for the plaintiff with costs against the first defendants and for the second and third defendants with costs against the plaintiff, the plaintiff asked that the first defendants should be ordered to pay the costs awarded to the second and third defendants.

HELD: although the plaintiff had acted reasonably in the light of the B authorities in joining the second and third defendants, he had acted on a wrong view of the regulations of 1931 and it would not be a proper exercise of the court's discretion to order the first defendants to bear the costs as suggested.

Hartwell v. *Grayson Rollo & Clover Docks, Ltd.* ([1947] K.B. 901), and *Hong* v. *A. & R. Brown* ([1948] 1 All E.R. 185), *applied.*

C [AS TO ENFORCEMENT OF REGULATIONS WITH REGARD TO DOCKS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 619-621, para. 1174; and FOR CASES, see DIGEST, Vol. 24, pp. 915-918, Nos. *104-126*.]

Cases referred to:

(1) *Smith* v. *Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; [1940] A.C. D 242; 109 L.J.K.B. 134; 163 L.T. 9; 104 J.P. 51; 2nd Digest Supp.

(2) *Wilkinson* v. *Rea, Ltd.*, [1941] 2 All E.R. 50; [1941] 1 K.B. 688; 110 L.J.K.B. 389; 165 L.T. 156; 2nd Digest Supp.

(3) *Hartwell* v. *Grayson Rollo & Clover Docks, Ltd.*, [1947] K.B. 901; [1947] L.J.R. 1038; 2nd Digest Supp.

(4) *London & North Eastern Ry. Co.* v. *Berriman*, [1946] 1 All E.R. 255; E [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.

(5) *Franklin* v. *Gramophone Co., Ltd.*, [1948] 1 All E.R. 353; [1948] 1 K.B. 542; [1948] L.J.R. 870.

(6) *Bristol Guardians* v. *Bristol Waterworks Co.*, [1914] A.C. 379; 83 L.J.Ch. 393; 110 L.T. 846; 78 J.P. 217; 43 Digest 1066, *62*.

F (7) *Royster* v. *Cavey*, [1946] 2 All E.R. 642; [1947] K.B. 204; [1947] L.J.R. 149; 176 L.T. 16; 2nd Digest Supp.

(8) *Hong* v. *A. & R. Brown*, [1948] 1 All E.R. 185; [1948] 1 K.B. 515; [1948] L.J.R. 1816.

ACTION for damages (i) against the first defendants for failing to provide a safe working system, and (ii) against all defendants under the Factories Act, G 1937, s. 26 (1) and the Shipbuilding Regulations, 1931.

The plaintiff, who was employed by Cammell Laird & Co., the first defendants, sustained injuries while employed by them on repair work on a ship called the Empire Rawlinson, which at the material time was in a graving dock belonging to the Mersey Docks and Harbour Board, the second defendants. The ship was in the registered ownership of the Crown, but she was managed by the H third defendants, Alfred Holt & Co. The plaintiff suffered his injuries by falling into a hold of the ship converted for use as a tank. The tank tops were on the lower tween decks. There were two decks above, each of which had a hatch, and, unless both hatches were open, the lower tween deck was in darkness. The two tank tops were separate structures near the centre of the deck, being separated by a strip of deck about 5ft. wide. The port one measured 11ft. by 8ft., and the starboard one was slightly larger. Each opening was separately protected by a coaming 6ins. high, on which the tank lids rested. The lids were hinged on the side nearest the fore and aft line of the ship, and were opened upwards and inwards towards the said line. In the strip of deck between the two tank tops there was a girder or channel ladder 13ins. wide rising from the lower tween deck to the deck above, and when the tank lids were raised they were secured to the girder at the top, forming a tunnel or passageway, roughly triangular in shape, between the tank tops. The forward entrance to the tunnel was obstructed by the girder, leaving a space on either side just wide enough for a man to squeeze through. By the bulkhead at the forward end of the tween deck and slightly to the starboard of the fore and aft line of the ship there was another ladder, enclosed in a booby hatch, giving access to the deck above. It was while he was going aft from the base of the booby hatch intending to enter the tunnel that the plaintiff missed his way and fell into the forward port corner of the starboard tank top. At the time of the accident the tween deck was lighted only by a cluster of four bulbs in a box which had been set at the aft port corner of the port opening so that it threw a light on the aft end of the port lid which the plaintiff and two other men were repairing. The hatches of the decks above were closed. Some staging was placed across the port opening for the men to stand on while at work. It appeared that a life line passing through stanchions fixed to the deck had been erected round the opening, but at the time of the occurrence it afforded no protection because it had been slackened, apparently by an employee of the first defendants. The plaintiff had completed his work on the tank lid before lunch on the day in question, and after lunch returned to collect the tools which he and two others had been using. He made two journeys through the tunnel carrying tools which he passed up from the booby hatch to a fellow workman on the deck above, but in returning for the third time for the remaining tools stepped into the tank opening instead of the tunnel, and fell some 25ft.

Devlin, J., held that the first defendants were liable for failure to provide a safe system of work because in removing the protection which the life line would have given they had created a source of danger which need never have existed, and the plaintiff was not guilty of contributory negligence. The plaintiff's claims against the second and third defendants depended mainly on the Shipbuilding Regulations, 1931, and the facts relevant thereto are set out in the headnote.

Wooll, K.C., and *Robertson Crichton* for the plaintiff.

Gorman, K.C., and *R. H. Forrest* for the first defendants, Cammell Laird & Co., Ltd.

Nelson, K.C., and *Miss R. Heilbron* for the second defendants, Mersey Docks & Harbour Board.

Nield, K.C., and *Nicklin* for the third defendants, Ocean Steamship Co., Ltd. (Alfred Holt & Co.).

Cur. adv. vult.

Apr. 12. **DEVLIN, J.**, read a judgment in which he stated the facts and continued. On these facts I am now able to consider the different causes of action which the plaintiff alleges. In the first place, he alleges that his employers, Cammell Laird, the first defendants, failed in their common law duty to provide a safe system of work and a safe place of work. In my judgment, the principal cause of the plaintiff's injuries was the fact that the starboard opening was unprotected. I think that the state of the light played only a minor part. Although the starboard opening was not fully illuminated I judge that there was sufficient light to reveal the boundary of the opening clearly enough to anyone who knew, as the plaintiff did, that it was there. It may be that a better light would have brought it more sharply to his attention, but it was what the plaintiff described in the evidence to which I have referred as his mis-judgment of the position that led to the disaster. That description is, in my view, a euphemism for saying that he had not got his

mind fully on what he was doing. The fact remains, however, that, if the star-
board opening had been properly guarded, the plaintiff would have been pro-
tected from his own inadvertence. Counsel for the first defendants accepts
that it is the employer's duty to make a proper lay-out of the job and to take
reasonable steps to guard against those dangers incidental to the work reason-
ably to be contemplated by the employer, but he contends that the starboard
A opening was not such a danger. There was, he says, no reason for the employer
to anticipate that the plaintiff would ever go near the forward end of that
opening. I think that the plaintiff might very well have done his work without
going near it, and I have said that the natural way for him to get to his job
was to go round the other side of the port opening. I do not accept the con-
tention that this route would have plunged him into darkness. It would have
B meant going behind the cluster, but I judge that the light from the cluster
was not so concentrated as to leave complete darkness behind it. I do not
think that the employer ought to have anticipated specifically that his workmen
would go through the tunnel. Having regard to the fact that it was in darkness
and its entrance obstructed by the girder I think that it was an unlikely route
for them to choose. The plaintiff and Reid did not strike me as being at all
C intelligent or quick-witted men. In this respect they were not untypical.
Workmen cannot always be relied on to do the most sensible and logical thing.
They are apt for one reason or another, whether sensible or not, to wander
a bit about the place they are working in. What a careful employer ought,
I think, to have contemplated was that an unprotected opening so near a place
of work was, for these general reasons, a probable source of danger. When a
D source of danger is near the border line, neither acutely obvious nor very remote,
it is legitimate to inquire whether any elaborate precautions against it would
have been needed. It may be, I do not say it is, that to require the starboard
lid to be closed—the work of half an hour—would be asking too much, but nothing
of that sort need have been done. What weighs with me in this case is that it is
not so much a question of leaving a source of danger unguarded against as of
E creating a source of danger which need never have existed at all. The first
defendants found the tank tops adequately protected by the lifeline. I am
satisfied from the evidence, as well as by my own judgment, that it was quite
unnecessary for the lifeline ever to have been lowered, either for the purpose
of laying the staging or for any other phase of the work. It is no answer to
say that the plaintiff would in any event have had to go within it, or that its
F presence at the forward end might or might not have deterred him from going
through the tunnel. A lifeline of this sort is not designed to keep people out.
It is intended primarily no doubt to guard against people outside stumbling
or slipping, but it also serves as a warning. The act of crossing it, by stooping
underneath or putting a leg over, reminds a man that he is entering a danger
area as effectively as if a warning were then spoken in his ear. Its removal
G by Cammell Laird's men was, I think, just as if they had for no good reason
taken down a notice which said: "Watch your step."

I hold, therefore, that a source of danger existed at the material time at the
plaintiff's place of work, rendering it unsafe for the ordinary workman. That is
a matter for which the first defendants are personally responsible. Could
they, by taking reasonable steps, have prevented the creation of the danger
H or have guarded against it or removed it? The organisation and lay-out of
the job and the duty of taking any necessary precautions with regard to it was
delegated to Mr. Swan, an employee of the first defendants. I think it is a
fair summary of Mr. Swan's evidence that he left it to each department con-
cerned with the preparation of the job, that is the staging and the lighting,
to see that they left it safe, and to Sweeney, the plaintiff's immediate superior,
to complain if it was not safe. In this there was no system or method at all.
What was everybody's business became nobody's business. Doubtless it was

a very small job, and Swan, I daresay, had many things to do. But he did nothing to discharge the duty that was admittedly his, and no-one exercised any co-ordinating function or final supervision to see that the place was safe to work in. I hold, therefore, that a cause of the plaintiff's injuries was the first defendants' breach of duty. Was it the only cause or was there contributory negligence by the plaintiff ? I have already indicated two matters in respect of which such negligence might be suggested. In the first place, the plaintiff did not go the natural and obvious way to his job, but I do not think that this choice of route was so unreasonable or absurd as to be negligent. In the second place, he had not got his mind fully on what he was doing. Although I regard the state of the light as of little importance compared with the absence of protection, I think that it goes some way towards explaining and condoning the plaintiff's inattention. After careful thought and not without hesitation, I have come to the conclusion that the plaintiff's behaviour was due to a momentary lapse from alertness such as might affect the ordinary, prudent workmen of his grade, and that it is not to be accounted as a falling short of the standard of care to be expected from him in the circumstances.

The first defendants are, therefore, liable at common law and irrespective of any liability imposed by statute on themselves or their co-defendants to compensate the plaintiff in full for the injuries he has sustained. He fell on his right side and heel, fracturing his heel bone. He sustained serious injuries which in the early stages, at any rate, caused him considerable pain. He is now 47, and permanently unfit for anything except light work which, so far, he has been unable to obtain. By far the most serious item in his claim for damage is, therefore, his loss of earnings, past and prospective. His average wage at the time of the accident was £6 12*s.* 6*d.* a week, and the loss of this sum from the date of the accident up to Feb. 14, 1949, comprises his claim of £1,050 for special damage. I think there should be some small deduction from this sum, since for the preceding twelve months or so he has done domestic work about the house and has thus been able to save himself, he being now a widower, the sum which, had he been in full employment, I think he would probably have had to have paid for domestic assistance. I have to make some allowance for this in the future, as well as in the past, and also for his prospects of obtaining light work regularly or irregularly. I think that a fair sum to award to him, including his special damages, would be £4,500.

I turn now to consider what liability, if any, in respect of this sum is imposed on the second or third defendants under the Shipbuilding Regulations, 1931. It cannot be disputed that there has been a breach of reg. 10, which provides that "all openings in decks and tank tops shall be securely protected." The question I have had to consider is on whom in this case the duty of seeing that this regulation is complied with is placed. This is to be ascertained from the section headed *Duties* at the beginning of the regulations. The scheme of this section is that the duty of compliance is placed in the first instance on the occupier, which means the occupier of the shipbuilding yard : see *Smith* v. *Cammell Laird & Co., Ltd.* (1). The occupier of the yard, of which the dry dock forms part, is, I think, the dock board, the second defendants. The liability imposed on the occupier is, however, subject to a proviso which, where it applies, creates what has been called a notional occupier of the dry dock, and puts on him the duty of compliance with the regulations, qualified by certain exceptions, which, so far as they relate to this case, relieve the notional occupier of some of these duties and impose them on the shipowner. The obscurity of this proviso is such that two decisions of the Court of Appeal, *Wilkinson* v. *Rea, Ltd.* (2), and *Hartwell* v. *Grayson Rollo & Clover Docks, Ltd.* (3), have not been able to do much to elucidate it. Obscurity is, perhaps, not quite the right word, for as a piece of English the proviso is intelligible enough. The trouble is that the draughtsman has legislated only for an assumed state of affairs in which more than one ship is never being repaired in a dry dock at the same time, and in which a shipowner never repairs his own ship and no-one repairs it except under contract with him, and he never contracts with more than one person at a time. When these assumptions break down, as they do in this case, it is difficult, if not impossible, to apply the proviso. Accordingly, I should not feel under any duty to search for a notional occupier, because I am satisfied that, if I found him, I should not be able to say that the regulations pointed to him with sufficient clarity to enable me to impose liability on him. In this regard, and, indeed, throughout this judgment, in construing these regulations I follow the principle recently applied to the Factories Acts by Lord Simonds in *London & North Eastern Ry. Co.* v. *Berriman* (4), and by Somervell, L.J., in *Franklin* v. *Gramophone Co.* (5). This principle was expressed by Somervell, L.J., as follows ([1948] 1 All E.R. 359):

> " Although we are dealing here with a civil action, it is one which has to be based on a breach of a statute which imposes penalties. It would, I think, be sufficient for the employers if the court came to the conclusion that there was ambiguity or that the liability alleged under the section was not clear or that the conclusion to which I have, on the whole, come was a reasonable interpretation."

But the two defendants with whom I am now concerned are not in any event notional occupiers, and what I have to consider is whether the section headed *Duties* succeeds in imposing liability on them. I shall take the second defendants, the dock board first. The argument which seeks to impose liability on the board can be divided into two stages. The first stage is that where at any given moment there is more than one person who is executing repairs to the ship in dry dock under contract with her owner, there can be no notional occupier : see *per* Lord Oaksey, L.J., in *Hartwell* v. *Grayson Rollo & Clover Docks, Ltd.* (3) ([1947] K.B. 912). The second stage is that, where there is no notional occupier, the duty of compliance with the regulations remains with the actual occupier of the yard. It is implicit in this argument, and it is, I think, clear, that, although the proviso by its words goes no further than to impose duties on the notional occupier of the dry dock which it creates, it must by necessary implication lift from the shoulders of the actual occupier of the yard those duties which in respect of the dry dock it imposes on the notional occupier. The repairer is deemed to be the occupier in the place of the actual occupier ; it is not intended that an actual and a notional occupier should co-exist. Thus, when the proviso comes into operation the dock board is freed.

The question I have to determine is what is the event or condition precedent the fulfilment of which brings the proviso into operation. So far as the express language goes, the event is " when a ship is being repaired in public dry dock " and nothing more, but the draughtsman has, nevertheless, assumed that whenever a ship is being repaired in dry dock there will always be a single repairer who can be identified as the notional occupier. Does this assumption impose a second condition precedent on the operation of the proviso ? Can I construe the proviso as if it read : " when a ship is being repaired in dry dock and when there is a person who contracts . . ." ? I do not think that I can. When an assumption essential to the operation of a statutory provision breaks down, the court, which is charged merely with the duty of interpretation, has no power to fill the void. The very fact that the Secretary of State has so evidently not contemplated the possibility that there might be more than a single repairer means that what he would have done if he had contemplated it can only be the subject of speculation. If I were to speculate, counsel for the dock board has given me a number of cogent reasons for thinking that the Secretary of State would not have intended that liability should revert to the dock board. The one that impresses me most is the absurdity of supposing that the liability of the dock board should appear and disappear in the manner of the Cheshire cat, dependent on whether more than one person were, or, alternatively, no person was, at any given moment under contract to repair the ship. But, in whichever direction speculation might lead me, I am satisfied that I should have no right as a result of it to re-fashion the words of the proviso so as to impose liability on the dock board. I think that this follows from the usual principles of construction applicable to an ordinary statute as set out, for example, in the speech of EARL LOREBURN, in *Bristol Guardians* v. *Bristol Waterworks Co.* (6) ([1914] A.C. 388), and *a fortiori* from the principle applicable to penal statutes to which I have referred. In this result, I appear to be differing from that arrived at by STABLE, J., as shown in the report of *Hartwell* v. *Grayson Rollo & Clover Docks Co.* (3), and in the transcript of his judgment, with which I have been supplied, but his conclusion was *obiter,* for he had not the dock board before him and it was not indorsed by any of the judgments in the Court of Appeal. With the advantage that I have had of hearing a full argument from counsel for the dock board, I feel compelled, for the reasons I have given, to reach with deference a different conclusion.

The argument on the regulations against Alfred Holt & Co., the third defendants, whom for this purpose I assume to be the shipowners, rests on exception (*b*) to the proviso. I am satisfied that on the facts of this case the control of the ship, apart from any work of repair that was going on, remained with Alfred Holt & Co., and I am satisfied that the starboard opening was not one which was required to be used for the purpose of any repairs. Accordingly, it is argued that there is no need to search for a notional occupier, for the liability in respect of the opening in which the accident occurred is in any event imposed on the shipowner. It is true that the shipowner provided a protection to the opening which was removed by the first defendants, but that fact, it is said, cannot avail the shipowner unless the first defendants were "the occupier," and on no view of the proviso could the first defendants be the occupier, since they had not contracted with the owner. If I had regard to the bare language of the exception this argument would succeed, but I must have regard also to the intention behind the proviso and its exceptions in so far as that can be inferred from the language of the section as a whole. I think that the proviso in relation to exception (*b*) is intended to create a division of responsibility between a single repairer, who is deemed to be "the occupier," and the shipowner. Just as the proviso assumes that whenever a ship is being repaired there will be only a single repairer, so also, in my judgment, it assumes that whenever there is a "main repairer" he will be under contract with the owner and not with anybody else. I use the term "main repairer" because the words "contracts with the owner" are, I think, an attempt to distinguish between the main repairer or contractor and his sub-contractors, the draughtsman supposing that by this device he would arrive at a satisfactory description of a single repairer. I cannot think that it is material to the definition of notional occupier whether a main repairer contracts with the owner or not. Nor can I think that, if there was more than one main contractor, it was intended that for the purposes of exception (*b*) they should fall into two classes, with one of which (that with which he had contracted) the owner should divide the responsibility, and for the other of which (that with which he had not contracted, and upon which, therefore, he could not have imposed terms and from which he could not have obtained any indemnity) he should assume all responsibility. The assumption underlying exception (*b*) is, therefore, that wherever there is a main repairer he will be "the occupier" there referred to. In the first instance he will be responsible only for the protection of those openings which are required for the purposes of the repairs, but, if he removes any protection provided by the shipowner for any other opening, he shall be responsible for its replacement, thus impliedly exonerating the shipowner from further responsibility. This assumption breaks down in relation to

Cammell Laird because, though a main repairer, they were one of several and they did not contract with the owner. The breakdown of the assumption makes it impossible for me to say how the Secretary of State would have intended to deal with the uncontemplated contingency of a main repairer who was not the occupier.

I do not think that the shipowner's case on this point is as strong as the similar case of the dock board. There are in exception (*b*) words which, applied literally, impose liability on him, but where a fundamental assumption underlying the exception has been vitiated I cannot feel reasonably sure that a literal application of the words used would achieve the result intended. Indeed, I strongly suspect that they would not, for I can see no reason for making the shipowner responsible for the misdeeds of some repairers and not of others. Accordingly, I come to the conclusion that in relation to the shipowner's liability also there is ambiguity and that the liability alleged is not clear. That is sufficient for the third defendants, and I think that the claim against them fails. I do not, therefore, need to inquire whether the willingness of these defendants to identify themselves with the shipowner is something on which I can safely act within the principle of *Royster* v. *Cavey* (7).

I appreciate that this judgment, if it is right, means that in many, perhaps most, cases of ship-repairing work in dry docks, the regulations will be a dead letter. This is a result which follows from the application of the principle that legislation of this character to be effective must be clearly expressed, and I regard it as on the whole less disturbing than the prospect that workmen, shipowners, repairers and dock owners should have to elucidate piecemeal and at great expense from one court after another, as they have started to do in *Wilkinson* v. *Rea* (2) and *Hartwell* v. *Grayson Rollo & Clover Docks Co.* (3), the extent of their rights and liabilities. A simple alternative, and one which I hope will commend itself to the Secretary of State if he thinks it important in the public interest to regulate work in dry docks, is that he should employ somebody with some knowledge of the conditions under which that work is done to draft a more comprehensible section. Meanwhile, and unless and until that is done, it is satisfactory to reflect that workmen will continue to enjoy the not inconsiderable degree of protection which is given to them by the Factories Act, 1937, generally and by the nature of an employer's duties at common law.

I consider finally the plaintiff's claim under the Factories Act, 1937, s. 26 (1). Counsel for the plaintiff said that he desired to pursue this claim against the second defendants only, namely, the dock board. Counsel for the second defendants had a number of answers to it in law, but I need not consider them as I can deal with it shortly on the facts. The obligation is to provide and maintain safe means of access to any place at which any person has at any time to work. Treating the place at which the plaintiff had to work as being the aft end of the port tank opening, I have already found that there was a safe means of access to that place round the outside of the port opening. It may well be that where there are two routes to a place of work, each equally likely to attract a workman, the section is not complied with unless both are made safe, but where, as in this case, there is one safe route and the workman chooses another, which it cannot reasonably be anticipated that he would choose, I do not think there can be any obligation in respect of the second route. The matter can be tested on the facts of this case by inquiring whether, if the plaintiff had injured himself because the space between the lids was in darkness, he could properly have complained of the lack of light in it. I do not think that he could. I hold that, whether or not s. 26 puts any duty on the dock board, there has been no breach of it. There will be judgment for the plaintiff against the first defendants for £4,500 with costs, and judgment for the second and third defendants against the plaintiff, with costs in each case.

[On the question of costs the plaintiff argued that the first defendant should be ordered to pay the costs awarded to the second and third defendants. After hearing counsel for the plaintiff, Devlin, J., said :] In this case I do not think I can make any special order with regard to the costs. It is a novel proposition that if a plaintiff has acted on an authority decided by the court in bringing his action instead of merely acting upon the advice of counsel, he should receive some special consideration under the *Bullock* or *Besterman** principle. I do not think I can adopt it. I do not think merely because the plaintiff has acted very reasonably in the light of the authorities in joining the second and third defendants I can, therefore, say that, since, in my judgment, I have taken a different view of the law, the first defendant ought to be made to pay for that. Nor do I think I can attach any real importance to the suggestion that in their arguments counsel for the second and third defendants may have blamed one another in construing the regulations. I think it obviously follows that when counsel is advancing his particular construction it is naturally one which exonerates his own client, but it may well be one which throws blame on one of the other parties, and I do not think that is a matter which I ought to apply as a principle. I think the true position here is simply that, if my judgment is right, the plaintiff took a wrong view of the regulations, and acting—very properly, of course—but acting on that wrong view he joined the second and third defendants. It is extremely unfortunate that the plaintiff should have to bear the costs, but that is a misfortune which may fall on any member of the public when the court is concerned with construing obscure regulations. I do not think, in applying the principle which was set out in *Hartwell* v. *Grayson Rollo & Clover Docks Co.* (3) and *Hong* v. *A. & R. Brown* (8), and exercising my discretion in accordance with the judgments in those cases, I can fairly say it would be reasonable to penalise the first defendants by making them bear the costs of the second and third defendants. I think I would be only yielding to my natural sympathies in acting on the ground that where costs have been unfortunately thrown away owing to the obscurity in public legislation the first defendants should bear the burden. I think I should be only yielding to temptation if I made the order on that ground, and I do not think it a proper case in which I should exercise my discretion. *Order accordingly.*

Solicitors : *John A. Behn, Twyford & Reece*, Liverpool (for the plaintiff) ; *Laces & Co.*, Liverpool (for the first defendants) ; *R. H. Bransbury* (for the second defendants) ; *Alsop, Stevens & Co.*, Liverpool (for the third defendants).

[*Reported by* Miss M. D. Chorlton, *Barrister-at-Law.*]

Re GIBSON (*deceased*).

[Probate, Divorce and Admiralty Division (Pearce, J.), May 25, 1949.]

Will—Codicil—Attestation—Blind man as "witness"—Wills Act, 1837 (c. 26), *s.* 9.

A testator made a codicil which he signed in the company of two persons, one of whom, a man of middle age, was blind, having been blinded some 18 months previously. Both persons subscribed the codicil as witnesses.

Held : the codicil had not been signed "in the presence" of the blind man within the meaning of the Wills Act, 1837, s. 9, nor was he a "witness" for the purposes of that section, and the codicil was, therefore, invalid.

Dicta of Dr. Lushington in *Hudson* v. *Parker* (1844) (1 Rob. Eccl. 23, 35, 36, 37, 40) and of Jessel, M.R., Brett and Holker, L.JJ., in *In the*

**Bullock* v. *London General Omnibus Co.*, [1907] 1 K.B. 264 ; 76 L.J.K.B. 127 ; 95 L.T. 905 ; Digest, Practice 878, *4185*.

Besterman v. *British Motor Cab Co., Ltd.*, [1914] 3 K.B. 181 ; 83 L.J.K.B. 1014 ; 110 L.T. 754 ; Digest, Practice 879, *4189*.

Goods of Gunstan, Blake v. *Blake* (1882) (7 P.D. 107, 113, 116), *applied.*

[AS TO MODE OF ATTESTATION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 62, 63, paras. 78, 79 ; and FOR CASES, see DIGEST, Vol. 44, pp. 258-262, 266-268, Nos. *850-890, 951-975.*]

Cases referred to :

(1) *Hudson* v. *Parker,* (1844), 1 Rob. Eccl. 14 ; 3 Notes of Cases, 236 ; 44 Digest 258, *850.*

(2) *Burdett* v. *Spilsbury, Skynner* v. *Spilsbury,* (1843), 10 Cl. & Fin. 340 ; 6 Man. & G. 386 ; 37 Digest 413, *232.*

(3) *In the Goods of Gunstan, Blake* v. *Blake,* (1882), 7 P.D. 102 ; 51 L.J.P. 36 ; 51 L.J.Ch. 377 ; 46 L.T. 641 ; 44 Digest 263, *913.*

(4) *Newton & Thomas* v. *Clarke,* (1839), 2 Curt. 320 ; 44 Digest 259, *857.*

(5) *Brown* v. *Skirrow,* [1902] P. 3 ; 71 L.J.P. 19 ; 85 L.T. 645 ; 44 Digest 259, *854.*

PROBATE MOTION.

PEARCE, J. held that a codicil signed in the company of and subscribed by a blind man was not signed " in the presence of " the blind man, nor was he a "witness," within the Wills Act, 1837, s. 9. The facts appear in the judgment.

Hollins for the applicant (the widow of the testator and executrix of the codicil).

Wigan for the respondent (a beneficiary under a second codicil).

PEARCE, J. : The court is naturally loth to upset the wishes of a testator, but the requirements of the Wills Act, 1837, have to be complied with. Section 9 of the Act provides :

> " No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned ; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Was this codicil signed " in the presence of two or more witnesses present at the same time," and did such witnesses " attest and subscribe " the codicil ? I am satisfied on the evidence that two persons, a man and his wife, were in the room with the testator when the codicil was signed and that both persons subscribed it. But the man was blind. He had been blinded 18 months before, in his middle age. He was, therefore, not so clever in his remaining faculties as people who have been born blind and had many years of affliction to train their other senses. His evidence was honest, but he admitted that he relied on presumption in regard to several matters that happened. On his evidence alone, without that of his wife, I should feel no certainty whether the document had been signed by the testator and the wife, nor would he be able to identify the document.

There is no direct authority on the capacity of a blind man to witness a will. The normal meaning of " attesting " is testifying or bearing witness to something, and the normal meaning of " witness " is one who is a spectator of an incident or one who is present at an incident. Is mere presence, without the faculty of sight, enough to constitute a person a " witness " for the purposes of s. 9 ? And is an act which he cannot see done " in his presence " ? The object of the Act is clear. One witness is not enough. The presence of two witnesses is made necessary to give certainty and avoid fraud. In the light of commonsense and without any authority I should be inclined to hold that for the purposes of the Act a " witness " means one who, in regard to things audible, has the faculty of hearing, and, in regard to things visible, has the faculty of seeing. The signing of a will is a visible matter, and, therefore, I think a will is not signed "in the presence of" a blind person, nor is he a "witness" for the purposes of the section. If, in peculiar circumstances, a blind man can be a witness to the signature of a will and it can be truly said to be signed in his presence, I do not think that the circumstances in this particular case are such as to lead to that conclusion.

I am confirmed in this view by the *dicta* in various cases which counsel for the respondent has put before me. In *Hudson* v. *Parker* (1) DR. LUSHINGTON A was considering the question of acknowledgment, and he there said (1 Rob. Eccl. 23):

> "The words of which we now wish to understand the meaning, are the following—'such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.' The previous part of the clause having required the signature to be affixed 'at B the foot of the will,' the section goes on—'and such witnesses shall attest, and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.' First then, as to the plain meaning of these words, 'that the signature of the testator shall be made in the presence of two witnesses,' will the statute be satisfied, if the signature be made in their presence, if they are in ignorance of the fact? I am of opinion, C under such circumstances that the statute is not complied with. It is obvious, that the solution of this question must mainly depend on the meaning which the legislature intended to convey by the use of the word 'presence,' in this and in the other clauses of the statute. What could possibly be the object of the legislature, except that the witnesses should see and be conscious of the act done, and be able to prove it by their own D evidence:—if the witnesses are not to be mentally, as well as bodily, present, they might be asleep, or intoxicated, or of unsound mind. Again, how is the signature so made to be proved, except by parol evidence?—to exclude which was one great object of the statute. In support of this view of the question, let us call to mind how the word 'presence' is received in its common acceptation:—*loquendum est ut vulgus*, says LORD COKE. If E in the course of common conversation a person wishes to support the truth of a statement, does he not say—'such a one was *present*, and he will vouch for the truth'?; if a statement be questioned, does not a person say 'I was *present* and can attest its correctness,' and does not the whole world understand by this, mental, not bodily presence? Would not a contrary construction lead to absurdity, and defeat the plain intention of the F statute?"

Later in his judgment he used these words (*ibid.*, 35):

> "The witnesses are to see the signature made or acknowledged, because they are to attest it and to bear witness thereof; . . . but they cannot equally depose to the signature of the testator being made or acknowledged G in their presence, unless they see the act."

Then he said (*ibid.*, 36): ". . . they must see the act done in order to attest it." Quoting from a judgment of PATTESON, J., in *Burdett* v. *Spilsbury*, *Skynner* v. *Spilsbury* (2) (10 Cl. & Fin. 394), dealing with a signature to a power under the Statute of Frauds, DR. LUSHINGTON said (*ibid.*, 37):

> "'Now the fair meaning of the previous words, "in the presence of three H or more credible witnesses" must be, that three or more credible persons should see what is done'."

Finally, in giving the reasons why he held that in that particular case there had been no proper execution, he said (*ibid.*, 40):

> "Lastly: because the witnesses never saw, or indeed could see the signature, of which there was no acknowledgment unless constructive."

Throughout his observations in that case DR. LUSHINGTON emphasised the necessity for seeing.

That case was followed in *In the Goods of Gunstan, Blake* v. *Blake* (3), in which SIR GEORGE JESSEL, M.R., said (7 P.D. 107) :

> "The question, then, arises whether the testatrix acknowledged her signature before the witnesses. What is in law a sufficient acknowledgment A under the statute ? What I take to be the law is correctly laid down in JARMAN ON WILLS, 4th ed., p. 108, in the following terms : 'There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will' ; and I may add, in my opinion, it is not sufficient even if the testator were to say, 'My signature B is inside the paper,' unless the witnesses were able to see the signature. There is a great deal of authority on this point, several cases are referred to in the note to the passage which I have read, but I think it is sufficient to mention three cases only. The first is *Hudson* v. *Parker* (1), where the matter is most elaborately discussed by DR. LUSHINGTON. He tells us what in his view is the plain meaning of acknowledging a signature in the presence C of witnesses ; he says, 'What do the words import but this ? "Here is my name written, I acknowledge that name so written to have been written by me ; bear witness." How is it possible that the witnesses should swear that any signature was acknowledged unless they saw it ?' "

BRETT, L.J., said (*ibid.*, 113) :

> D "When you find that in order to make the signature sufficient the witness must see the person sign, so when a signature is to be acknowledged they must see that there is a signature, and the testator must then in their presence say something equivalent to 'That is my signature' so that if they do not have the opportunity of seeing the signature, even if he say before them, 'My signature is in this instrument,' that will not do. That I take to be the decision of *Hudson* v. *Parker* (1).

E HOLKER, L.J., said (*ibid.*, 116) :

> "It is clear that good sense requires that the acknowledgment to which the witnesses are to bear testimony should be an acknowledgment of the signature seen or capable of being seen by the witnesses. Although the words of the statute are 'such witnesses shall attest the will' and not F 'the signature,' it seems to me that it comes to the same thing, for when the document is properly signed or acknowledged in the presence of the witnesses, it becomes a will. So to my mind, to bear testimony to a will is the same thing as to bear testimony to the signature."

All these Lords Justices seem to me to attach importance to the fact of a G signature being seen. It is argued by counsel for the respondent that those are cases of acknowledgment of a signature and that they differ from cases of a signing of a signature, but I see no logical reason to distinguish between those two things. Counsel also relies on *Newton* v. *Clarke* (4), but that case has not a direct bearing on this point, and, like the cases I have cited, it is useful only by inference. It is clear, I think, from *Hudson* v. *Parker* (1), that DR. LUSHINGTON did not wholly agree with the decision in *Newton & Thomas* v. *Clarke* (4), H and, so far as one is drawing inferences from the cases, I think that inferences drawn from *Hudson* v. *Parker* (1) are more cogent than those derived from *Newton & Thomas* v. *Clarke* (4).

In *Brown* v. *Skirrow* (5) the headnote reads :

> "Where a testatrix signed her will in a shop, and one witness, who saw her sign, attested it, but the other witness being at the time when the testatrix and first witness signed engaged at the other side of the shop

> with a person who stood between him and the testatrix, did not see them sign and did not know nor have the opportunity of knowing anything about what they had been engaged upon until after they had signed, when he was asked to be a witness. *Held*, That the testatrix did not sign 'in the presence' of the second witness."

So far as that case bears on the problem before me it tells against the validity of this codicil. It is interesting that in that case GORELL BARNES, J., during A
the argument propounded the question whether a blind person could witness a will, but unfortunately he did not give the answer to it.

After considering all the cases that have been cited to me, and getting as much advantage as I can from any of them, I think that when one of the witnesses is blind the will has not been signed "in his presence," and he is not able to attest it. B
In the particular circumstances of this case (if I am wrong in thinking that a blind man is always unable to witness a will), the circumstances are not such as to make it possible to say that the blind man was a witness and that the signing of the will was done "in his presence." The codicil was, therefore, not made in accordance with the provisions of the Wills Act, and I pronounce against it.

Order accordingly. C

Solicitors: *Stafford Clark & Co.*, agents for *Ironside & Co.*, Leicester (for the applicant); *Wigan & Co.*, agents for *F. C. White*, Leicester (for the respondent).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

D

SEABROOK ESTATE CO., LTD. *v.* FORD.

[KING'S BENCH DIVISION (Hallett, J.), May 17, 1949.]

Attachment of Debt—"Debt owing or accruing"—Money in hands of receiver for debenture holder—Debenture holders and preferential creditors not yet paid—R.S.C., Ord. 45, *r.* 1. E

On Jan. 1, 1948, a debenture holder of a limited company appointed a receiver and manager of the premises charged by the debentures. The receiver filed returns of receipts and payments for two periods of six months ending on June 30, 1948, and Dec. 31, 1948, respectively, showing F
a balance in his hands of £891 1*s.* 4*d.*, out of which he expected to have to pay £425 to debenture holders, the costs and legal charges of the receivership (which were at present only estimated items) and a preferential claim for income tax. On Feb. 22, 1949, the receivership not having been terminated, a judgment creditor of the company served on the receiver an order *nisi* for the attachment of £559 13*s.*, or part of that sum, out G
of the amount in the hands of the receiver, as a debt due by the receiver to the company.

HELD: a receiver for debenture holders is not a debtor to the company from time to time of the amount which might ultimately prove to be the balance in his hands after payment of preferential claims and of the principal and interest due to debenture holders; on Feb. 22, 1949, there H
was no debt *in praesenti*; and, therefore, on that date there was no debt owing or accruing to the company from the receiver, within the meaning of R.S.C., Ord. 45, r. 1, and the order *nisi* must be discharged.

[AS TO DEBT OWING OR ACCRUING, see HALSBURY, Hailsham Edn., Vol. 14, p. 108, para. 172, and FOR CASES, see DIGEST, Vol. 21, pp. 624-627, Nos. *2105-2120*.]

Cases referred to :

(1) *Webb* v. *Stenton*, (1883), 11 Q.B.D. 518 ; 52 L.J.Q.B. 584 ; *sub nom.*, *Re Hatton*, 49 L.T. 432 ; 21 Digest 625, *2107*.

(2) *O'Driscoll* v. *Manchester Insurance Committee*, [1915] 3 K.B. 499; 85 L.J.K.B. 83 ; 113 L.T. 683 ; 79 J.P. 553 ; *affg.*, [1915] 1 K.B. 811 ; *sub nom.*, *O'Driscoll* v. *Sweeny* (*Manchester Insurance Committee*,
A *Garnishees*) 84 L.J.K.B. 734 ; 112 L.T. 594 ; 21 Digest 634, *2156*.

(3) *Re Cowans' Estate*, (1880), 14 Ch.D. 638 ; 49 L.J.Ch. 402 ; 42 L.T. 866 ; 21 Digest 618, *2057*.

TRIAL OF AN ISSUE between judgment creditors and a proposed garnishee.

Seabrook Estate Co., Ltd., the judgment creditors of the Hythe Golf Club Co., Ltd., obtained, under R.S.C., Ord. 45, r. 1, an order *nisi* for the attach-
B ment of debts due to the club company from one R. S. Ford, the receiver and manager of premises charged under debentures of the club company who had been appointed by a debenture holder. An order was made for the trial of an issue under R.S.C., Ord. 45, r. 4, the judgment creditors, as the intended garnishors, to be the plaintiffs in the issue, and the receiver, as the intended garnishee, to be the defendant. The issue was whether on Feb. 22, 1949, the
C date on which the order *nisi* was served on the receiver by the judgment creditors, the receiver was a debtor of the club company. HALLETT, J., held that there was no existing debt on that date and discharged the order *nisi*. The facts appear in the judgment.

Monier-Williams for the judgment creditors.

Mattar for the receiver.

D **HALLETT, J.** : This is the trial of an issue between judgment creditors and a garnishee and the question which has to be tried has been pleaded as follows :

> "The above named plaintiffs affirm and the said defendant Reginald Severne Ford denies that the sum of £559 13*s.* or part thereof was at the
> E time the said order *nisi* was served due from the said defendant to the said Hythe Golf Club Co., Ltd."

The order *nisi* was served on Feb. 22, 1949.

The point is a nice one and, although counsel on both sides have done their best to help their arguments with authority, I do not feel that any of the cases cited to me are of any real assistance. In order that a sum can be attached
F there must be an actual debt existing at the time the order is sought, though the debt need not be then payable. There has been a good deal of discussion and authority about the words " debts owing or accruing " [in R.S.C., Ord. 45, r. 1], but I think that the position is reasonably clear having regard to the judgments of the Court of Appeal in *Webb* v. *Stenton* (1). It is now well settled that a sum of money may properly be the subject of a garnishee order although
G the time for payment of it is in the future—*solvendum in futuro*—provided that it constitutes *debitum in praesenti*, *viz.*, a sum of money the obligation to pay which is in existence at the date when the garnishee order is sought.

The facts in the present case are not in dispute. The Hythe Golf Club Co., Ltd., the judgment debtors, have been in a state of suspended animation for some time. On Nov. 3, 1922, they created some 40 debentures of £25 each
H and in respect of those debentures they now owe the sum of £300 and some interest. On Jan. 1, 1948, one of the registered debenture holders appointed Mr. Ford, the garnishee, as receiver and manager of the premises charged by the debentures. It was the duty of Mr. Ford, as receiver and manager, to collect and realise the assets, to pay out of the sums realised the preferential claims laid down by the relevant provisions of the Companies Act, 1929, to pay the debenture holders their principal and interest, and, having then discharged his duties as receiver and manager to the debenture holders, to

terminate his receivership, no doubt paying over to the company, or to their liquidator if they had been wound up, the ultimate balance remaining in his hands. On Feb. 22, 1949, he had not arrived at that stage. He had filed with the appropriate authority the two returns required by s. 310 of the Companies Act, 1929, *i.e.*, a return showing his receipts and payments for the first six months of his receivership, *viz.*, up to June 30, 1948, and a return showing his receipts and payments for the second six months of his receivership, *viz.*, up to Dec. 31, 1948, and it is common ground that at the material date, Feb. 22, 1949, the financial position was that shown by those two accounts. There was a balance in the hands of the receiver of £891 1*s.* 4*d.*, but it does not follow that that sum was owing by the receiver to the company.

On the contrary, it is plain from a perusal of these accounts that nothing had yet been paid in respect of either capital or interest due to the debenture holders. The payments which had been made do not appear to include certain other payments which might well be due to preferential creditors. Since the date of those two accounts, the receiver seems to have provided the prospective garnishors with some further information about the payments he anticipates he will have to make. He anticipates that he will have to pay debenture holders £425, that he will be entitled to certain costs in respect of his receivership, that certain legal charges in connection with his receivership will have to be defrayed, and that there will be a preferential claim for income tax. The document at which I am looking was furnished by the receiver in the course of these proceedings and is a mere estimate of what, at the time of drawing it up, he considered he would have to pay before he brought his receivership to an end. It is said by the judgment creditors that, if those anticipations are realised exactly, there will remain, when the receivership comes to an end, a sum of roughly £240 which will be payable to the company and which could, therefore, be the subject of a garnishee order. What, however, the judgment creditors have to establish is that on Feb. 22 there was a debt owing by the receiver to the company.

Counsel for the judgment creditors relies on *O'Driscoll* v. *Manchester Insurance Committee* (2) where an issue was tried by Rowlatt, J., whose decision was subsequently affirmed by the Court of Appeal. In that case, Dr. Sweeny, the judgment debtor, was a panel doctor who had done work under his agreement with the insurance committee. The committee had received funds with which to pay the panel doctors under contract to them and were indebted to Dr. Sweeny in respect of his work although the exact amount of their indebtedness would have to be calculated, their liability to pay the doctors being limited by the amount which they received from the National Insurance Commissioners. Rowlatt, J., held that the fact that a calculation would be necessary to ascertain the exact sum payable to the doctor did not prevent a garnishee order being made, and that the plaintiffs, the judgment creditors, were entitled to an order attaching all debts due and accruing to Dr. Sweeny up to Apr. 9, 1914 (the date of the garnishee order *nisi*) in respect of services rendered by him under the National Insurance Act, 1911. The case was referred by Rowlatt, J., to the master to ascertain what the amount of these sums was. *O'Driscoll's* case (2) is an authority, which is binding on me, for the proposition that, where a debt is established *in praesenti*, it is not sufficient objection to say that the exact amount of the debt will be the subject of a calculation which has not yet been made and, it may be, cannot yet be made. In the Court of Appeal Bankes, L.J., said ([1915] 3 K.B. 516) :

> " The matter is well put in the Annual Practice, 1915, p. 808 : ' But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is

an attachable debt, in the latter case there is not.' If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not show that there is no debt."

In *Re Cowans' Estate* (3), which was reviewed in *Webb* v. *Stenton* (1), the receiver in an administration action had been ordered by the court to pay A to a legatee a certain sum quarterly out of moneys in or coming to his hands and judgment creditors of the legatee sought to attach that sum. There was careful and technical argument whether a receiver who had been ordered by the court to make such payments could be treated as a person owing a debt, and the court decided that he could. I cannot, however, find anything in that case which assists me in the present matter.

B The question I have to ask myself on the facts of this case is whether, although its payment might be deferred and its amount might not have been calculated and might, at that time, be incapable of calculation, there was, on Feb. 22, any existing debt from the receiver to the company. In my view, there was not. In my view, it is not correct to say that a receiver for debenture holders is a debtor to the company from time to time of such sum as may ultimately C prove to be the balance in his hand after payment of preferential claims and after the discharge of whatever may be due to debenture holders in respect of principal and interest. A time may come when the receiver for the debenture holders will become the debtor to the company, but I do not think that that time had arrived on Feb. 22, 1949. For these reasons, I hold that at the material date there was no debt owing or accruing from the receiver to the company D within the meaning of R.S.C., Ord. 45, r. 1, and, accordingly, the order *nisi* must be discharged.

Order nisi discharged with costs.

Solicitors: *G. F. Hudson, Matthews & Co.*, agents for *Frederic Hall & Co.*, Folkestone (for the judgment creditor); *Whittington, Son & Barham* (for the receiver).

E [*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

F

RIDER *v.* METROPOLITAN WATER BOARD.

[KING'S BENCH DIVISION (Devlin, J.), March 29, 30, 31, April 1, May 19, 1949.]

Waterworks—Repairs in highway—Obligation to reinstate pavement—Work of reinstatement taken over by highway authority—Damage due to negligent G *reinstatement—Liability of undertaker—Waterworks Clauses Act,* 1847 (*c.* 17), *s.* 32—*Metropolis Management Act,* 1855 (*c.* 120), *s.* 114.

By the Waterworks Clauses Act, 1847, s. 32: "When the undertakers open or break up the road or pavement of any street . . . they shall with all convenient speed complete the work for which the same shall be broken up, and fill in the ground, and reinstate and make good the H road or pavement . . . so opened or broken up . . . and shall, after replacing and making good the road or pavement which shall have been so broken up, keep the same in good repair for three months thereafter, and such further time, if any, not being more than twelve months in the whole, as the soil so broken up shall continue to subside." By the Metropolis Management Act, 1855, s. 114: " . . . whenever the permanent surface or soil of any street is broken up or opened, it shall be lawful for the vestry or district board of the parish or district in which the same is situate, in case they think it expedient so to do, to fill in the ground and to make good the pavement or surface or soil so broken up or opened . . . instead of permitting such work to be done by the company or person by whom such surface or soil is broken up or opened ; and the expenses of filling in such ground, and of making good the pavement or soil so broken up or opened, shall be repaid, on demand, to the vestry or board by such company or person."

On July 8, 1944, the Metropolitan Water Board, acting under their statutory powers, broke up the surface of the pavement outside the plaintiff's house to carry out repairs to a stop-cock. After the repairs were completed, they refilled a hole two feet square and eighteen inches deep which they had excavated round the box and put on a temporary surface, leaving the renewal of the paving to be done by the highway authority to whom they sent a notice, pursuant to s. 30 of the Act of 1847, informing them that the surface of the public way had been disturbed and stating that immediate reinstatement was required. For many years previously the work of reinstatement had been done by the highway authority and, in answer to an inquiry by the Board in 1934 whether the work was done under contract or under s. 114 of the Act of 1855, the authority had replied that it was done under s. 114, and, on Oct. 16, 1934, the authority passed a resolution that the reinstatement of highways broken up by statutory undertakers having rights to open highways be carried out by the authority under s. 114 of the Act of 1855. In August, 1944, the highway authority renewed the surface of the pavement round the stop-cock box, but, as a result of their negligence in the laying of the topping, it disintegrated and the lid of the box projected above the surface of the pavement. On a foggy evening in December, 1946, the plaintiff tripped over the lid and was injured. In an action by the plaintiff against the Board for damages for negligence, the Board contended (*a*) that their duty under s. 32 of the Act of 1847 was only to make the pavement good and keep it in good repair for three months ; (*b*) that they were absolved from liability under s. 32 because the highway authority, in reinstating the surface of the pavement, had been acting under s. 114 of the Act of 1855. The plaintiff contended (*a*) that the Board's notice to the highway authority constituted an invitation to the authority to do the work at the Board's expense, and, accordingly, in undertaking the work, the authority were acting under a contract with the Board and not under s. 114 ; (*b*) that under s. 114 the Board were absolved from liability only where the whole of the work was done by the highway authority.

HELD : (i) the topping was never properly laid, and, therefore, there was a breach of the obligation to make good the pavement under s. 32 of the Act of 1847, and whether or not the topping disintegrated before the expiry of three months was immaterial.

Withington v. *Bolton Borough Council* ([1937] 3 All E.R. 108), *applied.*

(ii) on the facts of the case, the highway authority, in reinstating the surface of the pavement, were acting, not under a contract with the Board, but under s. 114 of the Act of 1855.

(iii) the obligation of the Board under s. 32 of the Act of 1847 was qualified by s. 114 of the Act of 1855, and the Board were absolved from liability where the work of reinstatement had been taken over by the highway authority.

Cressy v. *South Metropolitan Gas Co.* (1906) (94 L.T. 790), *followed.*

(iv) filling in the excavation and reinstating the pavement were two separate operations, and were referred to separately in ss. 32 and 114, and, therefore, the Board were absolved from their liability under s. 32 of the Act of 1847, even though they themselves performed the first operation and the highway authority undertook, under s. 114 of the Act of 1855, only the reinstatement of the pavement.

[FOR THE WATERWORKS CLAUSES ACT, 1847, s. 32, see HALSBURY'S STATUTES, Vol. 20, p. 197 ; and FOR THE METROPOLIS MANAGEMENT ACT, 1855, s. 114, see *ibid.*, Vol. 11, p. 913.]

Cases referred to :

(1) *Withington* v. *Bolton Borough Council*, [1937] 3 All E.R. 108 ; Digest Supp.

(2) *Cressy* v. *South Metropolitan Gas Co.*, (1906), 94 L.T. 790 ; 70 J.P. 405 ; 25 Digest 483, *78*.

(3) *Brame* v. *Commercial Gas Co.*, [1914] 3 K.B. 1181 ; 84 L.J.K.B. 570 ; *sub nom.*, *Braine* v. *Commercial Gas Co.*, 111 L.T. 1099 ; 79 J.P. 55 ; 25 Digest 491, *117*.

ACTION for damages for negligence.

In December, 1946, the plaintiff suffered injuries as a result of tripping over the lid of a stop-cock box which projected above the surface of the pavement. Two years earlier the defendants, the Metropolitan Water Board, after repairing the box, had filled in a hole which they had excavated round it, but the renewal of the paving was done by the highway authority, Wandsworth Borough Council. DEVLIN, J., found that the projection of the lid of the stop-cock box was due to the negligence of the highway authority in executing the work of reinstating the surface of the pavement, and he held that the highway authority, in doing this work, were acting under the Metropolis Management Act, 1855, s. 114, and not under a contract with the defendants, and, therefore, the defendants were not liable for the negligence. The facts appear in the judgment.

Humfrey Edmunds for the plaintiff.

Roy Wilson and *John Wilcox* for the Metropolitan Water Board.

Cur. adv. vult.

May 19. **DEVLIN, J.,** read the following judgment. On July 8, 1944, the defendants, the Metropolitan Water Board, executed some alterations or repairs to a stop-cock box outside the plaintiff's house, No. 16, Montserrat Road, Putney. For this purpose they broke the tarred surface of the pavement around the box and excavated a hole two feet square by eighteen inches deep. After completion of the work of repair the hole was re-filled and consolidated by pounding and the surface was made good temporarily by laying gravel to a depth of four inches, it being intended to leave the renewal of the paving to the Wandsworth Borough Council who are the appropriate highway authority. The work was actually done by a firm of contractors called J. B. Edwards & Co., Ltd., employed by the Board, but it was supervised by two servants of the Board. Two days later, on July 10, 1944, the Board sent a notice to the Wandsworth Borough Council informing them that the surface of the public way had been disturbed and that it required immediate reinstating. In opening and breaking up the highway the Board were acting under powers contained in the Waterworks Clauses Act, 1847, an Act which, it is agreed, is incorporated in the special Act applicable to the Board. In serving the notice to which I have referred the Board were, at any rate as to the first part which gives notice of the fact of disturbance, acting under s. 30 of the Act. This section ordinarily requires the Board to give notice of opening or breaking up not less than three days before they begin the work, but it also provides that in cases of emergency the notice may be given as soon as possible after the beginning of the work. This was, apparently, treated both by the Board and by the council as a case of emergency, a term which was rather loosely interpreted in the conditions of 1944. As to the part of the notice which says that immediate reinstatement is required, this has been the subject of a dispute which I shall deal with hereafter. On Aug. 15, 1944, the council did the work of renewing the surface. The temporary surface of gravel was removed. The earth below was pounded and on it a tar bottom was laid, about 2½ to three inches thick. Then a topping of finer material was laid ; this was about half an inch thick and it was finished so that it was level with the top of the box lid. At about 5.30 p.m. on Dec. 29, 1946, the plaintiff, returning to his house on a very foggy night, tripped over the lid of the box and sustained injuries as a result of which he has brought this action. An inspection of the pavement made shortly after the accident showed that almost the whole of the topping had disappeared and that the lid projected from half an inch to seven-eighths of an inch above the surrounding pavement. The projection of seven-eighths of an inch was on the side from which the plaintiff approached at the time of the accident. I am satisfied that in this condition the lid constituted a danger on the highway. This was the view expressed at the time by the Board's foreman, Mr. Blunt, and by the council's inspector, Mr. Fogg, and I see no reason to differ from it.

The action is brought in negligence, as it must be, because the work was done pursuant to statutory authority. The complaint is in effect that the Board neglected the duty imposed on them by s. 32 of the Act of 1847 of making good the pavement which they had broken up. Counsel for the Board has admitted that they are liable for the negligence, if any, of their contractors, J. B. Edwards & Co., Ltd., and has also admitted, subject to a defence based on the Metropolis Management Act, 1855, s. 114, that the Board are liable for the negligence, if any, of the council. Before me the plaintiff has contended that the work was done negligently in two respects. In the first place it is said that the soil filled in by J. B. Edwards & Co., Ltd., was not properly consolidated, with the result that by 1946 it had subsided, and that this subsidence was, at any rate, one of the causes of the exposure of the box lid. The second head of negligence relied on is the failure to lay the topping properly with the result that by 1946 it had disintegrated. [HIS LORDSHIP reviewed the evidence, found that there was no negligence in the consolidation of the soil, but that there was negligence in the laying of the topping, and continued :] As the result of this negligence, the lid was exposed in such a manner as to render it a danger on the highway.

Before I consider the defence under the Metropolis Management Act, 1855, s. 114, I shall dispose of two other minor defences. The first is an allegation of contributory negligence and of *volenti non fit injuria*. I think it is settled that the latter principle does not apply in a case of obstruction on the highway such as this. The authorities are collected in CLERK AND LINDSELL ON TORTS, 10th ed., p. 58. As to contributory negligence, it is true that the plaintiff knew of the exposed lid for some considerable time before the accident and that it was situated right opposite the centre of the entrance to his house, but in the ordinary way he did not come into contact with it, for he usually approached the entrance not from immediately opposite but from one side or the other. On the day of the accident there was a dense fog, which had caused him to find his way down Montserrat Road on the opposite side and then to turn and walk straight across. Usually the box, even at night, was rendered visible by street lighting, but on this day the fog concealed it. I am not satisfied that the plaintiff was guilty of contributory negligence on this occasion. The second defence is that the Board's duty under s. 32 of the Waterworks Clauses Act, 1847, is not to make a permanent repair but to make good and keep in good repair for three months, and that the disintegration of the topping does not amount to a breach of this obligation. I need not inquire whether the topping disintegrated before the expiry of three months, because I think that the inference I should draw from the evidence is that the topping was never properly laid at all and, accordingly, that there was a breach of the obligation to make good. On this point I follow the reasoning in *Withington* v. *Bolton Borough Council* (1).

I turn now to the defence under s. 114 of the Metropolis Management Act, 1855. This section empowers the council in a case of this kind to do the work themselves, and, to use the words of the section :

> " . . . in case they think it expedient so to do, to fill in the ground and to make good the pavement . . . instead of permitting such work to be done by the company or person by whom such surface or soil is broken up or opened ; and the expenses of filling in such ground, and of making good the pavement or soil so broken up or opened, shall be repaid . . . by such company or person."

The Board contend that in August, 1944, the council were acting under this power, and, therefore, that, on the authority of *Cressy* v. *South Metropolitan Gas Co.* (2) and *Brame* v. *Commercial Gas Co.* (3), the Board are absolved from all liability under s. 32 of the Act of 1847 in respect of all the work done to the soil and pavement around the stop-cock. I regard the reasoning of these two decisions in the Divisional Court as binding on me, and I think that this reasoning establishes that the obligation under s. 32 of the Act of 1847 is qualified by s. 114 of the Act of 1855 and is to be read as if it were subject to the proviso " unless the local authority step in and do the work." *Brame* v. *Commercial Gas Co.* (3) makes it clear that this proviso is not satisfied unless and until the work is actually taken over by the council.

Counsel for the plaintiff makes two answers to this defence. The first is that the council were not, in fact, acting under s. 114 at all. The notice of July 10 informed the council that the pavement required immediate reinstating. This, it is argued, was an invitation to the council to do the work at the expense of the Board, the invitation was accepted by conduct, and as a result an ordinary contract came into being. I find that work of this sort has been done by the council for many years past. There is some evidence that in 1913 and 1914 it was being done under contract, but in 1933 and 1934, on the question being raised by the Board, the town clerk replied that the practice adopted by the council with regard to reinstatement of trenches was in pursuance of s. 114. The Board raised the point that this practice ought to be sanctioned by a resolution of the council, and, consequently, on Oct. 16, 1934, the council resolved that until further order the reinstatement of highways broken up or opened by statutory undertakers or public authorities having rights to open highways be carried out by the council in pursuance of the powers contained in s. 114. I cannot doubt that this resolution was communicated to the Board, and I think it shows that, at least from that time onwards, there was no intention on the part of either side to make any contract for the execution of work of this type. There was in force at the material time a schedule of charges agreed between the parties for work done by the council, but this is not inconsistent with the work being done under s. 114, for it is not unnatural that, when the section was so frequently in operation, the parties should agree on the amount of the expenses which could be recovered by the council thereunder. I hold that this answer is bad.

Since the only negligence I have found lies in the laying of the topping and since that work was actually done by the council, it would appear to follow that the Board are exonerated, but counsel for the plaintiff contends, and this is his second answer to the defence based on the section, that s. 114 applies to relieve the Board only if the whole of the work is done by the council. In the phrase " instead of permitting such work," the words " such work," he says, refer to the joint work of filling in the ground and making good the pavement, and the words " instead of permitting " imply a power to prevent. The council did not fill in the ground and, therefore, the Board were not prevented from doing the whole of the work, but only a part of it. I accept the view that the filling in was done by the Board's contractors and that it was done not, as was argued on behalf of the Board, as a temporary measure for which the council must ultimately assume responsibility, but as permanent work. The evidence shows that the council were concerned only with the reinstatement of the surface. In the notice of July 10 they were not informed of the depth of the excavation. Their work consisted of removing the temporary surface of the gravel and beneath it they expected to find a firm base on which to lay their permanent surface. The responsibility for creating that firm base belonged to the Board. The pounding which the employees of the council did was intended primarily to make good any disturbance to the base caused by the work of removing the gravel. There were in practice two separate operations, one of filling in the excavation and the other of reinstating or making good the tar pavement. They are not unified merely by reason of the fact that one is built on the other. Section 114 of the Act of 1855 refers in its natural and ordinary construction to these two operations separately, and so does s. 32 of the Act of 1847. I see no reason why the implied proviso in s. 32 should not apply to the second operation which the council actually did. Accordingly, I hold that this defence succeeds. There will be judgment for the Board.

Judgment for the defendants with costs.

Solicitors: *Hewitt, Woollacott & Chown* (for the plaintiff); *H. R. McDowell* (for the Metropolitan Water Board).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

WILLIAMS *v.* SHARPE AND OTHERS.

[Court of Appeal (Lord Greene, M.R., Somervell and Evershed, L.JJ.), December 7, 8, 9, 1948, March 3, 4, 7, May 11, 12, 27, 1949.]

Compulsory Purchase—Mines—Coal mine—Acquisition of interest—Compensation—Disposal as between beneficial interests under settlement—Coal Act, 1938 (*c.* 52), *sched.* III, *pt.* IV, *para.* 21 (2).

Costs—Compensation—Coal mine—Acquisition of interest—Application to court to determine manner in which compensation to be held and disposed of—Coal Act, 1938 (*c.* 52), *sched.* III, *pt.* IV, *para.* 22 (1).

Compensation under the Coal Act, 1938, ss. 6 and 7, became payable in respect of certain coal holdings which were subject to the trusts of a settlement, and this application was made to the court for directions as to the disposal thereof under para. 21 of sched. III to the Act as between the beneficial interests. The plaintiff, G., was the tenant for life in possession on whose death there was a limitation to his first and every other son in tail male according to seniority. In default of a son of G., who had no son at the date of the application, M. was presumptive life tenant in remainder, on whose death the funds devolved in tail male on M.'s sons, I. and C., in order of seniority. The life tenant was not impeachable for waste. G. argued that the amount of the compensation payable represented the aggregate of the values as at the vesting date (July 1, 1942) placed by the valuation board on the estimated royalty income which might have been expected to have been received from each holding during the period of its estimated life. To dispose of the compensation, therefore, it was said that it should be divided into a number of sums each equal to the value as at the vesting date placed on a corresponding estimated annual royalty. Each sum should then be accumulated until the date on which the annual payment which it represented would have fallen to be made, and its capital and accumulation should then be divided between income and capital according to the Settled Land Act, 1925, s. 47, *i.e.*, in this case in the proportion of three to one respectively. It was argued for the remainderman that the proper method of disposal was that expounded in *Re Leeds* (*Duke*), ([1947] 2 All E.R. 200).

A HELD : (i) the scheme adopted in *Re Leeds* (*Duke*) was in accordance with para. 21, but that propounded by G. was not because it did not give to the beneficiaries "the like benefit . . . as they might lawfully have had" inasmuch as the amount which a life tenant would receive was unaffected by the fact that future income from coal royalties was discounted at a higher percentage than that earned by money in trustee B securities, whereas G.'s scheme caused the earlier life tenants to benefit by that fact.

(ii) the effect of proviso (ii) to para. 21 (2) was that (*a*) where the Settled Land Act, 1925, s. 47, would apply to cause the setting aside of a proportion of the abated royalty equivalent as capital, the proper proportion (in this case one-quarter) must be set aside, but the amount so set aside C must be limited to the amount of the capital supplement in that year ; (*b*) the tenant for life must be given the income of the compensation during any period notwithstanding that the holding was not estimated to produce any income during that period ; and (*c*) in a case where no estimate could be made of the date of working of a holding, the trustee must distribute the income.

D *Re Leeds* (*Duke*) ([1947] 2 All E.R. 200) and *Re Blandy-Jenkins* ([1948] 1 All E.R. 582), *approved*.

It was argued by the National Coal Board that it was only liable under para. 22 (1) for costs of the application at first instance and there was no power to order it to pay the costs of the appeal.

HELD : (i) the costs of the appeal were costs incurred in connection E with an application and were reasonably incurred within the paragraph, and, therefore, they should be paid by the National Coal Board.

(ii) "costs reasonably incurred" within the meaning of the paragraph were the costs of all parties as between party and party.

[AS TO METHOD OF DISTRIBUTION OF COMPENSATION ON COMPULSORY PURCHASE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 153, 154, para. 174 ; F and FOR CASES, see DIGEST, Vol. 11, pp. 247, 248, Nos. *1464-1503*.]

Cases referred to :

(1) *Re Leeds* (*Duke*), [1947] 2 All E.R. 200 ; [1947] Ch. 525 ; [1947] L.J.R. 1141 ; 177 L.T. 503 ; 2nd Digest Supp.

(2) *Re Blandy-Jenkins*, [1948] 1 All E.R. 582 ; [1948] Ch. 322 ; [1948] G L.J.R. 1315.

APPEAL by the plaintiff, the tenant for life in possession, from an order of JENKINS, J., dated June 11, 1948.

The plaintiff made an application on an originating summons to JENKINS, J., for directions as to the disposal of compensation payable under the Coal Act, 1938, ss. 6 and 7, in respect of the acquisition of interests in coal and coal H mines which were subject to the trusts of a settlement. In effect, the application was an attempt to secure the approval of the court of a scheme of disposal under para. 21 (2) of sched. III to the Act which was essentially different from that approved in *Re Leeds* (*Duke*) ([1947] 2 All E.R. 200) and *Re Blandy-Jenkins* ([1948] 1 All E.R. 582). JENKINS, J., while regarding himself bound by the principle of the earlier decisions, considered the scheme on its merits and rejected it. The Court of Appeal now also rejected the scheme and indicated that it considered that the scheme adopted in the earlier cases was in accordance with the provisions of para. 21 (2). The relevant facts are summarised in the headnote.

Bowen, K.C., and *Lindner* for the plaintiff, the tenant for life in possession.
H. A. Rose for the trustees of the settlement, representing unborn children.
Sir Andrew Clark, K.C., and *Dunbar* for the tenant for life in remainder.
Dunbar for persons expectantly interested in tail male.
Bonner for the National Coal Board. A

Cur. adv. vult.

May 27. **EVERSHED, L.J.**, read the following judgment of the court (written by **SOMERVELL, L.J.**). The plaintiff in the present proceedings, being tenant for life under a settlement which comprised coal holdings compulsorily acquired under the Coal Act, 1938, took out an originating summons for the determination of the question how the compensation received under B that Act should be disposed of by the trustees under para. 21 of sched. III to the Act.

The construction and effect of that paragraph had been considered by the learned judge from whose decision this appeal is brought in two previous cases, *Re Duke of Leeds* (1) and *Re Blandy-Jenkins* (2). All interested parties were represented and such provisions of the settlement as are relevant are set out C in the learned judge's judgment and need not be repeated. Counsel for the life tenant submitted to the learned judge a method of disposing of the compensation money radically different from that adopted by the learned judge in the *Duke of Leeds* case (1). The learned judge, while regarding himself bound by his previous decisions in respect of any matter of principle involved in those decisions, considered the argument on its merits and rejected it. D The same, or substantially the same, submission was made by counsel for the life tenant to this court which was, of course, free to consider the earlier decisions of Jenkins, J. In addition to what we may call the main submission, other questions arose, which we will consider and deal with later.

Under the Coal Act, 1938, the fee simple in all coal and mines of coal was vested in the Coal Commission as from July 1, 1942, the vesting date. The E compensation for the holding was to be a sum representing the value in the open market, arrived at in the following way. The Act, in s. 6 (3), provided that a sum of £66,450,000 should be the aggregate amount payable in respect of the coal hereditaments acquired. This, as is known, was arrived at on the basis, as settled by an arbitration, of 15 years' purchase of the average total royalty income. Under s. 6 (4) a central valuation board was to allocate this F sum among valuation regions covering the whole country. Individual holdings were then to be valued in the different regions on an open market basis. These individual valuations, if their total was more than the regional allocation, were adjusted down ; if less, as here, they were adjusted up, so that the regional allocation, no more and no less, was to be distributed to the owners. Claims had to be made in a prescribed form to which we refer later. The valuations G were to be made by regional valuation boards with a right of appeal to a referee. That is the scheme in broad outline. It is unnecessary to deal with it in greater detail as it is fully set out in the judgment of Jenkins, J., in the *Duke of Leeds* case (1).

We are concerned with para. 21 of sched. III to the Act which deals with the disposal of compensation as between beneficial interests in cases where H the holdings acquired were subject to a settlement. This paragraph is on lines similar to the Lands Clauses Consolidation Act, 1845, s. 74, and the Settled Land Act, 1925, s. 79. Apart from such statutory provisions money received on the sale of a wasting asset would become capital of the settlement. The present paragraph, like the sections referred to, is designed to give to the trustees a discretion to deal with the money so that the rights of tenants for life in successive years and the rights of remaindermen, *inter se*, in the compensation money shall bear as near as may be the same ratio to each other as if the asset had not been sold. Paragraph 21 (1) and (2) of sched. III is as follows :

> "(1) The compensation for a holding when paid by the Commission to the person entitled to receive it from them, including any sum paid on account thereof under para. 19 or 20 of this schedule, and the income A thereof, shall, in order to its being applied as compensation to the persons whose interests are comprised in the holding, be held and disposed of for the benefit of those persons, or their personal representatives or assigns, in accordance with the succeeding provisions of this paragraph. (2) In the case of a holding that consists of or comprises an estate or other interest subject to a settlement within the meaning of the Settled Land Act, 1925, B or to a trust for sale the proceeds whereof are subject to a settlement by way of succession, the trustees of the settlement or any court having jurisdiction in relation to the execution of the trusts of the settlement, and in the case of the court on the application of any beneficiary under the settlement, may require and cause the compensation, or the part thereof attributable to that estate or other interest, as the case may be, to be C laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the beneficiaries under the settlement the like benefit therefrom as they might lawfully have had from that estate or other interest, or as near thereto as may be, regard being had to the terms of the settlement and to all relevant circumstances affecting the premises in which the holding D subsisted, including :—(*a*) the terms of any subsisting coal-mining lease and the operation of any provision therein contained as to undergettings, short workings, and other like matters ; (*b*) the period within which coal being worked might have been expected to be worked out or coal not being worked might have been expected to come into working and to be worked out ; and (*c*) the extent to which, having regard to those circumstances, E the premises ought to be regarded as property of a wasting character."

To understand the arguments it is necessary to set out the nature of the evidence before the court on which the learned judge's scheme and that of counsel for the tenant for life operate. Under the Coal (Valuation Procedure) Rules, 1938 (S.R. & O., 1938, No. 1592), coal owners had to submit estimates of the value of their various holdings on forms scheduled to the Order. It is F unnecessary to go into detail, but estimates of output and royalty income in future years had to be made and submitted covering the whole estimated life of the mine. The claims as so made out in respect of the present holdings went before the regional valuation board and in two cases there was an appeal to the referee. There were in some cases reductions, and we have an explanatory note from Mr. Lynch Blosse, mining engineer and adviser to the trustees and G the plaintiff, who attended the proceedings on their behalf. It is sufficient to say that in some cases with absolute accuracy and in others with substantial accuracy the court has before it the figures of estimated income for each year of the estimated lives of the different holdings on which the board or the referee based the amount of compensation awarded.

We will briefly illustrate the procedure by one or two examples. Those who H prepared the claim for one of the holdings, G.M. 740, estimated, for reasons that are given, nine successive variations in income over 100 years, the estimated life of the mine. For example, a substantial drop in output was estimated in 1952 on the partial exhaustion of the five seams. In 2020 the existing lease expired. The board accepted the nine periods and made some, though not large, reductions in the figures submitted. For example, the average royalty figure under the existing lease was taken in the claim at 8*d*. The board reduced this to 7.648*d*. When the lease had to be renewed in 2020 the board forecast a reduction of royalty rate to 6*d*. Before considering the method by which the compensation figure is calculated, those figures, as accepted by the board, represent, as it seems to us, evidence of the "benefit" which beneficiaries in successive years might "lawfully have had" from this holding, assuming there was no question of setting aside as capital a proportion of the royalty income. If a proportion had to be set aside this would have to be taken into account. In arriving at the figure to be paid as compensation these annual sums were discounted back to the vesting date at varying percentage rates. For example, the "certain rents" were discounted back over the 100 years at rates varying from 6 per cent. to 8 per cent., the surplus income at rates varying from 8 per cent. to 10 per cent. It will be seen that this whole method differs from the method of arriving at a purchase price by taking so many years' purchase of an estimated future income. The estimated variations in future years, the varying dates at which current leases expired, might anyhow have made such a method difficult to apply. It also seems a reasonable surmise that the method laid down was adopted in order to assist trustees in carrying out the task imposed on them by para. 21 of sched. III to the Act. There was no evidence how the discounting percentages were arrived at. It seems again a reasonable surmise that they were worked out so as to produce in the case of an average royalty holding a figure in the neighbourhood of fifteen years' purchase of the average income which was the basis of the global figure.

The results of these percentage reductions were shown in exhibits H.L.B.1 and H.L.B.2 in respect, not of individual holdings, but of the totals of the various holdings. The settlement being one in which one-quarter of the royalty income had to be set aside as capital money, the totals for each year are so divided between capital and income. The discounted value of an income sum of £19,666 for 1960 is £4,922, of an income sum of £10,805 for 2042 is £115. The sum of these figures so discounted represented the compensation. The difference between the learned judge's method and that submitted by counsel for the life tenant can be most easily stated by considering a case in which none of the royalty income has to be set aside as capital. We will assume such a case in which the whole life of the mine is covered by an existing lease with uniform terms and that on the evidence there was no ground for assuming any reduction of output. On this basis the estimate of income from the first to the last year will be the same, say £10,000. The learned judge, "assuming that the compensation moneys not distributed at any given moment will earn three per cent. (less income tax), would direct the trustees to distribute the available funds so that the same sum would be available in each year from the first to the last. There would be a uniform abatement of the estimated royalty income throughout the period" of the estimated life of the mine. In the case we have assumed, where no part of the income has to be set aside, the fund would then be exhausted. In other words, the compensation money has wasted as the mine was expected to waste. The sum available in each year is, of course, substantially less than the estimated royalty income, but on the learned judge's method the sum is the same sum in each year. Counsel's scheme can be illustrated by taking two years, say 1960 and 2000. In arriving at the compensation figure the £10,000 estimated royalty income for 1960 will have been discounted back to the vesting date at, say, about 7 per cent., and the figure for the year 2000 at about 9 per cent. We take approximate figures from the documents before us. These discounted figures for all the successive years of the life of the mine can be ascertained, their total making up the figure of compensation. Each of them on counsel's scheme is notionally segregated and invested. When the year for which a particular figure was estimated arrives the investments so earmarked are realised and distributed with the interest they have in fact earned. The tenant for life in 1960 will get the then value of the investments made with £10,000 discounted at 7 per cent. back to the vesting date, with actual accumulations from that date. The tenant for life in 2000 will get the value of the investments made with £10,000 discounted back at 9 per cent. with accumulations. It will at once be seen that under this system life tenants in the early years get a larger proportion of the estimated royalty income than life tenants in later years. Some figures were worked out in the course of the argument showing that in 1943 a life A tenant would get over two-thirds of the estimated royalty income, in 1964 about one-third, and in 1984 about one-sixth.

We agree with the learned judge that his method is, and counsel's is not, in accordance with the provisions of para. 21. The beneficiaries are to obtain "the like benefit . . . as they might lawfully have had" from the holding. One thing seems to us perfectly clear. In any given year the output of coal B on which the return to a tenant for life will depend is unaffected by the fact that, in arriving at an open market price for coal, future income from a source such as coal royalties is discounted at a far higher percentage than that earned by money in trustee securities, but in counsel's division of the compensation money the early life tenant benefits by this fact. It, therefore, as it seems to us, is not having regard to the benefit which would have been received if C there had been no sale, but is having regard to the amount of the purchase price referable to each successive year's estimated return. This is a wholly different conception, which words could easily have been found to express. We think the provision that regard is to be had to the period within which coal might have been expected to be worked out also supports the learned judge's view. If, as here, there is uncontradicted evidence that certain annual D sums may be anticipated over a period on the footing that the compulsory purchase had not taken place, then, to repeat the learned judge's language, "the sub-paragraph quite clearly points to a uniform abatement of the estimated royalty income throughout the period."

We would also record our agreement with the learned judge's view, as expressed in the *Duke of Leeds* case (1), that to decide otherwise would be E inconsistent with the decisions to which he refers on similar words in earlier enactments. We have nothing we wish to add on what is said about those decisions. The learned judge, in rejecting counsel's scheme, relied in part on the proviso (ii) of para. 21. It seems to us that the argument fails before that proviso is reached.

We will now deal with the other issues which do depend on the construction F of proviso (ii). We have described the first step in the learned judge's scheme by which the total compensation fund consisting of capital and assumed interest is spread over the life of the mine so as to secure a uniform abatement of estimated royalty income. How is regard to be had to a provision that a proportion of the royalty income arising in each year would have had to be set aside as capital ? *Prima facie* one would set aside the required fraction of G the sum allocated to each successive year. The two provisos on which the argument turns are as follows :

> "(i) where a payment on account of the compensation for the holding has been made under para. 19 of this schedule before the vesting date, the net income accruing to the trustees before the vesting date from the investment of the sum paid, up to an amount sufficient to make good to H the capital of the settlement the interest on that sum brought into account under para. 19 of this schedule against the capital of the compensation, shall be set aside as capital of the settlement ; (ii) subject as aforesaid no part of the income of the compensation shall be required or caused by virtue of this sub-paragraph to be set aside as capital of the settlement."

The purpose of proviso (i) is clear. Paragraph 19 (3) provides that a payment on account before the vesting date with interest at three per cent. less income tax up to that date is to be treated in account as a payment on account of the capital of the compensation. Proviso (i) follows logically on this provision. In considering the effect of proviso (ii) there are three cases: (1) when there is existing royalty income at the vesting date; (2) when the mine is not in working at that date, but is estimated to come into working at a certain year in the future; (3) where the coal is not in working and it is impossible to estimate a date, the coal being valued on an acreage basis.

A The learned judge expressed his opinion on proviso (ii) in the *Duke of Leeds* case (1) and also in *Re Blandy-Jenkins* (2). I will read a passage from the former case ([1947] 2 All E.R. 212):

> "If a proportion of the royalty income derived from the holding in any year, had it remained subject to the settlement instead of being compulsorily acquired, would, in view of the Settled Land Act, 1925, s. 47, B have been liable to be set aside as capital money arising under the settlement, the like proportion (in this case one-fourth) of the abated royalty equivalent for the same year must be similarly set aside, but, in view of the prohibition against the capitalisation of income contained in the proviso to para. 21 (2) (which I regard as exempting the income of the compensation from accumulation except in so far as there may be an obligation to C accumulate by virtue of the actual limitations of the settlement itself in any particular case), not exceeding the amount, if any, of the capital supplement for that year. Any amounts so set aside and the future income thereof will, thenceforth, cease to be subject to the special provisions applicable to the capital and income respectively of the compensation."

In the course of the hearing we felt some doubt as to the scope and effect of D this proviso, particularly in the case of a mine estimated to come into working at a future date. The hearing was, therefore, adjourned in order that these matters should be fully argued. Counsel for the trustees submitted, first, that the learned judge, in coming to the conclusion as set out in the paragraph read, was misconstruing the words "subject as aforesaid." The learned judge, as is clear from other passages, read them as referring and referring only to E proviso (i). Counsel submitted that they referred to the whole of the sub-paragraph. This does not seem to us a possible construction. The wording of the proviso itself shows, we think, that it is intended to prohibit something which might have been proper or thought to have been proper under the sub-paragraph apart from the proviso. On this point counsel for the tenant for life in remainder referred us to the summary of his argument in *Re Blandy-F Jenkins* (2) as set out by JENKINS, J. ([1948] 1 All E.R. 589). That represented the argument that he desired to put before us in this case. The learned judge accepted that argument and we agree with his conclusion.

We have so far been assuming a mine in working at the vesting date. We will now consider a mine estimated to come to working at a certain year in the future. There is a "dead" period. It may be said that interest accumulated G over the dead period is not set aside finally and irrevocably as the capital of the settlement. The argument can be well illustrated by a holding B.C.10 in the present case. The coal was expected to come into working in 1958 and to be exhausted by 1968. Any income, therefore, accumulated up to 1958 would be distributed, subject possibly to retention of one-quarter by 1968. The accumulations as such would be set aside finally as capital of the settle-H ment. In certain contexts the words being considered might be construed as not covering accumulations during the "dead" years for the reason indicated above. On the other hand, the words "setting aside as capital of the settlement" are clearly capable of covering an accumulation in the dead period irrespective of whether the "capital" so accumulated may subsequently in whole or in part be distributed in annual payments to tenants for life. The same words occur at the end of proviso (i). There, as it seems to us, they are plainly used to cover what is accumulated irrespective of whether it may be in whole or in part distributed annually after the vesting date to tenants for life. The words in proviso (i) are applicable although the mine may be expected to be worked out in three years, and there may have been no proportion of royalty income to be set aside. The words cannot be limited under proviso (ii) in a way which plainly cannot apply to the same words in proviso (i). We agree with the learned judge that the effect of the proviso is to give the tenant A for life the income of the compensation fund over the dead period. When the estimated period of working arrives, the ordinary scheme will apply. In a case where no estimate can be made of the date of working, the trustees must clearly distribute the income. There is only one very small sum of this kind in this case, and no point has been taken with regard to it. It is unnecessary, therefore, to consider what other problems, if any, might be B raised with regard to sums of this kind. In the *Duke of Leeds* case (1) JENKINS, J., said that the method he adopted was not necessarily the only possible method of giving effect to the paragraph. This may be so. The question in the present appeal is whether the order of the learned judge is in accordance with the paragraph. In our view, it is, and we would, therefore, dismiss the appeal.

C [There was then argument as to costs.]

LORD GREENE, M.R. : We are all of opinion that this is a case where the court has jurisdiction to order the National Coal Board to pay these costs. The argument of counsel for the Coal Board was to the effect that the application to the Court of Appeal was not requisite because the matter had been decided D by the trial judge, that all that was requisite was to take out a summons in the Chancery Division and to carry it as far as the court of first instance, and that after that there was no power to charge costs on the National Coal Board. In my opinion, that is much too narrow a reading of the provisions of para. 22 (1) of sched. III. The relevant words are :

> "... costs reasonably incurred ... in connection with ... any
> E application to the court that may be requisite."

Leaving aside for the moment that there were other decisions of the court, namely, of JENKINS, J., already in existence, an application to the court was clearly requisite. The argument of counsel for the Coal Board would mean that the costs of an appeal against the decision on that application would not be the costs "in connection with" the application. I cannot read the words of F the legislature in that narrow sense. The object clearly was to leave the recipient of the compensation in such a position that he would get his compensation free of the expense of ascertaining what he was to get. The legislature, in my opinion, must have realised that any application to the court might be appealed and that any costs incurred in connection with such an application would include costs of an appeal provided one requisite is there. The overriding provision, which G is the safeguard of the Coal Board against frivolous appeals or anything of that kind, is the provision that the costs must have been reasonably incurred. If the incurring of costs of an appeal is an incurring of costs in connection with an application to the court, which I think it is, the question then is whether on the facts of each individual case the costs of such an appeal were reasonably incurred. The language of the schedule dealing with the distribution of compensation leaves H a considerable latitude of discretion, and JENKINS, J., said more than once, and I am sure he was right in so saying, that it does not follow that one method is the only method of dealing with a given situation. That being so, the question here was whether a different method from that adopted by JENKINS, J., in the previous cases was within the four corners of the Act. That seems to me to be a fair matter for an application notwithstanding the decisions of JENKINS, J. JENKINS, J., is the only judge who has had to deal with these very complicated and very difficult provisions of this Act. It is not like a case where you have decisions of six judges of first instance all deciding independently of one another. It is a case where one judge, following what he had already done before in two cases, has come to a decision. It is clear to my mind that if one went back to the first of those decisions the costs of an appellant in such a case would have been costs in connection with the application to Jenkins, J., and it would have been reasonable for the appellant to carry the matter of this very complicated Act at any rate as far as the Court of Appeal. Having regard to the fact that the only decision is a decision of a judge of first instance and that the matter is one of very great complication and one which, in my opinion, it was fair and reasonable to litigate as far as the Court of Appeal, I come to the conclusion that the costs here have been reasonably incurred in connection with an application to the court which was requisite. In my opinion, the Coal Board ought to pay all the costs of this appeal.

SOMERVELL, L.J. : I agree.

EVERSHED, L.J. : I agree.

[There followed discussion as to the scale of costs to be ordered.]

LORD GREENE, M.R. : We all take the view that the costs reasonably incurred within the meaning of the paragraph are the costs of all parties as between party and party. The trustees can take the difference between that and solicitor and client costs out of the estate.

Appeal dismissed ; party and party costs of all parties to be paid by the National Coal Board.

Solicitors : *Ashurst, Morris Crisp & Co.* (for the plaintiff); *Pennington & Son* (for the trustees and remaindermen) ; *Solicitor, National Coal Board.*

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

CASEY *v.* CASEY.

[Court of Appeal (Bucknill, Somervell and Cohen, L.JJ.), April 29, May 23, 1949.]

Conflict of Laws—Jurisdiction of court—Nullity—Non-consummation—Wilful refusal—Respondent domiciled and resident in Canada—Marriage in England.

Nullity—Jurisdiction—Domicil -Marriage in England—Petitioner domiciled and resident in England at time of marriage and resident in England when petition presented—Husband domiciled and resident in Canada.

In 1943 the parties were married in England, the wife then being domiciled and resident in England. The husband was a member of the Canadian forces and his domicil and residence were Canadian. The only periods spent by the parties together in England were the night of the marriage, seven days a few weeks later, and two hours in April, 1945. In June, 1945, the husband returned to Canada, and in May, 1946, the wife joined him, but he told her that he was no longer in love with her and after some two and a half months the wife returned to England. The marriage was never consummated owing to the husband's wilful refusal. In a suit brought by the wife for a decree of nullity on the ground that the marriage had not been consummated owing to the wilful refusal of the husband to consummate it, the husband did not enter an appearance nor take any part in the proceedings. No evidence was given whether, by Canadian law, the marriage was void or voidable on the ground of wilful refusal. The question was whether an English court had jurisdiction to entertain the suit.

Held : (i) although certain Canadian cases indicated that a marriage annulled on the ground of impotence was, according to Canadian law, void *ab initio*, there was no evidence to show that Canadian law would regard those cases as applying today to a case of nullity on the ground of wilful refusal to consummate, and, accordingly, in the absence of evidence, the court was bound to regard Canadian law as being the same as English law, with the result that the marriage in the present case was voidable only and not void, and the wife's domicil followed that of the husband until the marriage was annulled.

(ii) the marriage being voidable and the husband being domiciled abroad, the fact that the marriage was celebrated in England was not sufficient to found jurisdiction in the suit.

De Reneville v. *De Reneville* ([1948] 1 All E.R. 56), *applied.*

[As to Voidable Marriages, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640, 641, para. 937, and Supplement ; and for Cases, see DIGEST, Vol. 27, pp. 265, 266, Nos. *2326-2338*, and Supplements.

As to Jurisdiction of English Courts in Nullity Suits, see HALSBURY, Hailsham Edn., Vol. 6, p. 303, para. 357, and Supplement ; and for Cases, see DIGEST, Vol. 11, p. 428, Nos. *924-926*, and Supplements.]

Cases referred to :

(1) *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56 ; [1948] P. 100 ; [1948] L.J.R. 1761.

(2) *Simonin* v. *Mallac*, (1860), 2 Sw. & Tr. 67 ; 29 L.J.P.M. & A. 97 ; 2 L.T. 327 ; 11 Digest 428, *924*.

(3) *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator*, [1927] A.C. 641 ; 96 L.J.P.C. 105 ; 137 L.T. 571 ; Digest Supp.

* (4) *Sottomayer* v. *De Barros*, (1877), 3 P.D. 1 ; 47 L.J.P. 23 ; 37 L.T. 415.

(5) *Galene* v. *Galene* (*otherwise Galice*), [1939] 2 All E.R. 148 ; [1939] P. 237 ; 108 L.J.P. 82 ; Digest Supp.

(6) *De Massa* (*otherwise Horveno*) v. *De Massa*, [1939] 2 All E.R. 150, *n.* ; Digest Supp.

(7) *Ogden* v. *Ogden*, [1908] P. 46 ; 77 L.J.P. 34 ; 97 L.T. 827 ; 11 Digest 334, *228*.

(8) *Linke* (*otherwise Van Aerde*) v. *Van Aerde*, (1894), 10 T.L.R. 426 ; 11 Digest 428, *925*.

(9) *Inverclyde* (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29 ; 100 L.J.P. 16 ; 144 L.T. 212 ; 95 J.P. 73 ; Digest Supp.

(10) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517 ; 64 L.J.P.C. 97 ; 72 L.T. 873 ; 11 Digest 422, *885*.

(11) *G.* v. *G.*, (1928), 22 Sask. L.R. 376.

(12) *Brook* v. *Brook*, (1861), 9 H.L. Cas. 193 ; 4 L.T. 93 ; 25 J.P. 259 ; 11 Digest 414, *806*.

(13) *Reid* v. *Francis*, (1929), 4 D.L.R. 311.

(14) *Niboyet* v. *Niboyet*, (1878), 4 P.D. 1 ; 48 L.J.P. 1 ; 39 L.T. 486 ; 43 J.P. 140 ; 11 Digest 423, *894*.

(15) *Mitford* v. *Mitford & von Kuhlmann*, [1923] P. 130 ; 92 L.J.P. 90 ; 129 L.T. 153 ; Digest Supp.

(16) *White* v. *White*, [1937] 1 All E.R. 708 ; [1937] P. 111 ; 106 L.J.P. 49 ; 156 L.T. 422 ; Digest Supp.

(17) *Cooper* v. *Crane*, [1891] P. 369 ; 61 L.J.P. 35 ; 27 Digest 37, *134*.

(18) *Hussein* (*otherwise Blitz*) v. *Hussein*, [1938] 2 All E.R. 344 ; [1938] P. 159 ; 107 L.J.P. 105 ; Digest Supp.

(19) *Hutter* v. *Hutter* (*otherwise Perry*), [1944] 2 All E.R. 368 ; [1944] P. 95 ; 113 L.J.P. 78 ; 171 L.T. 241 ; 2nd Digest Supp.

Appeal by the wife from a judgment of His Honour Judge Earengey, sitting as a commissioner in divorce, whereby he dismissed the petition of

* See Sottomayor v. De Barros (1879) 5 P.D. 94 reversing the decision of the Court of Appeal.

the wife for a decree of nullity on the ground of the husband's wilful refusal to consummate the marriage, the commissioner holding that he had no jurisdiction owing to the Canadian domicil of the husband. The Court of Appeal dismissed the appeal. The facts appear in the judgment of Bucknill, L.J.

Glazebrook for the wife.

The husband did not appear and was not represented.

Cur. adv. vult.

May 23. The following judgments were read.

BUCKNILL, L.J.: This is an appeal from the judgment of His Honour Judge Earengey sitting as a commissioner in divorce whereby he dismissed the petition of the wife for a decree of nullity on the ground that her marriage had not been consummated owing to the wilful refusal of the husband. The petition, dated Feb. 6, 1948, was served on the husband in Canada. He did not enter an appearance and has not taken any part in the proceedings. The petition admitted that at the time when it was filed both wife and husband were domiciled in Canada.

The wife, at the time of her marriage in England on Feb. 27, 1943, was domiciled and resident in England. The husband was a member of the Canadian forces and his domicil and residence were Canadian. The parties slept together on the night of the marriage, but the husband made no effort to consummate the marriage. He rejoined his unit on the following day, but he obtained seven days' leave a few weeks later which he spent with the wife, but again he made no attempt to consummate the marriage. Apart from two hours together in April, 1945, the wife did not see the husband again before his return to Canada in June, 1945. In May, 1946, the wife went to Canada and rejoined the husband, but she found his manner cool and reserved, and shortly afterwards he admitted that he was no longer in love with her and said that in those circumstances it would be wrong for intercourse to take place. After two and a half months together, and after he had said that he had ceased to love her and that this was final, the wife, without any dissent on his part, returned to England and subsequently filed this petition.

On these facts the judge found that the husband had wilfully refused to consummate the marriage, but dismissed the petition because he held that the court had no jurisdiction to grant a decree of nullity. The ground of his decision was that the case was governed by the decision of the Court of Appeal in *De Reneville* v. *De Reneville* (1). In that case an Englishwoman, domiciled and resident in England, was married in Paris to a Frenchman domiciled and resident in France and thereafter lived with him in France. She subsequently returned to England and petitioned for a decree of nullity on the ground of impotence or wilful refusal to consummate the marriage. The Court of Appeal held that: (i) By English law a marriage is voidable and not void on the ground of impotence or wilful refusal to consummate it. If voidable, the marriage must be regarded as having had the effect of giving to the petitioner, as a matter of law, the French domicil of her husband and as precluding her from casting off that domicil before a decree of annulment is actually pronounced. (ii) The question whether the marriage was void or merely voidable was for French law to answer. Lord Greene, M.R., said ([1948] 1 All E.R. 61):

> "The validity of a marriage so far as regards the observance of formalities is a matter for the *lex loci celebrationis*. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion, by the law of France, either because that is the law of the husband's domicil at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicil in reference to which the parties may have been supposed to enter into the bonds of marriage."

(iii) The English court had no jurisdiction to grant a decree of nullity on the ground of impotence or wilful refusal solely on the ground of the wife's residence in England before and at the time of the institution of the suit.

The only material difference between the facts in that case and the present one is that in *De Reneville's* case (1) the celebration of marriage took place in Paris. Counsel for the wife argued that the fact that the marriage was in England gives the court jurisdiction in the present case. He relied in support of his argument on reported cases where the court decided on the validity of a marriage celebrated in this country although the respondent husband was resident and domiciled abroad when the suit was instituted. Thus, in *Simonin* v. *Mallac* (2) the material facts were that a man and woman, both domiciled and resident in France, came over to England for the purpose of being married here. They went through a regular form of marriage in church on June 21, 1854, and two days later returned to Paris. The marriage contravened the law of France regulating the marriage of native-domiciled French subjects contracted in foreign countries. The husband refused to consummate the marriage, and on Dec. 1, 1854, on the petition of the wife the appropriate court in France declared the marriage null and of no legal effect. About four years later, the "wife," who was then residing and domiciled in England, applied to the Divorce Court for a decree of nullity of her marriage. The court dismissed the petition on the ground that the validity of the contract of marriage depended on the law of England as prevailing among English subjects. The decision in this case merely dealt with the question whether the court had jurisdiction to decide on the validity of a contract of marriage made in England. As LORD HALDANE said in *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator* (3) ([1927] A.C. 659), with reference to *Simonin* v. *Mallac* (2) :

> "SIR CRESSWELL CRESSWELL held that as the marriage had been solemnised in England, the parties had contracted with reference to the law of this country as to validity."

In the present case no question arises as to the validity of the contract of marriage so far as forms are concerned. The only question is whether the court has jurisdiction to annul this marriage which, by English law, is not void *ab initio*, but voidable, and, therefore, valid until the decree avoiding it is declared.

In *Sottomayer* v. *De Barros* (4) the petitioner and respondent were first cousins * and Portuguese subjects domiciled in Portugal. They came to reside in England in 1858, and in 1866 went through a regular form of marriage in London. They returned to Portugal in 1873. Their domicil throughout was Portuguese. By the law of Portugal a marriage between first cousins was incestuous and illegal. In 1874 the petitioner filed a petition praying the court to declare the marriage to be null and void. SIR ROBERT PHILLIMORE, who heard the case, dismissed the petition because he felt himself bound by the decision in *Simonin* v. *Mallac* (2). The Court of Appeal reversed this decision and, in the course of his judgment, COTTON, L.J., who gave the judgment of the court, said (3 P.D. 5) :

> "The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted ; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil."

At the conclusion of the judgment COTTON, L.J., said (*ibid.*, 7) :

> "It only remains to consider the case of *Simonin* v. *Mallac* (2). The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country.

* After the decree nisi – and before it was made absolute – the Queen's Proctor intervened to shew cause. Consequently the decision was reversed. See Sottomayer v. De Barros (1879) 5 P. D. 44.

> In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage ; and the decision in *Simonin* v. *Mallac* (2) does not, we think, govern the present case."

I understand that the court was prepared to annul the marriage in *Sottomayer* v. *De Barros* (4), not because the marriage was celebrated in England, but because the domicil and residence of both parties was in Portugal. Cotton, L.J., said (*ibid.*, 6) :

> "It is proved that the courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void, as solemnised between parties incapable of marrying, and incestuous. How can the courts of this country hold the contrary, and, if appealed to, say the marriage is valid ?"

The essential difference, however, between *Sottomayer* v. *De Barros* (4) and the present case is that the marriage in the present case was valid in all respects so far as form and capacity were concerned. It is merely voidable because of the wilful refusal of the husband to consummate it.

Two other cases to which counsel referred were *Galene* v. *Galene* (*otherwise Galice*) (5) and *De Massa* (*otherwise Horveno*) v. *De Massa* (6). In *Galene's* case (5) Henn Collins, J., followed the decision of Lord Merrivale, P., in *De Massa* (*otherwise Horveno*) v. *De Massa* (6) in 1931. The facts in that case were that the petitioner, a Frenchwoman and a minor, went through a form of marriage in London in July, 1927, with a Frenchman. They subsequently lived together in London for three weeks and the petitioner then returned to France and had not seen the respondent since. Three years later a decree of the French court was obtained annulling the English marriage on the ground that the petitioner's father had not given his consent to the marriage as required by French law. When the wife subsequently petitioned for a decree of nullity in the Divorce Court, Lord Merrivale, P., pointed out that the domicil was French and that it was necessarily a matter for a French tribunal. He then said ([1939] 2 All E.R. 150) :

> "A French tribunal of competent jurisdiction has annulled the marriage, and that declaration of nullity has come into operation. All that it is necessary for me to do now, the facts being in due order, is to declare the marriage to have been null and void, citing the judgment of the French tribunal as a judgment between the parties."

Some support for the wife's argument in the present case may be found in the judgment of Sir Gorell Barnes, P., in *Ogden* v. *Ogden* (7), where he said ([1908] P. 80) :

> ". . . it has frequently been held that, although the courts of the domicil of the parties might entertain the question of the validity of their marriage, yet that the courts of the country in which the marriage was celebrated will also entertain a suit to determine the same question : see *Linke* (*otherwise Van Aerde*) v. *Van Aerde* (8). It may possibly be that if a suit were brought for nullity on the ground of impotence, and the facts were established in favour of the petitioner, either in the court of the domicil of the parties or in the court of the country in which the marriage was celebrated, it might be reasonable to hold that such a decree ought to be treated as universally binding . . ."

In *Linke* (*otherwise Van Aerde*) v. *Van Aerde* (8) the wife petitioned for a decree of nullity of her marriage on the ground that the respondent was then a married man. Both husband and wife were foreign, but the marriage was celebrated in England. Gorell Barnes, J., in his judgment, said (10 T.L.R. 426) ;

> "The marriage contract was entered into here, that the principles of dissolution of marriage did not apply to nullity suits, and that in these suits the validity of the ceremony was to be determined according to the law of the place in which it was celebrated. The jurisdiction of this court to deal with the question of the validity of the marriage of the parties to the present suit was therefore clear."

The law, however, draws a distinction between nullity cases based on bigamy and nullity cases based on impotence or wilful refusal to consummate, as the decision in *De Reneville* v. *De Reneville* (1) pointed out. The suggestion of Sir Gorell Barnes, P., in *Ogden* v. *Ogden* (7) was not accepted by Bateson, J., in *Inverclyde* (*otherwise Tripp*) v. *Inverclyde* (9). In that case Bateson, J., held that the court had no jurisdiction to grant a decree of nullity on the ground of impotence in a case where the marriage took place in London, but both husband and wife were domiciled in Scotland. I find, therefore, no clear decision on the point as to the jurisdiction in nullity cases on the ground of wilful refusal to consummate it where the marriage has been celebrated in England, but the respondent husband is domiciled and resident abroad.

It is well established that in a case where the petition is for the dissolution of a marriage the court has no jurisdiction to grant a decree on the ground that the marriage took place in England if the domicil of the husband, and therefore, of the wife, is abroad at the time of the institution of the suit. Such jurisdiction is based exclusively on domicil as decided by the Privy Council in *Le Mesurier* v, *Le Mesurier* (10), and approved by the House of Lords in *Salvesen's* case (3). Why, then, should there be a distinction, on the ground of the place of celebration of marriage, between a petition for dissolution of a valid marriage and a petition to annul a marriage on the ground of wilful refusal to consummate it ? I can see no valid reason for such a distinction. It is not necessary in this case to decide whether there is a difference between the jurisdiction to dissolve and the jurisdiction to annul in that the residence of both parties in England at the time of the institution of the nullity suit may be sufficient to establish jurisdiction, although such residence is insufficient in the case of a valid marriage which is not voidable but dissoluble. That question is undecided, but I see no sufficient reason why the law should declare that the celebration of marriage in England may in itself found jurisdiction in a suit based on wilful refusal to consummate, although it does not do so in a suit for dissolution of marriage. There may be considerable hardship to the petitioner in refusing jurisdiction where both parties are resident within the jurisdiction although domiciled abroad at the time when the suit is instituted, but there is not the same hardship to the petitioner in refusing jurisdiction in a case where the ceremony of marriage took place in England but the respondent is resident and domiciled abroad. In the present case it may be hard on the wife to require her to take proceedings in Canada to obtain a decree of nullity. It is also hard on the husband to require him to defend the suit in England. I think that inasmuch as the wife could have started proceedings in Canada for a decree of nullity when she was there, but elected to leave Canada and return to England, the scales of hardship tip in favour of the husband rather than the wife, so far as the venue is concerned. I may here quote the words of Lord Greene, M.R., in *De Reneville's* case (1) ([1948] 1 All E.R. 63) :

> "That a wife who is resident but, *ex hypothesi*, not domiciled here can compel her husband who is both domiciled and resident abroad to come to this country . . . appears to me to be contrary both to principle and to convenience."

A further point arises, *viz.* : Should the question whether this marriage is void or voidable be decided by English law or Canadian law ? The passage in Lord Greene's judgment in *De Reneville's* case (1), which I have already cited, indicates that the law applicable is the law of Canada, because the husband is domiciled in Canada, and because at the date of the marriage it was the matrimonial domicil in reference to which the parties may have been supposed to enter into the bonds of marriage. I do not think that the fact that the marriage took place in England while the husband was on active service raises an inference that the parties intended to make England their permanent matrimonial domicil. Apart from evidence to the contrary, one assumes that the law of Canada on the question of voidability of marriages is the same as English law, as stated in *De Reneville's* case (1). No evidence as to the appropriate Canadian law on the subject was produced before the trial judge or before the Court of Appeal. The note in Professor Cheshire's work on Private International Law, 3rd ed., p. 449, refers to two cases in Canada in which the court held that it had jurisdiction to annul a marriage by reason of the impotence of a respondent, resident and domiciled abroad, provided the marriage was celebrated within the jurisdiction. The first is *G.* v. *G.* (11), decided by the Court of King's Bench for the province of Saskatchewan in 1928. MacDonald, J., held that the court had jurisdiction to grant a decree of nullity of marriage entered into in Saskatchewan on the ground of the impotence of the wife although the husband plaintiff was domiciled and resident in Alberta and the wife was residing in Manitoba at the time of the commencement of the action. The learned judge founded his judgment, *inter alia*, on the decisions in the following cases :—*Brook* v. *Brook* (12), *Ogden* v. *Ogden* (7), *Linke* v. *Van Aerde* (8), and *Sotomayer* v. *De Barros* (4). The other case is *Reid* v. *Francis* (13) decided by the Saskatchewan Court of Appeal in 1929. In that case the marriage took place in the city of Saskatoon, and the parties lived there four years after the marriage. The defendant husband then left the province and went to live in California, where he was served with the writ of summons. The judgment of Martin, J.A., who delivered the judgment of the court, dealt with the question of jurisdiction as follows (1929) (4 D.L.R. 312) :

> "I do not consider it necessary to determine whether or not the defendant husband was domiciled in Saskatchewan at the time of the issue of the writ (although I am of the opinion that so far as appears in the evidence, he was), because the Court of King's Bench has jurisdiction to entertain a suit for a declaration of nullity of an existing marriage when the marriage was celebrated in Saskatchewan."

In addition to some of the cases referred to in the previous report of *G.* v. *G.* (11), *Simonin* v. *Mallac* (2), *Niboyet* v. *Niboyet* (14) and *Mitford* v. *Mitford* (15), were referred to.

Both these Canadian cases were decided before the English decisions in *Inverclyde* (9) (1931) and *De Reneville* (1) (1948). The cases cited in the Canadian judgments tend to show, in my respectful opinion, that the Canadian courts at that time regarded a nullity suit on the ground of impotence as one in which the marriage was void *ab initio*. It may be argued that these cases show that by Canadian law, at any rate, in 1929, a marriage was void and not merely voidable on the ground of impotence, and, therefore, that the wife in this case had not by Canadian law acquired her husband's domicil, and, therefore, that she, being domiciled and resident in England, was entitled to ask for a declaration of nullity in the English Divorce Court : see *White* v. *White* (16), approved in *De Reneville's* case (1). I am not satisfied from these decisions, however, that the Canadian law, in 1948, so far as nullity proceedings for wilful refusal to consummate are concerned, would not be the same as the decision of the Court of Appeal in *De Reneville's* case (1). This point as to Canadian law was not argued before us.

My opinion in favour of dismissing this appeal is based partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicil of the husband is the sole court in dissolving a valid marriage. It seems to me reasonable that a similar rule should be applied in principle to a marriage which is merely voidable on the ground of wilful refusal to consummate it. There may be an exception to the rule in the case of a
A voidable marriage where both parties are resident in the country where the petition is filed, but I do not see the necessity of making an exception on the ground that the marriage has been celebrated in the country where jurisdiction is invoked. I am in favour of dismissing the appeal.

SOMERVELL, L.J. (read by **COHEN, L.J.**). In *Inverclyde* v. *Inverclyde* (9), BATESON, J., based his decision on the principle that suits for nullity
B in which the marriage is voidable, being similar to suits for dissolution, the only court that has jurisdiction is that of the domicil. It is clear from the judgment in *De Reneville* v. *De Reneville* (1) that this court did not accept that principle. If that had been the basis, the cases in which jurisdiction had been exercised where both parties were resident, though not domiciled, were plainly wrong. LORD GREENE, M.R., however, expressly refrained from coming to
C any conclusion on that point ([1948] 1 All E.R. 63).

We were referred to a number of cases in which the suit for nullity was based on the alleged invalidity of the ceremony. Jurisdiction has in such cases been exercised although the parties were not domiciled here, but the ceremony was performed here: see *Cooper* v. *Crane* (17), *Hussein* (*otherwise Blitz*) v. *Hussein* (18). In the present case, however, it is not suggested that the
D ceremony was invalid. It is clear from *Salvesen* v. *Austrian Property Administrator* (3), that the courts of the country in which the parties are domiciled have jurisdiction to annul a marriage on the ground that the ceremony of marriage was invalid though performed in another country. LORD PHILLIMORE expressed the opinion ([1927] A.C. 671) that the courts of the country of domicil had exclusive jurisdiction. This was *obiter* and has not
E been followed in, for example, *Hussein's* case (18). In *Simonin* v. *Mallac* (2) the parties, being domiciled in France, went through a ceremony of marriage in England, returning thereafter to France. The man obtained a decree of nullity in France owing to the non-observance of conditions precedent required by French law. The woman subsequently came to reside here and petitioned for a decree of nullity. Her petition was refused. It seems clear that today
F the court would, in the absence of fraud or collusion which was not suggested, have accepted the decree of the French court as settling the status of the parties. This does not mean that the court would not have had jurisdiction to entertain the petition. In *De Massa* (*otherwise Horveno*) v. *De Massa* (6), followed in *Galene* v. *Galene* (5), a decree was pronounced here, the ceremony having been performed here, following on and by way of enforcing decrees
G previously pronounced by the courts of the domicil. In both these cases the petitions were based on the invalidity of the ceremony.

In my opinion, these cases do not cover the present issue. It may well be convenient that the courts of the country where a ceremony of marriage has been performed should have jurisdiction to entertain suits where the validity of that ceremony is in issue. Where, however, the ceremony is not attacked,
H a different issue arises and there seems to me no ground in principle for giving jurisdiction to the courts of the country of the ceremony. The present case illustrates the inconvenience. The husband whose status is affected is domiciled and resident in Canada and the events mainly relied on in support of the petition took place in Canada. *De Reneville* v. *De Reneville* (1) decided that in the case of a voidable marriage the fact that the petitioner was, previous to the marriage, domiciled here is not a ground on which jurisdiction can be founded. The mere fact that the ceremony of marriage took place in a certain country does not

seem to me a ground for founding jurisdiction in that country in cases where the matters alleged in the petition do not in any way dispute the validity of the ceremony as affecting a marriage. With regard to *Inverclyde* v. *Inverclyde* (9), Pilcher, J., in *Hutter* v. *Hutter* (19), refused to follow that case where both parties were resident in England at the time of the institution of the suit. That point does not arise here. No doubt there is force in the argument that nullity suits where the marriage is voidable are similar to suits for dissolution. On the other hand, there seems to me considerable reasons of convenience for giving the courts where the respondent or both parties reside jurisdiction in this class of case, and I would desire, so far as this court is concerned, to keep that point open until it arises.

COHEN, L.J. : I have written a judgment in this case, but I have since had an opportunity of reading the judgment which has been delivered by Bucknill, L.J., and I find myself in such complete agreement with it that I will not take up time by giving reasons of my own for agreeing that this appeal fails.

Appeal dismissed with costs.

Solicitors : *Sidney L. Samson* (for the wife).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

LAZARUS-BARLOW *v.* REGENT ESTATES CO., LTD., AND ANOTHER.

[Court of Appeal (Lord Greene, M.R., Somervell and Evershed, L.JJ.), May 10, 11, 30, 1949.]

Rent Restriction—Standard rent—Previous tenancy held to be outside Rent Acts —Whether decision binding on subsequent tenant—Rent and Mortgage Interest Restrictions Act, 1923 (*c.* 32), *s.* 11 (1).

The Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (1), provides : "For the purposes of proviso (i) to sub-s. (2) of s. 12 of the [Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] (which relates to the exclusion of dwelling-houses from the [Act of 1920] in certain circumstances), a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent. Section 11 (1) provides : "The county court shall have power on the application of a landlord or a tenant to determine summarily any questions as to the amount of the . . . standard rent . . . of any dwelling-house to which the principal Act applies . . ."

On Sept. 1, 1939, a flat was let by the first defendants to one K. for three years at a rent of £165 a year. In 1944 the first defendants brought proceedings in the High Court against K. for ejectment, and the court made an order for possession, holding that the value of the services rendered under the lease formed a substantial portion of K.'s rent, and, therefore, that K. was not protected by the Rent Acts. By a lease dated May 11, 1945, the first defendants let the flat to the plaintiff for a term of seven years at a rent of £280 a year. By its terms the first defendants covenanted to provide the same services to the plaintiff as had been rendered to K., but it was now conceded that in view of the decision in *Palser* v. *Grinling* ([1948] 1 All E.R. 1) the value of the services no longer formed a substantial portion of the rent, and, therefore, the premises were not excluded from the protection of the Rent Acts. On June 30, 1948, the reversion expectant on the plaintiff's lease was acquired by the second defendants. On an application by the plaintiff for a determination of the standard rent of the flat it was contended that the decision in K.'s case was one to which the plaintiff was not a party, and, therefore, it was not binding on her; that the decision in K.'s case was wrong; and that the standard rent should be based on the rent at which the flat was first let within the meaning of the Rent Acts, *viz.*, £165 and not £280.

HELD: (i) the fact that the Rent Acts might operate *in rem* did not mean that judgments under the Acts were conclusive against all persons.

(ii) the decision as to K.'s tenancy was *res inter alios acta* and binding only on the parties to those proceedings and their privies, and the present case should, therefore, be remitted to the county court to re-determine whether K.'s tenancy was or was not within the Rent Acts and to fix the standard rent accordingly.

[AS TO JUDGMENTS IN REM, see HALSBURY, Hailsham Edn., Vol. 13, pp. 405-408, paras. 459-462; and FOR CASES, see DIGEST, Vol. 21, pp. 153-156, Nos. *149-190.*]

Cases referred to:

(1) *Regent Estates Co., Ltd.* v. *Kerner*, [1945] *Estates Gazette Digest*, 259.

(2) *Signy* v. *Abbey National Building Society*, [1944] 1 All E.R. 448; [1944] K.B. 449; 113 L.J.K.B. 486; 170 L.T. 238; 2nd Digest Supp.

(3) *Palser* v. *Grinling*, [1948] 1 All E.R. 1; [1948] A.C. 291; [1948] L.J.R. 600; *affmg.*, [1946] 2 All E.R. 287; [1946] K.B. 631; [1947] L.J.R. 97; 175 L.T. 204; 2nd Digest Supp.

(4) *Lloyd* v. *Cook*, *Goudge* v. *Broughton*, *Simson* v. *Miatt*, *Bartram* v. *Brown*, *Barker* v. *Hutson*, [1929] 1 K.B. 103; 97 L.J.K.B. 657; 139 L.T. 452; 92 J.P. 199; Digest Supp.

(5) *King* v. *York*, (1919), 88 L.J.K.B. 839; 31 Digest 555, *7020*.

(6) *Griffiths* v. *Davies*, [1943] 2 All E.R. 209; [1943] K.B. 618; 112 L.J.K.B. 577; 169 L.T. 201; 2nd Digest Supp.

APPEAL by the plaintiff from an order of His Honour JUDGE BENSLEY WELLS, sitting at Marylebone County Court, dated Jan. 21, 1949, determining the standard rent of a flat at £280 a year and disregarding a previous letting at a rent of £165 a year, on the ground that in 1944 the High Court had decided that the first letting was outside the Rent Acts and that that decision was binding on the plaintiff, although not a party to the action. The Court of Appeal now allowed the appeal and remitted the case to the county court to determine the standard rent on the footing that the previous judgment must be disregarded as *res inter alios acta*. The facts appear in the judgment of EVERSHED, L.J.

Beney, K.C., and *Crispin* for the plaintiff.
Lloyd-Jones, K.C., and *Willett* for the first defendants.
Marshall, K.C., *I. H. Jacob* and *Alfred Stone* for the second defendants.

Cur. adv. vult.

May 30. **LORD GREENE, M.R.**: I have read the judgment about to be read by EVERSHED, L.J. I agree with it and only propose to add a word or two of my own. In the course of the argument I was impressed by the suggestion that the legislature might have been expected to provide for the finality of judgments of the county court determining whether a given dwelling-house was one to which the Rent Restrictions Acts applied or what its standard rent should be. It would, no doubt, have been convenient, though the practical inconvenience must not be exaggerated, if a judgment in such a matter, given between competent parties, could have been made binding on the whole world. At one time I was attracted by the argument that the use in certain authorities of such expressions as that the Acts "operate *in rem*" required or justified such an interpretation. On consideration I have come to the conclusion that when the history of these observations is examined they cannot be interpreted to mean that judgments under the Acts operate *in rem*, a quite different conception. If the legislature had intended so radical a departure from the ordinary rule that a judgment *inter partes* which does not fall under one of the known heads of judgments *in rem* is, so far as third persons, not privies, are concerned, *res inter alios acta*, it would have said so. In the present case, moreover, the language of s. 11 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, seems to make it clear that any tenant can apply to the county court for a determination of the amount of the standard rent, a provision which, in my view, is inconsistent with the idea that an applicant would be conclusively bound by a previous decision to which he was no party. There are other difficulties which are referred to by EVERSHED, L.J. The order will be as EVERSHED, L.J., will state.

EVERSHED, L.J. : The judgment I am about to read is the judgment of **SOMERVELL, L.J.**, and myself. These are proceedings by the plaintiff, Miss Lazarus-Barlow, under s. 11 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, to have determined the standard rent of a flat, No. 28, Manor House, Marylebone, of which she is the tenant. Her present landlords are the second defendants who acquired from the first defendants on June 30, 1948, the reversion expectant on the plaintiff's lease. The lease, dated May 11, 1945, was for a term of seven years from Mar. 25, 1945, and the contractual rent was £280 per annum. By its terms the first defendants, in effect, covenanted to provide certain services by way of delivery of coals, removal of refuse, etc. It is unnecessary to refer further to the terms of the lease, for it has been conceded for the purposes of this appeal that the value to the plaintiff at the date of the granting of the lease of these services was, as fixed by the county court judge, not more than £26 per annum, a figure rather less than ten per cent. of the amount of the rent. Since the rateable value of the flat is and was at all material times within the limit set by the Rent Acts, the flat is and was *prima facie* within the ambit of those Acts, and it is also conceded that the proportion which the value of the services previously mentioned bears to the total rent of £280 is not such as to exclude the premises from the Acts. On Sept. 1, 1939, the flat was in the occupation of one Kerner as tenant of the first defendants. Kerner's lease was, for practical purposes, identical with the plaintiff's lease, save that the term was three years and that the rent fixed thereby was £165 per annum instead of £280 per annum, and it is the plaintiff's case in these proceedings that that rent (£165 per annum) constitutes the standard rent of the premises.

In 1944 the first defendants brought proceedings in the High Court for ejectment against Kerner [*Regent Estates Co., Ltd.* v. *Kerner* (1)], and on Dec. 5 of that year they obtained from LORD CALDECOTE, C.J., an order for possession. From the judgment of the learned Chief Justice it is plain that Kerner sought to rely, by way of defence to the claim made against him, on the Rent Acts, and that the first defendants' answer to that defence was that the value of the services rendered by the defendants under the lease to Kerner (which were the same as those which the second defendants are now liable to render to the plaintiff) formed a substantial portion of Kerner's rent : see s. 3 (2) (*b*) of the Rent and Mortgage Interest Restrictions Act, 1939; and s. 10 (1) of the Act of 1923, as amended by sched. I to the Act of 1939. This question was decided by the learned Lord Chief Justice in favour of the first defendants, the material part of his judgment being in the following terms :

> "There are 52 flats and to perform those services, which is admitted to be attendance within the meaning of the Act, it seems to me that a substantial cost was involved. Perhaps I ought not to use the words

'substantial cost' because on this I had not intended to express a view, but if everybody was to have coal brought up and the dust and refuse removed before 9 a.m., I think there must have been a considerable payment expended in employing persons who would carry out those duties. I have to consider whether that considerable expenditure is a substantial part of the rent. I can only interpret 'substantial part of the rent' as A meaning a real part of the rent and not a mere trifle. 'Substantial' cannot mean half or a quarter or a third or anything of that sort; it means something which can be recognised and ascertained and quantified. I have been given a figure in evidence as to the cost of the services which were rendered, some of which were clearly, as Mr. Green admitted to me, not to be taken into account as attendance provided in consideration of B rent, but although I do not think that anything like £2,000 should be regarded as paid for providing attendance, I am satisfied that these services must have required the employment of men who would be paid £2, £3 or £4 a week, and a proportion of those payments would, of course, be expended in respect of each of those 52 flats."

If this decision was correct, it follows that the lease to Kerner was not a C letting to which the Rent Acts applied, with the result that the flat was not "let" on Sept. 1, 1939, within the meaning of the Rent Acts, for it must be taken that by the word "let" is meant "let pursuant to a letting to which the Acts apply: see *Signy* v. *Abbey National Building Society* (2). It follows, accordingly, since there was no "letting" before Sept. 1, 1939, that the standard rent of the premises has to be determined by reference to the "letting" D since that date, namely, the letting to the plaintiff. In other words, the standard rent on this view will be £280 per annum, and this is the defendants' answer to the plaintiff's claim. The plaintiff, however, by way of premise to her case, says that LORD CALDECOTE's decision, having been made in proceedings to which she was not a party, is not binding on her. She claims further that the decision was wrong, being inconsistent with the recent decision of the E House of Lords in *Palser* v. *Grinling* (3), and that she is entitled in the present proceedings to litigate afresh in the county court the question whether the lease to Kerner was or was not within the ambit of the Rent Acts and to have that question determined in her favour on the ground that in the light of the House of Lords' decision in *Palser* v. *Grinling* (3) the value to Kerner of the services to which he was entitled was not a substantial portion of the rent of F £165. As later appears, the last point is one which, if the premise of the plaintiff's argument is well founded, would have to be remitted to the county court for determination, but if the plaintiff is justified in all her contentions it follows that the standard rent of the premises is £165 per annum instead of £280 per annum, and it follows, consequently, that she would be entitled to have the order against her on the second defendants' counterclaim for G £110 13*s*. 4*d*. set aside and to obtain judgment in respect of overpaid rent against the first and second defendants respectively, for £70 6*s*. 0*d*. and £94 14*s*. 0*d*.

As we have already indicated, the real question which is presented for the determination of this court is that involved in the premise to the plaintiff's argument, namely, whether it is now open to the plaintiff to raise in these H proceedings the character of Kerner's lease or whether, as the defendants say, that matter has been irrevocably determined by the judgment of LORD CALDECOTE, a judgment which was admittedly given by a court of competent jurisdiction in an action *bona fide* litigated between the then landlord and the then tenant, which was not appealed from, and which is not now capable of being appealed from by the tenant or by the present plaintiff who was not a party to the proceedings. The point is a short one, but by no means easy, and, though many cases have been cited to us in argument, no authority has been found which bears directly on it. In his short judgment the county court judge expressed the view that the plaintiff was not precluded from arguing that her own tenancy was a protected tenancy by reason merely of the *Kerner* judgment (1), that is, that it was open to her to argue that the value of the services rendered to her under the lease of 1945 was not a substantial portion of her rent notwithstanding the decision of Lord Caldecote that the value of the identical services rendered to Kerner constituted a substantial portion of his rent of £165 a year. On this point we think the county court judge was clearly right. He proceeded, however, as follows :

> " It is common ground between the parties that on the assumption that the [plaintiff's] tenancy is a protected tenancy . . . the standard rent is the rent at which the property was first let after Sept. 1, 1939 [if] of course, it was not let on that date. It was let on Sept. 1, but the letting . . . was the Kerner letting, and there is ample authority for the proposition that in arriving at the standard rent I must disregard any rent which was in respect of a letting outside the Act. The learned Chief Justice held that the Kerner letting was outside the Act. Therefore, the Kerner rent was one which I am bound to disregard."

It is round the last sentence, " Therefore, the Kerner rent was one which I am bound to disregard," that the whole argument has ranged, for no criticism has been made, or can be made, of the preceding language.

It is clear that the *Kerner* judgment (1) cannot operate to estop the plaintiff *per rem judicatam*, but learned counsel for the defendant companies have contended that, having regard to the policy and general tenor of the Rent Acts, the judgment had the effect of determining at its date the " status " of the flat as outside the scope of the Acts, and, at any rate to that extent, had the quality of a judgment "*in rem*" binding accordingly on all the world, or at least on the plaintiff. The Rent Restriction legislation has, since it was first introduced, given rise to a rich volume of judicial decisions, and judges have from time to time observed it to be a characteristic of the legislation that it operates "*in rem* and not *in personam*." Counsel not unnaturally referred to a number of instances, but they then proceeded to argue that from these authorities it followed, or should follow, that judgments determining the " status " of specific premises, *i.e.*, that they were or were not at a particular date a dwelling-house within the Acts, should be treated as judgments "*in rem*" so as to be binding on all the world or on all persons subsequently interested in the premises, and not only on parties to the decision or their privies.

In our judgment, this argument cannot be accepted. It is not, we find, necessary for the purposes of the present case to attempt to define what is the precise significance of the phrase that has been used, " the Acts operate *in rem*," save to observe that it appears to be used in a somewhat special sense. The term " judgment *in rem* " is one clearly understood to the law and has been defined in Halsbury's Laws of England, Hailsham ed., vol. 13, p. 405, para. 460, as meaning

> " . . . the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation)."

Such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matters actually decided : see Phipson on Evidence, 8th ed., p. 401. The words " the Acts apply *in rem* " have been used, by way perhaps of analogy, to illustrate the point that, given certain facts, the Acts will or may operate not merely in relation to a particular tenancy of some premises and between the parties to that tenancy, but in relation to the premises as such, for example, " by attaching to a dwelling-house a standard rent which applies to the whole house, and, where necessary, also applies by apportionment to every part" : *per* GREER, L.J., in *Lloyd* v. *Cook* (4) ([1929] 1 K.B. 135) ; and see also the earlier case of *King* v. *York* (5) where a Divisional Court held that it was the house itself and not a particular tenant that was protected. Though we have examined carefully all the cases cited to us in argument it is clear that in none of them was the point raised, still less decided, that a determination of the facts essential to and involving the applicability of the Acts to any premises pronounced by a court of competent jurisdiction operated as conclusive evidence for or against persons not parties or privies to the judgment.

The question, however, in the present case is not whether the Acts operate *in rem*, but whether *determinations by the courts* of matters of fact or of mixed law and fact essential to the application, or non-application, of the Acts to particular premises on particular dates operate "*in rem*" in the sense of binding not only parties to the proceedings and their privies, but all other persons who may thereafter be interested in the premises. It is clear that, if judgments of the kind stated have so extensive an effect, the result involves a substantial departure from the ordinary rule. Counsel for the plaintiff was, at least, entitled to say that, in the absence of direct authority, the burden was on his opponents to point to the provisions of the Acts which expressly or by necessary implication lead to so far-reaching a result. We have not seen the order in fact made by the Lord Chief Justice. We assume it to have been an order in common form against Kerner commanding him within a limited time to deliver up possession of the premises in suit to the first defendants. Such an order would not, on the face of it, appear to have any of the qualities of a judgment "*in rem.*" It is, however, said that when regard is had to the reasons given by the Lord Chief Justice for his judgment, it is clear that the order made necessarily involved a determination of the question that at its date the letting to Kerner was not a controlled letting. That is true. The defendants' argument, however, involves, in the first place, the application to judgments in suits relating to premises which at some date (past or future) fall within the embrace of the Rent Acts considerations properly relevant to estoppel by record, that is, that such judgments will have the binding effect claimed as regards any matters relevant to the application of the Acts which were, in fact, raised and determined in the action and also presumably which could and should have been so raised. There is also, in our judgment, considerable difficulty in the way of accurate formulation of the extent and limits of the principle sought to be established. It was conceded by counsel for the second defendants that the judgment relied on would have to be free of any taint of fraud or collusion and to have been pronounced in an action "duly litigated." Where, as in the present case, the qualities of a particular tenancy have been judicially determined in an action between the actual parties to the contract, there is obvious force in the argument that such a decision ought, at least, to carry more weight than a determination of the same question between persons who were not parties to the bargain, and the more so where one of the matters in issue is the value *to the tenant* at the date of the contract of board, attendance or the use of furniture.

If, however, the principle for which the defendant companies contend be admitted, where and how is the line to be drawn ? If there had been no *Kerner* judgment (1) in the present case, would a determination of the character of the Kerner letting and, consequently, of the standard rent made in the present proceedings between the plaintiff and the defendants bind future tenants not deriving title from the plaintiff ? What of a judgment capable of being shown to be based on some manifest error of fact, for example, an erroneous entry in the rate books of a rateable value ? Would a judicial determination that certain premises were not within the Acts made in proceedings between a vendor and purchaser bind future tenants ? Would a judicial determination between a landlord and occupier that the latter was not a tenant but a licensee bind a rating authority? If an affirmative answer is given to the above questions it is obvious that the principle sought to be established is of a very far-reaching character, and the difficulties are formidable of finding in the Acts any language to justify either so extensive a departure from the general rule or, on the other hand, a principle requiring so elaborate a formulation.

In our judgment, it is impossible to find any sufficient justification in the Acts for either of these last mentioned alternatives. As we have already indicated, the proposition that the Acts apply *in rem* does not involve the further proposition that judgment establishing the conditions for the application, or non-application, of the Acts likewise operate *in rem*, nor do we think that any sufficient support can be derived from considering the general "policy" of the Acts. So far, indeed, as policy is concerned, the effect in the present case seems rather to be the other way. du Parcq, L.J., in *Griffiths* v. *Davies* (6) said ([1943] 2 All E.R. 213):

> "The whole scheme of the Act is to prevent a tenant from coming to any agreement or doing anything which shall increase the standard rent . . ."

In that case the tenant had failed in earlier proceedings to take certain points which would have had the effect of reducing the amount recoverable from him by way of arrears of rent, and it was held by this court that it would be contrary to the policy of the Acts and the duty imposed thereby on the courts to treat such failure as operating to estop the same tenant from subsequently applying under s. 11 (1) of the Act of 1923 to have the standard rent truly determined. In the present case, if the argument of the defendant companies prevails, the *Kerner* judgment (1), though wrongly decided (if it was wrongly decided), will for all time prevent any tenant from having the standard rent properly determined. Moreover, the terms of s. 11 (1) itself, under which the present application has been made, seem to us against the contention of the defendant companies. The sub-section, so far as relevant, is as follows:

> "The county court shall have power on the application of a landlord or a tenant to determine summarily any question as to the amount of the . . . standard rent . . . of any dwelling-house to which the principal Act applies . . ."

The terms of the sub-section are perfectly general, and would, in our view, be inapposite if a determination of the standard rent of a dwelling-house once made between a particular landlord and a particular tenant were intended to be conclusive for all time.

Reference may also be made to s. 6 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which provides that, in proceedings for fixing the standard rent of any premises to which the Act applies, if no evidence is available in regard to the rent of those premises at the material date, the court may, for the purposes of those proceedings determine their standard rent by reference to the standard rent of similar premises. The section concludes:

> " . . . as from the date on which any such determination is made under this section the standard rent of the dwelling-house shall, unless the court making the determination otherwise orders, be deemed for all purposes to be of that amount."

The question is not before us whether the words in the section "for all purposes" are intended (in contradistinction to the earlier words in the section "for the purpose of those proceedings") to have the effect that a determination under the section binds persons not parties or privies to the proceedings in which the determination is made, or whether they mean no more than that

the figure arrived at shall, as between the persons bound by the decision according to the ordinary rule of law, be treated as the standard rent for all purposes of the Acts—for example, for the purpose of determining the amount of any permitted increase in the rent or the amount of rent that is legally recoverable. Without, therefore, expressing any opinion on the proper construction of this section it is, in our judgment, sufficient to say that, if a determination under
A the section binds persons other than parties to the original proceedings or their privies, it must do so by virtue of the language at the end of the section to which we have referred ; that no such words occur in s. 11 (1) of the Act of 1923 ; and that in any case s. 6 of the Act of 1933 appears to contemplate a right in a party affected to apply to the court for a review of the earlier decision. It is also, we think, pertinent to bear in mind the circumstances in
B which determinations may have to be made by county courts, not infrequently on applications where one or both parties may be legally unrepresented, and, therefore, at a considerable disadvantage in presenting to the judge the relevant law or facts.

A forceful argument was put to the court based on the inconvenience and hardship which would result if the plaintiff were to succeed, and it is true
C that the advantages of certainty and finality are considerable in cases arising under the Acts where, as often as not, one or both of the parties concerned are persons of slender means. Moreover, in the present case the first defendants fixed the present contractual rent of £280 per annum on the faith of the *Kerner* decision (1), and, no doubt, the purchase price paid by the second defendants for the whole block of flats was in some degree influenced by that
D rent. In our judgment, however, the argument of inconvenience and hardship cannot overcome the difficulties which we have indicated. Nor, after all, is the inconvenience likely to be so very great in practice. A new tenant under a new tenancy would in the normal case be at a great disadvantage if he sought in effect to upset a previous determination duly litigated between the parties to an earlier contract. All the relevant facts would be in the possession of
E the landlord. It is true that a landlord might seek to harass subsequent tenants in an attempt to improve on an earlier decision given against him, but he would be liable to somewhat severe cross-examination on the material of the earlier decision, and in any case he could not presumably harass any one tenant more than once. The present case may work a hardship on the defendant companies if the plaintiff ultimately succeeds, but the hardship is, after all,
F no greater than that suffered by any landlord who fixes a rent on a *bona fide* but mistaken belief as to his rights, and under our system of law a decision by this court or the House of Lords overruling some earlier case at first instance may upset many a calculation based on the latter's authority. In the result, therefore, and for the reasons we have stated, we think this appeal should be allowed, and that the case should be remitted to the county court to deter-
G mine the standard rent on the footing that the *Kerner* judgment (1) must in the present proceedings be regarded as *res inter alios acta.*

We were invited by counsel for the plaintiff, in the event that the plaintiff is entitled to succeed on the main question, to go further and determine here and now the standard rent. Counsel argued that the court was in possession of all the relevant facts, and that in the light of the judgments of the House of
H Lords in *Palser* v. *Grinling* (3), and having regard to the notorious rise in the cost of providing the material services between 1939 and 1944, we ought to hold that the Kerner letting was not excluded from the operation of the Acts and to fix the standard rent accordingly at £165 per annum. We do not think we ought to accede to this argument. The whole matter being, on the view we take, *res integra* between the parties, it is open to either side to raise any question of law or fact which they or she may think proper, and the question is, by the terms of s. 11 (1) of the Act of 1923, one specifically deputed to the

county court. We think, however, it is right that we should make some observations on the Lord Chief Justice's judgment in the *Kerner* case (1). The case was referred to both in this court and in the House of Lords in *Palser* v. *Grinling* (3). In this court Morton, L.J., said in reference to it ([1946] 2 All E.R. 292):

> "The decision in that case may have been justified, having regard to the very wide admission made as to the services which constituted 'attendance'; but Lord Caldecote, C.J., is reported as saying: 'As to the meaning of "a substantial part of the rent," this could only be interpreted as meaning a real part and not a mere trifle. It could not mean half or a quarter or a third or anything of that sort; it meant something which could be recognised and ascertained and quantified.' If these observations are correctly reported, I am unable to agree with them." A B

The House of Lords did not approve the figures by way of percentage which Morton, L.J., had suggested as a guide, but the decision of this court was affirmed. No express reference is to be found in any of the speeches to the *Kerner* judgment (1), but Viscount Simon, however, said this ([1948] 1 All E.R. 11): C

> "It is plain that the phrase [*i.e.*, 'substantial portion'] requires a comparison with the *whole rent*, and the whole rent means the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. 'Substantial' in this connection is not the same as 'not unsubstantial,' *i.e.*, just enough to avoid the *de minimis* principle. One of the primary meanings of the word is equivalent to considerable, solid, or big. It is in this sense that we speak of a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence. Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances in each case, the onus being on the landlord. If the judgment of the Court of Appeal in *Palser's* case (3) were to be understood as fixing percentages as a legal measure, that would be going beyond the powers of the judiciary." D E

We agree with the language of Morton, L.J., in the passage cited above. In our view, the judgment of Lord Caldecote, C.J., cannot be reconciled with the opinion of Lord Simon or with the opinions of the other noble Lords in *Palser* v. *Grinling* (3). The county court judge must, therefore, in the present case apply to the facts as he finds them the principles laid down by the House of Lords in *Palser* v. *Grinling* (3), and he should in the circumstances disregard the observations of Lord Caldecote, C.J., in the *Kerner* case (1). F

Appeal allowed with costs. Case to be remitted to county court. Costs of first and new hearings below to be in the discretion of the judge. G

Solicitors: *Martineau & Reid* (for the plaintiff); *Cooper, Bake, Fettes, Roche & Wade* (for the first defendants); *Stone & Stone* (for the second defendants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

BOWMAN *v.* BOWMAN.

[COURT OF APPEAL (Bucknill and Denning, L.JJ., and Vaisey, J.), May 13, 1949.]

Divorce—Petition within three years of marriage—Exceptional hardship suffered by petitioner—Exceptional depravity on part of respondent—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 1 (1).

A A wife sought leave of the court on the ground of exceptional hardship suffered by her or exceptional depravity on the part of the husband, within the meaning of the Matrimonial Causes Act, 1937, s. 1 (1), to present a petition for divorce although three years had not passed since the date of the marriage. Her affidavit in support of her application contained 23 paragraphs, 21 of which dealt with the alleged depravity of the husband, B and one of which alleged hardship which would be suffered by her by reason of the fact that a material witness was about to leave the United Kingdom so that that witness's evidence would not be available except on commission unless the petition were presented immediately.

HELD : the departure of the material witness from the United Kingdom would not alone be an exceptional hardship suffered by the wife, but, C taking into account the facts alleged as to the conduct of the husband, her affidavit disclosed exceptional hardship suffered by her.

Per DENNING, L.J. : If there is nothing more than adultery with one person within the first three years of marriage that may be considered ordinary depravity. There is, I am sorry to say, nothing exceptional about that situation, and it does not involve exceptional hardship on the D applicant. If, however, the adultery is coupled with other matrimonial offences, *e.g.*, if a husband not only commits adultery, but also deserts his wife in favour of another woman, or if he is cruel to her, thus causing her not only distress by his adultery but also injury by his violence, then, even if his offence cannot be stigmatised as exceptional depravity on his part, nevertheless, it does involve exceptional hardship suffered by the E wife. Even when the adultery is not coupled with desertion or cruelty, it may be committed in such aggravating circumstances as to show exceptional depravity, and, even if the adultery is not coupled with another matrimonial offence, nevertheless, its consequences may involve exceptional hardship to the applicant, as, for instance, when a wife as a result of her adultery has a child by another man so that the husband, F if he took her back, would have to maintain another man's child. The husband who commits adultery within a few weeks of marriage, or who commits adultery promiscuously with more than one woman, or with his wife's sister, or with a servant in the house, may probably be labelled as exceptionally depraved. Cruelty again, by itself, is not exceptional, but, if it is coupled with aggravating circumstances, as, for instance, drunken- G ness and neglect, or if it is exceptionally brutal or dangerous to health, then, even if it does not evidence exceptional depravity on the part of the respondent, it does, at least, cause exceptional hardship to the applicant. If it is coupled with perverted lust, it shows exceptional depravity on the part of the proposed respondent. The really important consideration in all these cases is to see whether there is any chance of H reconciliation. On this point it is most material to inquire what the applicant has already done to try to make the marriage a success or to become reconciled. If the court is not satisfied that all which is reasonable has been done in this respect, it may well dismiss the application.

[AS TO PETITION WITHIN THREE YEARS OF MARRIAGE, see HALSBURY, Hailsham Edn., Supplement, Vol. 10, para. 971.

FOR THE MATRIMONIAL CAUSES ACT, 1937 (*c.* 57), *s.* 1, see HALSBURY'S STATUTES, Vol. 30, p. 336.]

Appeal by the husband from an order of His Honour Judge Norris, sitting as a commissioner in divorce on Apr. 20, 1949, by which he granted, on the grounds of exceptional hardship suffered by the wife, leave to the wife to present a petition for divorce within three years of the marriage. The Court of Appeal now affirmed his decision.

William Phillips for the husband.

Fairweather for the wife.

BUCKNILL, L.J. : Counsel for the husband has contended that it is clear that the commissioner did not grant the wife's application on the ground of exceptional depravity on the part of the husband. One ground on which he appears to have acted was that the wife desired to call to prove the adultery a witness who was about to go abroad early in June, 1949. Once this witness had left the country, it was contended for the wife, it might be impossible to prove the adultery. Of course, it might be possible to take her evidence on commission, and, if that matter had stood alone, I cannot see that it constituted an exceptional hardship suffered by the wife. I think, however, I may assume that the commissioner, in coming to his conclusion, took into consideration the facts alleged as to the conduct of the husband in 21 paragraphs of the wife's affidavit. If they were true, I think it would, indeed, be an exceptional hardship on the wife that this marriage should be kept in being for the three years. There was, for instance, an incident alleged in a motor car and another incident when the husband is alleged to have said to his wife : "If I can get my hands on you I will murder you." This conduct of the husband during the first six weeks of marriage must be material on the issue whether extraordinary hardship was suffered by the wife. There is no reason to think that the commissioner exercised his discretion wrongly and I think the appeal should be dismissed.

DENNING, L.J. : This case raises the question in what circumstances leave ought to be given to a spouse to present a petition for divorce within three years of the marriage. By the Matrimonial Causes Act, 1937, s. 1 (1) that leave can only be granted on the ground of exceptional hardship suffered by the would-be petitioner or of exceptional depravity on the part of the proposed respondent. The answer depends on the use of the word "exceptional." The case put forward by the applicant must disclose "exceptional" depravity on the part of the other spouse or "exceptional" hardship suffered by the applicant. This involves an inquiry into the degree of depravity alleged or the degree of hardship said to be suffered—an inquiry which, it is plain, may prove to be a difficult task, and it is not surprising that different judges have interpreted the provisions of s. 1 (1) in different ways.

The only cases in which the question arises are, of course, those of adultery or of cruelty. If there is nothing more than adultery with one person within the first three years of marriage that may be considered ordinary depravity. There is, I am sorry to say, nothing exceptional about that situation, and it does not involve exceptional hardship on the innocent spouse, the applicant. The distress that it causes is one which many have to endure. If, however, the adultery is coupled with other matrimonial offences, *e.g.*, if a husband not only commits adultery, but also deserts his wife in favour of another woman, or if he is cruel to her, thus causing her not only distress by his adultery but also injury by his violence, then, even if his offence cannot be stigmatised as exceptional depravity on his part, nevertheless, it does involve exceptional hardship suffered by the wife. Even if the adultery is not coupled with another matrimonial offence, nevertheless its consequences may involve exceptional hardship to the applicant, as, for instance, when a wife as a result of her adultery has a child by another man so that the husband, if he took her back, would have to maintain another man's child, or it may be committed in such aggravating circumstances as to show exceptional depravity. The husband who commits adultery within a few weeks of marriage, or who commits adultery promiscuously with more than one woman or with his wife's sister, or with a servant in the house, may probably be labelled as exceptionally depraved. Such, at least, are instances in which, when sitting in chambers, I have given leave to a spouse to present a petition for divorce within three years of marriage.

A Cruelty again, by itself, is, I fear, not exceptional, but, if it is coupled with aggravating circumstances, as, for instance, drunkenness and neglect, or if it is exceptionally brutal or dangerous to health, then, even if it does not evidence exceptional depravity on the part of the respondent, it does, at least, cause exceptional hardship to the applicant. If it is coupled with perverted lust, it shows exceptional depravity on the part of the proposed respondent.

B The really important consideration in all these cases is to see whether there is any chance of reconciliation. On this point it is most material to inquire what the applicant has already done to try to make the marriage a success or to become reconciled. Is the breakdown of the marriage due to any failing or maladjustment on the part of the spouse who applies to launch her petition within three years of the marriage ? Has the applicant consulted a probation officer or anyone else specially qualified to help ? If the court is not satisfied C that all which is reasonable has been done in this respect, it may well dismiss the application. In this case, the wife, in her affidavit in support of her application, charged her husband not only with adultery, but with cruelty and perverted lust. She has consulted a psychiatrist about her husband. There is, it is clear, no chance of reconciliation. The judge has thought it a proper case in which to grant leave to present the petition within three years of the marriage D and I do not see that he has gone wrong in principle. If the wife is lying in her statements as to the grounds of the petition, they will be investigated at the hearing of the petition and the judge will see that she gains no advantage by her lies. The Act gives him ample powers in this respect.

VAISEY, J. : I agree that the appeal be dismissed.

Appeal dismissed.

E Solicitors : *Collyer-Bristow & Co.*, agents for *Band, Hatton & Co.*, Coventry (for the husband) ; *Langhams & Letts*, agents for *Philip Baker & Co.*, Birmingham (for the wife).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Affirmed. C.A. *post*, p. 882.

F

PHILCO RADIO AND TELEVISION CORPORATION OF GREAT BRITAIN, LTD. *v.* J. SPURLING, LTD. AND OTHERS.

[KING'S BENCH DIVISION (Jones, J.), May 16, 17, 1949.]

G *Negligence—Dangerous article—Inflammable material—Delivery by defendants to plaintiffs by mistake—Explosion caused by cigarette of plaintiffs' employee —Liability of defendants.*

H Five packing cases containing dangerously inflammable celluloid film scrap were delivered in error by a carter employed by the defendants to the plaintiffs' premises. No warning of their dangerous contents was given by the carter, by the delivery note, or by labels on the cases, but the plaintiffs' foreman recognised the material as inflammable and dangerous when some of it was taken out of one of the cases. He warned the two workmen in charge of the cases not to smoke near them, instructed them to replace the scrap and remove the cases to the yard, and telephoned to the firm who had sent them and arranged to deliver them to their proper destination 150 yards away. Before the cases were moved a typist employed by the plaintiffs negligently set light to it with a cigarette and it exploded causing serious damage.

Held: the defendants were negligent in not taking proper precautions when dealing with such dangerous material; there had been no negligence by the plaintiffs or their servants apart from the typist; and, as she had not intended to injure her employers' premises or do more than perpetrate a joke, her behaviour was not such a conscious act of volition as to relieve the defendants from liability for their negligence.

Dictum of Lord Dunedin in *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins* ([1909] A.C. 646), *applied.*

[As to Effective Cause of Injury, see HALSBURY, Hailsham Edn., Vol. 23, pp. 590-596, paras. 843-845; and for Cases, see DIGEST, Vol. 36, pp. 24-34, Nos. *118-205.*]

Cases referred to:

(1) *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins*, [1909] A.C. 640; 79 L.J.P.C. 13; 101 L.T. 359; 36 Digest 28, *142.*

(2) *Dixon* v. *Bell*, (1816), 5 M. & S. 198; 1 Stark. 287; 36 Digest 57, *354.*

(3) *Thomas* v. *Winchester*, (1852), 6 N.Y.R. 397.

(4) *Parry* v. *Smith*, (1879), 4 C.P.D. 325; 48 L.J.Q.B. 731; 41 L.T. 93; 43 J.P. 801; 36 Digest 57, *356.*

Action for damages for negligence.

A carter employed by the defendants by mistake delivered five packing cases to the premises of the plaintiffs who were wireless manufacturers. The cases contained highly inflammable and dangerous celluloid film scrap, but no indication of the character of their contents was given by the carter, by label on the cases, or by the delivery note. One of the cases was opened by two of the plaintiffs' employees who took out some of the scrap in the receiving department of the plaintiffs' premises. These employees, who had expected to find wireless parts in the case, did not know what the contents were. The plaintiffs' foreman, however, recognised them as inflammable and dangerous film scrap. He warned the two employees not to smoke in that part of the receiving department and instructed them to put back the scrap taken out, to replace the lid on the case, and to remove the cases to the yard. He then telephoned to the defendants, and, on learning of the proper destination of the cases, which was some 150 yards away, he undertook to deliver them there. In the meantime a typist from the plaintiffs' office with a lighted cigarette negligently set light to the film scrap before it was all replaced in its case and an explosion occurred causing serious damage. The defendants admitted that they knew that the scrap was highly inflammable and dangerous and it was conceded in argument that they had been negligent in delivering the cases to the wrong address. They contended that the proximate cause of the accident was the typist's act, which, they alleged, was deliberate, in applying a lighted cigarette to the material, and that the chain of causation was broken by her conscious act. They relied on contributory negligence and on the maxim *volenti non fit injuria.* Jones, J., found for the plaintiffs.

Glyn-Jones, K.C., and *Ryder Richardson* for the plaintiffs.
Aiken Watson, K.C., and *Colin Duncan* for the defendants.

JONES, J.: The plaintiffs claim in respect of damage which they allege they have sustained by reason of the negligence of the defendants in sending to their (the plaintiffs') premises material which was dangerous, as a result of which there was an explosion at the premises. [His Lordship recited the facts, held that the explosion was the result of the thoughtless act of the typist in setting fire to the material with a cigarette, found that there was no negligence on the part of the plaintiffs or on the part of any of their servants other than the typist, and continued:] So far as *volenti non fit injuria* goes, the argument that that is a good defence is based on the alleged

acceptance by a servant of the plaintiffs of this material by saying that he would deliver it to its proper destination, and it is suggested that, by so saying, he accepted it, that he had no fear of it and was prepared to take any risk of what might happen. I should have thought that what was in this employee's mind was the exact opposite and that he wanted to get rid of it as soon as possible. Therefore I come to the conclusion that there is no substance in the defence
A *volenti non fit injuria.*

There remains the difficult question whether the typist's intervention broke the chain of causation so as to relieve the defendants of liability. Among the cases to which I have been referred is a passage from a judgment of the Privy Council in *Dominion Natural Gas Co., Ltd.* v. *Collins & Perkins* (1), which was delivered by LORD DUNEDIN, who said ([1909] A.C. 646) :

B

> " It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis,* there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident
> C would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (2), *Thomas* v. *Winchester* (3) and *Parry* v. *Smith* (4), are all illustrations of liability enforced. On the
> D other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail. In applying these principles to the facts in hand the basis of consideration must be sought in the findings of the jury, unless it can be said of these findings that they are incapable of support by the evidence."

E

That indicates that in any case the facts are of the utmost importance. I am not in possession of full information as to exactly what happened here, but the inference I draw with regard to this typist is that she had no intention of doing any damage. I cannot conceive that she should have desired to injure the premises of her employers, and that in that sense she was unconscious
F rather than conscious of doing anything that was negligent. I cannot believe that she meant more than to perpetrate a joke. The conclusion I draw is that there cannot have been very much of this material outside the case when she came along and that probably all she meant to do was to make a small and innocuous bonfire of some of the material which she probably took to be ordinary packing. Taking that view of the facts and drawing those conclusions from
G them and from what evidence there is, I hold that this behaviour on her part was not such a conscious act of volition as to relieve the defendants from liability for their admitted negligence. In my view, they should have contemplated the possibility of what in fact happened—that, if they delivered this dangerous, inflammable, and explosive material at the wrong place, it would probably be handled by persons without any knowledge of its character who might easily
H in complete innocence allow it to come in contact with a lighted match or cigarette in view of the fact that smoking is prevalent in workshops and factories except where it is forbidden for reasons of safety or security. In those circumstances, therefore, I come to the conclusion that the defendants are liable, and there will be judgment for the plaintiffs for damages to be assessed.

Judgment for the plaintiffs with costs.

Solicitors : *Gardiner & Co.* (for the plaintiffs) ; *Stafford Clark & Co.* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Affirmed. C.A. *post*, p. 956.

CAPITAL AND NATIONAL TRUST, LIMITED *v.* GOLDER (H.M. INSPECTOR OF TAXES).

[King's Bench Division (Croom-Johnson, J.), May 19, 1949.]

Income Tax—Deduction—Management expenses—Investment company—Expenses of changing investments—Brokerage and stamp duty—Income Tax Act, 1918 (*c.* 40), *s.* 33 (1).

The Income Tax Act, 1918, s. 33 (1), provides : " Where . . . any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom . . . claims and proves to the satisfaction of the Special Commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise . . . the company . . . shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year . . ."

An investment company within s. 33 (1) sought to include in its management expenses sums disbursed for brokerage and stamp duty in changing its investments.

Held : such disbursements were not " expenses of management " within s. 33 (1).

[As to Allowance for Management Expenses, see HALSBURY, Hailsham Edn., Vol. 17, pp. 135-137, paras. 267-273 ; and for Cases, see DIGEST, Vol. 28, pp. 55, 56, No. *283*, and Supplement.]

Case Stated by the Special Commissioners of Income Tax.

It was stated in the Case that for many years it had been the practice of the Commissioners of Inland Revenue, in examining claims under s. 33 (1) of the Income Tax Act, 1918, made by investment trust companies (including the appellant company), to offer no objection to the inclusion of sums disbursed by way of brokerage and stamp duties in connection with changes of investments as distinct from investments representing capital expansion, but that the Commissioners of Inland Revenue had informed the appellant company that they were no longer prepared to regard such expenditure as allowable. The Special Commissioners found that the expenses of changing investments were not expenses of management, and, therefore not allowable, and, on the present appeal by the company, their decision was upheld by Croom-Johnson, J.

Grant, K.C., and *Talbot, K.C.*, for the company.
Donovan, K.C., and *R. P. Hills* for the Crown.

CROOM-JOHNSON, J. : Where any company whose business consists mainly in the making of investments and the principal part of whose income is derived therefrom claims and proves to the satisfaction of the Special Commissioners that for any year of assessment it has been charged to income tax by deduction at the source by the persons paying its income from investments, it has the right, under s. 33 (1) of the Income Tax Act, 1918, to repayment of so much of the tax paid by deduction as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year. The company in the present case, which is an investment company having all its income taxed at the source, made a claim including the amount now in question which was in respect of expenses paid by the company in changing its investments in the course of conducting the familiar process of selling out investments the quotations of which had gone up in the market and either getting in again lower down, or buying other stock with the view to capital appreciation in the future. The Special Commissioners rejected the claim and the company now appeal.

The only question is whether the company has proved that the expenses in question are expenses of management. The facts are not in dispute, and I have to determine whether it is right, as a matter of law, to say that the expression "expenses of management" covers expenses of this nature. It A may be thought that the expenditure contemplated by s. 33 is something which would be deductible as a sum of money wholly and exclusively expended for the purpose of making profits and gains within r. 3 of the Rules Applicable to Cases I and II of sched. D, and, accordingly, that any expenditure partaking of a capital nature is not aimed at by the section. I do not find it necessary, for the purposes of the present decision, to express an opinion B on that point, which I confess I find rather attractive, but it seems to me that it is impossible for the company here to say, on the facts as proved, not only that as a matter of law these payments are expenses of management, but that the commissioners ought to have been satisfied that they were. I do not think they are expenses of management, although, no doubt, it was judicious for the company to do what was done. If they are not expenses C of management, then the sub-section is not satisfied and the company is not entitled to relief under it. I cannot see how, giving the expression "management" its ordinary everyday meaning, it can possibly be said, with regard to an investment company, that the cost of stamps on transfers and contract notes and brokers' remuneration can be said to be expenses of the management of the company. It is, no doubt, incidental to the business of an investment D company, but I do not think it is within the expression which is used, giving it, as I must give it, its ordinary meaning.

The only other point left in the case is that the section refers to "commissions." I think that that reference is not apt to cover a stockbroker's remuneration, which is calculated as a commission, in making bargains on behalf of the company. The section is aimed at something quite E different—managing a concern where somebody gets, as part of his remuneration, perhaps, a commission on income, or something of that sort. I should be disposed to think that these transactions partook of the character of capital transactions rather than income, but I do not decide that point. I do not think it necessary that I should go through all the reasons that the commissioners gave. Some of them, perhaps, may be open to criticism. In F my opinion, the commissioners arrived at a right conclusion and this appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Linklaters & Paines* (for the company); *Solicitor of Inland Revenue.*

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

MASON *v.* BURNINGHAM.

[COURT OF APPEAL (Lord Greene, M.R., Evershed and Singleton, L.JJ.), May 25, 26, 27, 1949.]

County Court—Appeal—"Debt or damage claimed"—Claim exceeding £20—*Action claiming* £21 10*s.*—*Payment of* £10 *by defendant after commencement of action but before service of particulars of claim—County Courts Act,* 1934 (*c.* 53), *s.* 105, *proviso* (*a*). A

Sale of Goods—Breach of warranty for quiet possession—Measure of damages—"Loss directly and naturally resulting"—Second-hand typewriter—Stolen property—Cost of overhauling—Sale of Goods Act, 1893 (*c.* 71), *s.* 12 (2), *s.* 53 (2).

The County Courts Act, 1934, s. 105, gives a right of appeal to the B Court of Appeal from a decision of a county court judge on any point of law or equity: "Provided that, without the leave of the judge, there shall be no appeal (*a*) in any action founded on contract or on tort (other than an action for the recovery of land or an action in which the title to any hereditament has come in question) where the debt or damage claimed does not exceed £20 . . ." C

The plaintiff bought a second-hand typewriter from the defendant for £20, and spent £11 10*s.* in having it overhauled. Later, the typewriter was found to have been stolen and the plaintiff brought an action against the defendant claiming the repayment of the purchase price, less a sum of £10 which had been repaid on account, and also the sum of £11 10*s.* as damages for breach of warranty, the total amount claimed being £21 10*s.* D After the particulars of claim had been handed in to the county court officer, but before he had served them on the defendant, the defendant paid a further £10 to the plaintiff. The particulars were not amended, but at the trial of the action it was agreed that the plaintiff's claim at the date of the hearing was for £11 10*s.* and costs. The county court judge found that the plaintiff did the ordinary and natural thing in having E the typewriter overhauled, but held that the amount spent thereon was not a loss due to the fact that the defendant had sold an article which he should not have sold, and gave judgment for the defendant with costs on Scale B., *i.e.*, the scale applicable where the amount claimed was greater than £20 and less than £50. On an appeal by the plaintiff from the judge's decision, the defendant took the preliminary objection that the claim was in reality F only for £11 10*s.* and not for £21 10*s.*, and, therefore, under the County Courts Act, 1934, s. 105, proviso (*a*), there was no right of appeal without leave of the judge, which had not been obtained.

HELD: (i) the words "debt or damage claimed," in proviso (*a*) to the County Courts Act, 1934, s. 105, meant claimed at the moment when the writ or plaint was issued in view of the state of affairs then existing, and the G amount claimed by the plaintiff within the meaning of the proviso was the sum of £21 10*s.*, notwithstanding that the defendant had paid £10 before the action went to trial and before the particulars of claim had been served on him, and, therefore, as the amount "claimed" was over £20, proviso (*a*) to s. 105 did not apply and the plaintiff had a right of appeal without leave of the judge. H

Lamb Brothers v. *Keeping* (1914) (111 L.T. 527), *approved.*

Mayer v. *Burgess* (1855) (4 E. & B. 655), *criticised and distinguished.*

(ii) as the plaintiff did the ordinary and natural thing in having the typewriter overhauled, the sum of £11 10*s.* spent thereon was a "loss directly and naturally resulting . . . from the breach of warranty," within the meaning of the Sale of Goods Act, 1893, s. 53 (2), and the plaintiff was entitled to recover that sum.

Per Lord Greene, M.R. : No exception in the case of disturbance by title paramount could be implied in the Sale of Goods Act, 1893, s. 12 (2) which provides that in a contract of sale of goods there is an implied warranty "that the buyer shall have and enjoy quiet possession of the goods."

[As to Appeals from County Court, see HALSBURY, Hailsham Edn., Vol. 8, pp. 376, 337, para. 810, and 1948 Supplement ; and for Cases, see DIGEST, Vol. 13, p. 525, Nos. *751-754*.

As to Damages for Breach of Contract, see HALSBURY, Hailsham Edn., Vol. 10, pp. 97, 98, para. 122 ; and for Cases, see DIGEST, Vol. 17, p. 93, No. ***101***, and p. 95, Nos. ***109-113***.]

Cases referred to :

(1) *Pearce* v. *Bolton*, [1902] 2 K.B. 111 ; 71 L.J.K.B. 558 ; 86 L.T. 530 ; 13 Digest 490, *405*.

(2) *Lamb Brothers* v. *Keeping*, (1914), 111 L.T. 527 ; 13 Digest 490, *405*.

(3) *Mayer* v. *Burgess*, (1855), 4 E. & B. 655 ; 24 L.J.Q.B. 67 ; *sub nom.*, *Graham* v. *Burgess*, 24 L.T.O.S. 253 ; 19 J.P. Jo. 98 ; 13 Digest 525, *752*.

(4) *North* v. *Holroyd*, (1868), L.R. 3 Exch. 69 ; 37 L.J.Ex. 42 ; 17 L.T. 575 ; 32 J.P. 310 ; 13 Digest 525, *753*.

(5) *Bunny* v. *Hopkinson*, (1859), 27 Beav. 565 ; 29 L.J.Ch. 93 ; 1 L.T. 53 ; 40 Digest 336, *2849*.

(6) *Rolph* v. *Crouch*, (1867), L.R. 3 Exch. 44 ; 37 L.J.Ex. 8 ; 17 L.T. 249 ; 17 Digest 109, *212*.

(7) *Victoria Laundry* (*Windsor*), *Ltd.* v. *Newman Industries, Ltd.*, [1949] 1 All E.R. 997.

Appeal by the plaintiff from an order of His Honour Judge Pugh, at Bow County Court, dated Feb. 10, 1949.

The plaintiff bought from the defendant a typewriter which was later found to have been stolen. She brought an action in the county court claiming the repayment of the £20 paid for the typewriter, less the sum of £10 already repaid to her by the defendant, and £11 10*s.* (the amount paid by the plaintiff in having the typewriter overhauled), as damages for breach of warranty, the claim, as set out in the particulars of claim, amounting to £21 10s. After the action was begun, but before the particulars of claim were served on the defendant, he paid another £10 to the plaintiff, and denied liability for the £11 10*s.* The county court judge gave judgment for the defendant with costs on Scale B. On an appeal by the plaintiff from this decision the defendant took the preliminary objection that, under the County Courts Act, 1934, s. 105, proviso (*a*), no appeal lay without leave of the judge, the amount claimed at the trial being under £20. The Court of Appeal now overruled the preliminary objection and gave judgment for the plaintiff. The facts appear in the judgment of Lord Greene, M.R., on the preliminary objection.

Leon and *Behrens* for the plaintiff.

O'Sullivan, K.C., and *J. Watkins* for the defendant.

LORD GREENE, M.R. [giving judgment on the preliminary objection:] The action which has given rise to the present appeal was an action in the Bow County Court in which the plaintiff was claiming against the defendant a certain sum in the following circumstances. In January, 1947, she purchased from the defendant a second-hand typewriter for £20. She had it overhauled, which cost her £11 10*s.*, with the result that she was out of pocket to the extent of £31 10*s.* Unfortunately, the typewriter turned out to have been stolen, and, accordingly, the plaintiff, as purchaser, acquired no title to it whatsoever. She brought an action against the defendant claiming repayment of the £20, less £10 which had been repaid on account, and also the £11 10*s.*, by way of damages for breach of warranty. The particulars of claim were dated Dec. 30, 1948. They set out the facts relating to the £31 10*s*. and they gave credit for a repayment by the defendant to the plaintiff on Dec. 1, 1948, of a sum of £10. The claim, therefore, was a claim for the balance of £21 10*s*. The particulars were handed to the county court officer who did not serve them until Jan. 13, 1949. On Jan. 4, 1949, the defendant's wife had written to the plaintiff's solicitors, enclosing a further £10. That was acknowledged on Jan. 5, 1949, by the plaintiff's solicitors in the following terms :

> "We are obliged by Mrs. Burningham's letter of yesterday inclosing £10. This leaves a balance in respect of the debt amounting to £11 10*s*."

On Jan. 22 particulars of defence were put in stating that the defendant had repaid the sum of £20 and denying any liability for the £11 10*s*. The £20 thus referred to was made up of the £10 which had been paid before the lodging of the particulars of claim and the £10 which was paid on Jan. 4. The action went to trial. No amendment of the particulars had been made, and on the face of the particulars the claim as it came before the county court judge was for £21 10*s*. When the case was opened it appears from an agreed note prepared by the two solicitors that the solicitor for the plaintiff either stated that it had been agreed, or that it was then and there agreed, that the defendant had paid the plaintiff a second sum of £10 after the date on which the summons was issued and that the plaintiff's claim on the date of the hearing was for £11 10*s*. and costs. The action proceeded and the plaintiff failed to recover that £11 10*s*: The result was that the action was dismissed, and judgment was entered for the defendant with costs on Scale B, under the County Court Rules, 1936, Ord. 47, rr. 5 (2) and 6, the scale applicable in cases where a defendant is successful in an action in the county court where the amount claimed is greater than £20 and not greater than £50. The judge, in awarding costs on Scale B, did so, as it seems to me, clearly on the footing that that was the scale applicable in view of the amount claimed. The position, therefore, was that the defendant was given costs on the footing that he had been successful in an action in which the amount claimed was over £20.

The plaintiff is appealing against the judgment because, she maintains, she ought to have obtained judgment for £11 10*s*. The defendant takes a preliminary point and says that, in view of the fact that the amount claimed in the action ought, on a true view, to be taken as £11 10*s*. only, no appeal lies without leave of the judge, and, no such leave having been obtained, this court has no jurisdiction to hear the plaintiff's appeal. The relevant section of the County Courts Act, 1934, is s. 105. Proviso (*a*) to that section, which gives the right of appeal, is as follows :

> "Provided that, without the leave of the judge, there shall be no appeal (*a*) in any action founded on contract or on tort (other than an action for the recovery of land or an action in which the title to any hereditament has come in question) where the debt or damage claimed does not exceed £20."

The controversy between the parties turns, in my opinion, on the true construction of the phrase "debt or damage claimed." On behalf of the plaintiff it is said that the claim was fixed at the time when the particulars were issued, and at that date and all through the hearing and right down to the end the claim on the face of the particulars was £21 10*s*. It was also said that, to issue her plaint, the plaintiff had to pay fees relevant to a claim for £21 10*s*., and she was forced to do that because when she first started her proceedings the defendant was in default. He owed her £21 10*s*. and the only way she could recover it was by taking proceedings against him. It was pointed out, moreover, that when the matter was tried, the judge gave the defendant costs on a scale which was only applicable to a claim of that amount. It was said that the defendant, having had that benefit, is now turning round and saying that the claim must be treated for the purpose of the right to appeal as a claim only for the balance of £11 10*s*. The defendant's case is that one must see what was the substance of the position when the case was opened before the county court judge and that the claim for the present purpose is that which was then put forward and not that which appeared on the pleadings or existed when the pleadings were issued. On the face of the pleading and at the moment when the pleading was issued and in view of the circumstances warranting its issue the claim was for £21 10*s*., but, it is argued, that claim must be taken as having been, in effect, amended so as to make it a claim only for £11 10*s*. Although no formal amendment was ever made, it is contended, as soon as it was agreed that all that the plaintiff could get judgment for was £11 10*s*., the claim which up to that date was properly described as a claim for more than £20 had ceased to be a claim for more than £20 and had become a claim for £11 10*s*. As I have said, this case is really a question of construction of the words " debt or damage claimed." If " claimed " means claimed on the face of the pleading or claimed at the moment when the pleading was issued in view of the state of affairs then existing, then clearly the defendant is in the wrong. If, on the other hand, " claimed " means that claim as reduced by something which happened since, then the defendant is right.

There is one matter which appears to me to throw a very important light on the whole of this controversy. It is impossible, to my mind, to treat the construction of the phrase " debt or damage claimed " in this proviso without reference to the County Court Rules, 1936, Ord. 47, r. 6, which provides that the costs of a defendant are, in the circumstances there mentioned, to be determined " by the amount claimed," and as regards the costs of the plaintiff, " by the amount recovered." If the plaintiff had succeeded in her claim for £11 10*s*., I ask myself what would have been the amount which she could be said to have recovered in the action. It is to be observed that the rule says " the amount recovered," and not " the amount of the judgment recovered."

As one step in the construction of those words I may refer to *Pearce* v. *Bolton* (1), a decision of a Divisional Court consisting of CHANNELL, J., DARLING, J. (who dissented), and LORD ALVERSTONE, C.J. In that case the true meaning of the phrase " recovered in the action " had to be construed, the circumstances being that, after the writ had been served, the defendant made a payment on account and the plaintiff only recovered the balance. The question was whether the amount recovered for the purposes of costs was not merely the amount of the judgment, but the amount of what had been paid on account plus the amount actually recovered by the judgment. It was decided that the proper amount was the total of those two sums because, although the amount paid on account was not part of the judgment, nevertheless it was " recovered in the action " within the meaning of the County Courts Act, 1888, s. 116 (the section there under construction). CHANNELL, J., referring to the sum in question, which was £27, said ([1902] 2 K.B. 114) :

> ". . . the whole of that sum has got into the pockets of the plaintiffs since they brought their action . . . If the plaintiffs had stated in their particulars that the £8 for which they gave credit had been paid since the action was brought, and had claimed the balance—£19—only, and had got judgment for that sum, then it would have appeared on the proceedings that they had got, since action brought, the whole sum they claimed . . ."

The matter was taken a little further by *Lamb Brothers* v. *Keeping* (2), also in the Divisional Court. In that case the amount paid on account had been paid by the defendant after the issue of the writ but before he knew it had been issued, and it was argued that *Pearce* v. *Bolton* (1) did not cover the case on the ground that it was not knowledge that the writ had been issued that resulted in the defendant making the payment on account. That argument was overruled by the Divisional Court, consisting of Ridley and Bray, JJ., who said that the fact that the defendant did not know that the writ had been issued did not distinguish the case from *Pearce* v. *Bolton* (1), and that, according to the latter decision, the sum in question had been recovered in the action. If that decision be right, the result in this case would be that, had the plaintiff succeeded in getting judgment for £11 10*s*., she would have been entitled to costs on the scale applicable to a sum recovered of £21 10*s*., because she would A have recovered that sum since the issue of her proceedings partly by payment on account and partly by her judgment, and for the purpose, therefore, of costs she would have been entitled to costs on the basis of £21 10*s*., the basis on which she had already paid the necessary fees when she started her proceedings. Correspondingly, the defendant in this case, having succeeded in the action, gets his costs on the basis that he had succeeded, not in resisting a claim for £11 B 10*s*., but in resisting a claim for £21 10*s*.

In my opinion, this decision of the Divisional Court, which counsel for the defendant has criticised, was perfectly right. It appears to me that, if it were not right, all kinds of refinements might arise. A man who knew that a writ was on the point of being issued and made a payment on account after it had been issued but before the plaintiff could have brought to his notice that it C had been issued could then say : "The amount that you have recovered is not recovered in the action." That appears to me to produce a very unreal situation because, as all of us know, people often pay up when a writ has been issued, and to say that a matter of seconds one way or the other in such a case may make all the difference appears to me to ignore the substance of the position. In the present case the amount paid on account was received after the plaint D was issued, and it appears to me, on the authority of *Lamb Brothers* v. *Keeping* (2), that the defendant cannot say that the amount which would have been recovered by the plaintiff would only have been £11 10*s*., within the meaning of the rule. Similarly, the defendant having got costs applicable to a claim for £21 10*s*. (without any protest that he was getting too much and without any *scintilla* of suggestion that the judge was asked to exercise, E or that he was exercising, any discretion), it seems to me that was rightly based, and must have been based, on the view, which, in my opinion, was the correct view, that the claim must be treated as a claim for £21 10*s*. The justice of the case seems to me to be secured by that when one remembers that, owing to the default of the defendant, the plaintiff is bound to issue his writ, he is bound to pay the fees applicable to the amount which he claims when F he issues his writ, and that, if it is afterwards going to be said that his claim was a claim for the lesser amount, the result would be that the defendant would be saved from having to pay fees referable to the higher amount which, by the defendant's default, the plaintiff was bound to claim.

There are some authorities which have been referred to, and I think I need only mention two of them. One, which, frankly, I feel some difficulty in under- G standing as it is reported, is *Mayer* v. *Burgess* (3). The County Courts Act, 1846, s. 58, had conferred on the county courts jurisdiction up to £20, and there was no appeal. The County Courts Act, 1850, s. 1, extended the jurisdiction to £50 and, by s. 14, gave a right of appeal in cases in which the claims exceeded the jurisdiction conferred by the Act of 1846. The case in question was brought in the county court after the passing of the Act of 1850. The plaintiff's demand H on the face of his particulars was for £21 1*s*. as damages from the defendant on three stated grounds. There was nothing, as I read the report, on the face of that claim to suggest that the amount claimed was not a perfectly correct amount claimed in law, and, had such an action been brought before the passing of the second of those two Acts, the county court would have been bound, in my opinion, to disclaim jurisdiction, because it would have had presented to it a claim for more than £20. In the trial of the action it was established that the plaintiff's right was confined to a sum of £12 17*s.* 8*d.* It was argued by counsel for the defendant, who was objecting to the right of appeal, that the case must be regarded as though the claim was one for £12 17*s.* 8*d.*, and he said (4 E. & B. 658):

> "Here the amount really sued for was £12 17*s.* 8*d.*, the amount of the debt and costs. The defendant was answerable to the plaintiff for no more."

That, as I have said, was only brought out when the action came to trial. Counsel for the plaintiff said (*ibid.*, 659):

> "The language of s. 58 of [the County Courts Act, 1846] is 'Where the debt or damage claimed is not more than £20': and the legislature must have had in view the amount claimed, not the amount ultimately recovered: otherwise the jurisdiction would depend upon the result of the cause, which may be uncertain to the last. The amount claimed is that for which the plaint is entered and the fees paid."

In a very short report of the judgment LORD CAMPBELL, C.J., said (*ibid.*) (and COLERIDGE, WIGHTMAN and CROMPTON, JJ., concurred):

> "We must look at the real nature of the cause, not at the amount claimed. It is clear that here so much as £20 could not have been recovered; so that there was jurisdiction under [the County Courts Act, 1846], s. 58 . . ."

I cannot understand that. The claim was for £20 1*s.*, and on the footing of that, with great respect, I cannot see how it can have been said on the facts as reported that there would have been jurisdiction under the County Courts Act, 1846. If the plaint had been brought to the county court before the Act of 1850 was passed, the county court would have been bound to reject it. LORD CAMPBELL, C.J., went on to say that there was jurisdiction under the earlier Act and that it was not given by the later Act, in which case only an appeal lay. That I follow. If there had been jurisdiction under the earlier Act, the later Act was not necessary to give that jurisdiction, and, as the right of appeal was only given in cases where the later Act came into operation the decision would have been intelligible. I cannot help thinking that this was a case where there was evidence of *mala fides* of some sort in the formulation of the original claim. If it was a case where the court came to the conclusion that the original claim had been written up to £20 1*s.* *mala fide* for the sole purpose of obtaining a right of appeal, the court might very well have taken a strong line and treated the matter as a genuine claim for £20 1*s.* On that basis I can understand the decision. I am bound to say, with all respect, that, apart from some consideration of that sort, I cannot understand it. I cannot take it as compelling me in any way to decide in favour of the defendant in this case.

North v. *Holroyd* (4), which was also cited, was an action in which the particulars of claim started with the sum of £54 and set out various reductions which brought it down to £19 12*s.*, but on the face of the particulars it appeared that there was a miscalculation as a result of which the balance owing was made out to be £19 12*s.* That was the amount actually claimed, but the miscalculation, as I say, was apparent on the face of the particulars, and, when it was pointed out to the judge, he had the particulars amended, which had the effect of bringing the amount up to £20 12*s.*, the true figure. The amendment, it seems to me, although formally desirable, was not necessary in that case because on the true construction of the particulars the amount of the claim was that arrived at by deducting the stated deductions from the £54. The fact that there was a mis-casting somewhere in the document does not seem to me to make it anything but a claim for the true figure of £20 12*s.* In giving judgment KELLY, C.B., said (L.R. 3 Exch. 71):

> "The particulars of demand claim the balance of an account. It is true that a sum of £19 12*s*. only is claimed in form; but the amount really claimed is the balance of £54, after the deduction of certain items, the miscalculation of one of which reduces the claim to the sum named. In substance, therefore, it is a claim not to £19 12*s*., but to £20 12*s*., and the plaintiff would have been entitled to have his particulars amended so as to enable him to claim that sum; such an amendment would be made as a matter of course." A

It seems to me that the phrase the "substance" of the matter is used there with a very different meaning from that which counsel for the defendant wishes to give it in this case. The substance of the matter there was that the claim was for the larger amount. The substance of the matter here was nothing of the kind. The claim was for the larger amount in truth and in B fact, but the position had been changed by something that had happened since the claim was formulated and which could only have been corrected by way of amendment, if it had been asked for, by altering the amount claimed in truth and in fact, not in correcting a mere slip. I do not read that case, either, as carrying the defendant's argument any further. In the result, the preliminary point, in my opinion, fails. C

EVERSHED, L.J.: I agree, and I only venture to add one word about *Mayer* v. *Burgess* (3), to which my Lord has referred, because in the COUNTY COURT PRACTICE, 1948, p. 128, in the notes to the County Courts Act, 1934, s. 105, the case is cited as authority for this proposition:

> ". . . if the nature of the case is such that the judge cannot lawfully give higher damages than £20, there is no right of appeal." D

That sentence, of itself, might, I think, lend colour at any rate to the view that the test should be applied when the judge came to deliver judgment. The MASTER OF THE ROLLS has pointed out that *Mayer* v. *Burgess* (3) is not entirely easy to follow for the reasons which he has stated, but it seems to me plain that what the court did eventually decide was that from the very beginning the E action in question had the quality that it was in reality and substance only a claim for a sum of less than £20. I think that limitation must be read into the sentence in the notes to s. 105 of the Act of 1934 in the COUNTY COURT PRACTICE, 1948. As my Lord has pointed out, in this case, at the time when the action started, it had the quality of being a claim for £21 10*s*. I agree that, unless it can be shown that it somehow lost that quality, it retained it for the purpose of F the construction of proviso (*a*) to s. 105, the words of which might have been, but are not, such as are used in s. 58 (1), "the only matter remaining to be tried." I add, finally, that, in a case where there had been an amendment of the plaint, the result might be different, but there had not been an amendment in this case, and I, therefore, prefer to say nothing further on that hypothesis.

SINGLETON, L.J.: I agree. G

Preliminary objection overruled.

Argument having been heard,

LORD GREENE, M.R.: I will ask SINGLETON, L.J., to deliver the first judgment.

SINGLETON, L.J.: The amount involved in this claim is quite small. H [His Lordship stated the facts and continued:] Before the action was commenced the defendant had paid to the plaintiff a sum of £10 on account. After the issue of the plaint and before service of it he paid a further £10, and at the time of the hearing by the learned county court judge there was only left for consideration her claim for the balance of £11 10*s*., which was the amount it had cost her to have the typewriter put in order. By her particulars of claim she alleged, in para. 2:

> " In the contract of sale there was (*a*) an implied condition on the part of the defendant that he had a right to sell the typewriter and (*b*) an implied warranty that the plaintiff should have and enjoy quiet enjoyment thereof."

The case was heard by the learned county court judge on Feb. 10, 1949, and his judgment was in favour of the defendant, with costs on Scale " B." In the course of his judgment the learned judge said :

A
> " I agree that the plaintiff behaved in a common-sense way. She converted a good typewriter into a first-class one. She did the ordinary and natural thing."

I should say that the only evidence as to the condition of the typewriter was that of the plaintiff herself, who said that, when she tested it, it was " fairly good." No evidence was given by the defendant. The learned judge went on B to say :

> " It is natural to assume at first sight that the defendant must pay for this, but, if so, anything which a purchaser might naturally do must be a loss for which the defendant would be responsible. Is anything which the purchaser does to the article such a loss ? That cannot be. Suppose the C purchaser decided to paint the typewriter with gold paint, no one would argue that the defendant was liable. Yet, if the purchaser were a dealer, gold paint might add to its price."

In that passage the learned judge is failing to approach the matter in the right way. The question to be considered was whether or not it was the natural and ordinary thing that the purchaser of a second-hand typewriter of this D kind should have it overhauled, and the learned judge had already said that that was the fact, for he said: " She did the ordinary and natural thing." He went on to say :

> " I hold that the extra amount spent on the article by the plaintiff quite naturally is not a loss due to the fact that the defendant sold an article which he should not have sold. Although what the plaintiff did was right E and proper, I must decide against her."

Counsel for the plaintiff submitted to this court that that judgment was wrong. His argument was based almost wholly on two or three sections of the Sale of Goods Act, 1893. He referred the court to two cases further back in date which are of interest. They are *Bunny* v. *Hopkinson* (5) and *Rolph* v. F *Crouch* (6), both of which have to do with land. In *Bunny* v. *Hopkinson* (5) :

> " A sold some building land to B, and he covenanted for title. After some houses had been built on the land, the purchaser was evicted. *Held*, that the purchaser was entitled to recover upon the covenants, not only the value of the land, but also that of the houses subsequently built thereon."

G SIR JOHN ROMILLY, M.R., in the course of a very short judgment, said (27 Beav. 567) :

> " I am of opinion that the measure of the damages upon these covenants includes the amount expended in converting the land into the purposes for which it was sold."

H In *Rolph* v. *Crouch* (6) :

> " The defendant demised premises for a term of years to the plaintiff, and covenanted that the plaintiff should occupy the same during the term ' without any interruption whatsoever from or by the said defendant, his executors, etc., or any other person or persons lawfully claiming by, from, or under him or them.' An action of trespass was afterwards brought by a person claiming under the defendant against the plaintiff, who gave notice of it to the defendant. The defendant paid no attention to the notice,

> and the plaintiff, acting on his own judgment and without express authority, defended the action. A verdict was eventually found against him, and he was obliged to pay damages and costs. In an action against the defendant, his landlord, for breach of the covenant for quiet enjoyment contained in the demise : *Held*, that the plaintiff was entitled to recover from the defendant the costs and damages he had paid, and also the expenses he had himself incurred in defending the action of trespass." A

It appeared that there was a further claim to damages because the lessee had expended money in erecting a greenhouse on the land demised in reliance on the defendant's covenant and had lost the profits he would have acquired from the sale. SIR FITZROY KELLY, C.B., said (L.R. 3 Exch. 49) :

> " Under these circumstances, I am of opinion that the plaintiff was justified in the course which he took, and therefore that the damages, costs and B expenses which he incurred in the action brought against him by Cook, are the natural and immediate consequence of the defendant's breach of covenant. . . Then, lastly, as to the conservatory. The plaintiff, relying on the performance by the defendant of his covenant, erected it for the better and more conveniently carrying on of his trade as a florist. He has lost the use of it, and I think that he is entitled to the sum given him by the jury for C that loss."

Those cases, though on different subject-matter, are in point, but really, to come to a decision, one has to look first at s. 12 and then at s. 53 of the Sale of Goods Act, 1893. Section 12 provides :

> " In a contract of sale, unless the circumstances of the contract are such D as to show a different intention, there is (1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass : (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods . . ."

The particulars of claim in this action claim fall under both heads, but in this court E counsel for the plaintiff has put forward only that there was breach of the implied warranty that the buyer should have and enjoy quiet possession of the goods. Counsel for the defendant admitted that there was a breach of the implied condition that he had a right to sell the goods, but he submitted that that breach would give rise only to a claim for the return of the money paid and would not give a general right of action for damages. It appears to me F that that matter has little to do with this case, because, in any event, if there was breach of the implied condition, the plaintiff was entitled to treat that as a breach of warranty.

Section 53 of the Act provides :

> " (1) Where there is a breach of warranty by the seller, or where the buyer G elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods ; but he may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price ; or (*b*) maintain an action against the seller for damages for the breach of warranty. (2) The measure of damages for breach of warranty is the H estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."

Counsel for the defendant submitted that it was not shown that the defendant had any foreknowledge that this kind of damage might flow in case there was a breach. He further submitted that there was no evidence to show that the overhaul of the typewriter took place at once or soon after the purchase, and, unless that was shown, the damage would not flow and did not flow naturally from the breach. No such point as the second was raised at the hearing in the court below, and no suggestion whatever was made to the plaintiff that she did not send the typewriter to be overhauled soon after she purchased it. It was accepted, as far as one can see, that she had, in fact, done so.

On the submission that the defendant had no foreknowledge that this kind A of damage might flow, we were referred to the judgment of this court, delivered by ASQUITH, L.J., in *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* (7), and in particular to a passage in the judgment where the Lord Justice said ([1949] 1 All E.R. 1002) :

> " What was at that time reasonably foreseeable depends on the knowledge B then possessed by the parties, or, at all events, by the party who later commits the breach. For this purpose, knowledge ' possessed ' is of two kinds—one imputed, the other actual. Everyone, as a reasonable person, is taken to know the ' ordinary course of things ' and consequently what loss is liable to result from a breach of that ordinary course."

In the present case the learned county court judge found that the plaintiff C " behaved in a common-sense way," that she did " the ordinary and natural thing," that what she did was " quite naturally " done, and that it was " right and proper." In those circumstances that which followed flowed directly and naturally from the breach. It resulted "in the ordinary course of events." Damages have to be assessed under s. 53 (2) of the Sale of Goods Act, 1893, and those damages, resulting from the breach of warranty on the part of the seller, would D have been, if there had been no payment on account, the total amount of £20 which the plaintiff paid for the typewriter and the amount which she " rightly " and " properly " and " naturally " expended to have it overhauled and put in proper order. The learned county court judge, in my view, approached this matter from the wrong angle. He ought to have held that the plaintiff was entitled to the sum of £11 10*s*., which was the balance remaining due. The E judgment should be set aside and judgment entered for the plaintiff.

EVERSHED, L.J. : With all respect to the argument of counsel for the defendant, I think it is impossible to hold that the plaintiff here was confined to such remedy as she might have had as on a breach of condition. I add nothing on that point to what has already fallen from SINGLETON, L.J., and it F follows that she was entitled to sue, as she does sue, for breach of warranty. If that be so, then there can be only two questions : (i) Was the warranty broken ? (ii) If so, what were the damages that flowed from it ? It is, I think, not really in dispute that the warranty, whether for title or quiet possession, was broken, but, as regards the damages, the argument has been put that it is not established in fact that the work done to the typewriter was done at a time G which relates it sufficiently to the transaction of purchase and sale which is the contract in question. Nay, further, counsel for the defendant says that the language of the learned judge, namely, that the amount spent by the plaintiff (quite naturally) is not a loss due to the fact that the defendant had sold an article he should not have sold, constitutes a finding of fact negativing the application to the sale in question of s. 53 (2) of the Act. In my judgment, that is a mis-H reading of the effect of the judgment, or, alternatively, if it is not, it involves a misdirection by the judge of himself. When the judge found, as he did, that what the plaintiff had done was the " ordinary and natural thing," it seems to me almost inevitably to follow that the amount spent in doing " the ordinary and natural thing " was something covered by s. 53 (2), and, consequently, I read it clearly as indicating that what she did was done more or less immediately after and certainly as an immediate consequence of the purchase of the typewriter in order to make it usable by her for typing.

I venture to think that where the learned judge went into error was at this point. The argument appears to have been put that, on an action brought in tort by the true owner of the property against the possessor, the possessor would have been entitled to claim against the true owner anything she had spent which increased the value, however and by whatever means that increased value had been arrived at. The learned judge felt that, if the plaintiff succeeded in this action in contract, it would involve that she would be entitled to recover anything she had spent, whether " naturally " or " in the ordinary course of events," or not, in improving the value of the property. In my judgment, there was no analogy between the two cases, and, that being so, the logic, as it seems to me, with all respect to the learned judge's judgment, broke down, and, having found that what she did was " ordinary and natural " he should have then concluded that the cost of doing it fell within s. 53 (2). For these reasons I think that the appeal must succeed.

LORD GREENE, M.R. : I am of the same opinion. There is only one matter on which I think I might usefully add a word and that is the argument of counsel for the defendant as to what is called, not quite correctly, the warranty for quiet enjoyment. The warranty is : " An implied warranty that the buyer shall have and enjoy quiet possession of the goods." Counsel for the defendant, at one stage of his argument, said that in that sentence there should be implied an exception in the case of disturbance by title paramount, and, of course, it is familiar learning that, in the case of the ordinary covenants for title on a sale of land, the covenant for quiet enjoyment does not extend to cover disturbance by title paramount. In the case of land, the ordinary implied covenants under the Law of Property Act, 1925, merely reproduced what had been the practice of conveyancers for generations in inserting their covenants in conveyances. It is to be observed that in those covenants the wording is as follows (I am quoting from the Law of Property Act, 1925, sched. II, pt. I). A covenant for quiet enjoyment begins as follows :

> " . . . that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken . . ."

Now, " notwithstanding anything as aforesaid " refers back to these words :

> " . . . notwithstanding anything by the person who so conveys or anyone through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey . . ."

That, on the face of it, limits the covenant for quiet enjoyment to the case of the person conveying and does not cover the case of eviction by title paramount. The covenant for quiet enjoyment goes on as follows :

> " . . . and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction . . ."

Those words are quite clearly sufficient to exclude, as they do exclude, disturbance by title paramount. It is to be observed that in the language used in the Sale of Goods Act, 1893, s. 12 (2), there is no exception for any disturbance by title paramount. The words are as I have quoted them. " that the buyer shall have and enjoy quiet possession of the goods." I invited counsel for the defendant to refer us to any authority that would justify the insertion into that statutory phrase of an exception in the case of disturbance by title paramount, but he was unable to do so, and, in the absence of any authority, I can only express my opinion that the statute means what it says and is not to have any such gloss put on it. The order will be that the appeal will be allowed with costs, and judgment will be for the plaintiff for £11 10*s.*, with costs on Scale "B."

Appeal allowed, with costs in both courts. Costs already paid by plaintiff to defendant to be repaid.

A Solicitors: *Duthie, Hart & Duthie* (for the plaintiff); *Devonshire & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

B

EDWARDS *v.* EDWARDS.

[COURT OF APPEAL (Bucknill, Cohen and Asquith, L.JJ.), May 31, June 1, 2, 1949.]

C *Desertion—Constructive desertion—Conduct equivalent to expulsion of other spouse—Conduct falling short of cruelty.*

The parties were married in 1921, and in 1930 the wife left the husband. In 1948, the husband petitioned for divorce on the ground that the wife had deserted him without just cause. The wife, in her answer, alleged cruelty, in that the husband had struck her on many occasions, inflicting severe pain and causing her to be in fear, and that her husband had often D associated with other women, causing the wife anxiety and distress. The learned commissioner was not satisfied that the wife had made out a case of cruelty against the husband, but he found that the conduct of the husband was such as to justify the wife in leaving him. On appeal against this finding:

E HELD: (i) conduct which falls short of legal cruelty may justify one spouse in leaving another, provided it is of a grave and convincing character.

Dicta of LOPES, L.J., in *Russell* v. *Russell* ([1895] P. 334), and LORD GREENE, M.R., in *Buchler* v. *Buchler* ([1947] 1 All E.R. 321), *applied.*

Dictum of HODSON, J., in *Barker* v. *Barker* ([1949] 1 All E.R. 250), *explained.*

F (ii) on the facts, there was sufficient evidence to entitle the commissioner to find that the conduct of the husband was such as to justify the wife in leaving him.

[AS TO CONSTRUCTIVE DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 655, para. 964, and Supplement; and FOR CASES, see DIGEST, Vol. 27, G pp. 315, 316, Nos. *2930-2939,* and Supplement.]

Cases referred to:

(1) *Barker* v. *Barker*, [1949] 1 All E.R. 247; [1949] P. 219; [1949] L.J.R. 464; 113 J.P. 91.

(2) *Russell* v. *Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *on appeal* [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 H Digest 318, *2960.*

(3) *Oldroyd* v. *Oldroyd*, [1896] P. 175; 65 L.J.P. 113; 75 L.T. 281; 27 Digest 277, *2480.*

(4) *Buchler* v. *Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 2nd Digest Supp.

APPEAL by the husband from a judgment of MR. COMMISSIONER GRAZEBROOK, K.C., dated Jan. 20, 1949, dismissing the husband's petition for divorce on the ground of the wife's desertion.

The parties were married in 1921. There were no children of the marriage. During 1928 and 1929 the wife went away from the husband for varying periods and in October, 1930, she finally left him. A few months later a Mrs. Jacques and her children went to live in the husband's house and the husband admitted having committed adultery with her on two occasions. On March 5, 1948, the husband filed his petition for divorce alleging desertion without cause since 1930. In her answer the wife alleged cruelty, both physical and mental, in that he had struck her on many occasions and that between 1923 and 1930 he had been associating with other women, in particular, Mrs. Jacques, causing her (the wife) anxiety and distress. She further pleaded that, if she had deserted the husband in 1930, that desertion had been terminated in 1931 when the husband on two occasions had sexual intercourse with her, but she alleged desertion by the husband from 1932 and prayed for a judicial separation. The commissioner, in dismissing the husband's petition, held that there were grounds justifying the wife in leaving him, but he also rejected the prayer in the wife's petition. From the latter decision there was no appeal. The Court of Appeal now dismissed the husband's appeal.

Silkin for the husband.
J. W. Reader Harris for the wife.

BUCKNILL, L.J.: This is an appeal by the husband from a judgment of Mr. Commissioner Grazebrook, K.C., whereby he dismissed the husband's petition for the dissolution of his marriage on the ground that his wife had deserted him. In her answer the wife prayed for a judicial separation on the grounds of her husband's cruelty and desertion, but the learned commissioner rejected that prayer also, and there is no appeal by the wife from that decision. Therefore, the only question before us is whether the commissioner was wrong in dismissing the husband's petition for desertion.

[His Lordship recited the facts and continued :] The husband's petition, dated Mar. 5, 1948, alleged desertion by the wife without cause—I emphasise those words—for more than three years before the presentation of the petition, namely, since 1930. In her answer the wife alleged, first, physical cruelty in that the husband struck her on many occasions, inflicting severe pain on her and causing her to be in fear, and, then, that from 1923 to September, 1930, he often associated with other women, and, in particular, with a woman known to the wife only as Mrs. Jacques, causing her much anxiety and distress. She goes on to plead : " . . . if the respondent [the wife] did desert the petitioner in 1930, which is denied, the said desertion was terminated in 1931 when the petitioner on two occasions had sexual intercourse with the respondent " at a place where she was then living. She then goes on to allege desertion from 1932, that is, after the occasions when they had intercourse, and she prayed for a judicial separation.

The first and main issue, so far as this appeal is concerned, is : Was the commissioner wrong in deciding that the husband had not made out his case of desertion ? The learned commissioner said as to that :

> " Then comes the question of the wife leaving her husband which is on a somewhat different footing because in regard to that it would not be necessary for her to have to prove cruelty. It would be necessary for her to prove some course of conduct which justified her in leaving her husband. There again I am satisfied that she did leave her husband by reason of some treatment of his, and I am satisfied to that extent that she was justified in leaving him ; but subsequent events to a great extent wipe out any matter of complaint that she had at that time because I am satisfied also in regard to the subsequent period that the wife's story is nearer the truth than the husband's in regard to subsequent events."

On that counsel for the husband has put forward three points. The first is a point of law—that in view of the judgment of Hodson, J., in *Barker* v. *Barker* (1) it was not open to the commissioner to find that the wife was justified in leaving her husband once he (the commissioner) had decided that the case of cruelty alleged by the wife had not been made out. The second point was that, on the facts, the commissioner was wrong in holding that there were sufficient grounds to justify the wife's leaving. The third point was that the commissioner's judgment was illogical because, if there were sufficient grounds for the wife to leave the husband, the husband himself was a constructive deserter and, that being so, the wife ought to have succeeded in her plea for a judicial separation on the ground of the husband's desertion.

As regards the first point, it is well to look at three cases before I come to the judgment of Hodson, J. The first is *Russell* v. *Russell* (2), which is referred to in the judgment of Hodson, J. In that case the wife petitioned for a decree of restitution of conjugal rights on the ground that the husband had left her. In his answer he pleaded that he had good grounds for leaving her in that she made an unfounded charge of an unnatural offence committed by him. In his answer he also asked for a decree of separation on the ground of her cruelty. In the result, both petition and answer failed. The husband failed in his plea for a judicial separation on the ground of his wife's cruelty because he failed to establish that her conduct had injured his health or was likely to injure it. She failed in her claim for restitution of conjugal rights because it was held that her conduct was such as to justify him in living away from her. Lopes, L.J., in giving a judgment on this part of the case (with which Rigby, L.J., agreed), said ([1895] P. 334) :

> " By s. 16 of the Matrimonial Causes Act of 1857 desertion is for the first time made a ground for judicial separation, and is not governed by the old ecclesiastical law ; but it is no ground for a sentence of judicial separation unless the desertion is without cause. If the wife were petitioning for a judicial separation here on the ground of desertion against her husband, her conduct towards him would disable her from contending that the desertion was without cause, and she would fail in her suit."

It is plain that the Lord Justice is saying in effect that the husband had failed to make out a case of cruelty against the wife, but, nevertheless, her conduct towards him prevented her from contending that the desertion was without cause. In other words, one can have cause for desertion which falls short of legal cruelty.

The second case is *Oldroyd* v. *Oldroyd* (3), decided by Gorell Barnes, J., in 1896, before *Russell* v. *Russell* (2) reached the House of Lords. Gorell Barnes, J., says ([1896] P. 184) :

> " The effect of that case [*Russell* v. *Russell* (2)] appears to be that in cases where the conduct of the petitioner has led to desertion by the respondent, and has amounted to sufficient cause to disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion, the court is now empowered to refuse to pronounce a decree compelling the respondent to return to cohabitation with the petitioner. The truth is that in such cases it has become practically impossible for the spouses to live properly together."

The third case is *Buchler* v. *Buchler* (4). There the question arose as to what conduct on the part of a husband justified a wife in refusing to live with him and then setting up a plea of constructive desertion. Lord Greene, M.R., said ([1947] 1 All E.R. 321) :

> " The crucial matter for consideration, therefore, is the nature of the conduct relied on as equivalent to an expulsion of the complaining spouse. It must, I think, be accepted that the acts sufficient to satisfy this test must be of a serious and convincing nature. Counsel for the husband submitted

> that nothing short of a matrimonial offence such as cruelty or adultery would suffice, and he pointed out that, even in the case of adultery, some more flagrant conduct beyond the mere commission of adultery had always been present in the reported cases, but he eventually found himself compelled to agree that conduct short of an actual matrimonial offence might be sufficient. In this I agree with him, but the necessary conduct must, from the very nature of the offence of desertion, obviously be of a grave and convincing character. Whether in any given case this requirement is fulfilled is a question of fact on which a jury would require to be carefully directed. It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home."

On the same point, Asquith, L.J., said (*ibid.*, 326) :

> " Constructively the deserter may be the party who remains behind, if that party has been guilty of conduct which justifies the other party in leaving. Secondly, to afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence, such as cruelty or adultery. But, thirdly, it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other 'for better or worse.' The ordinary wear and tear of conjugal life does not in itself suffice. Where the judge seems to have erred is in supposing that on the evidence before him conduct complying with this last test had been established . . . This would appear to be a question of law, involving, as it does, the issue whether there was any or no evidence to support the judge's conclusion. But between the extremes indicated there is obviously a no-man's land where the issue is one of fact. This does not debar an appellate tribunal from disturbing the judge's findings if, in the view of that tribunal, they are plainly wrong."

That case was decided before *Barker* v. *Barker* (1), which came before the court in December, 1948. *Buchler* v. *Buchler* (4) may not have appeared in the Reports, and, apparently, it was not cited in *Barker* v. *Barker* (1), but the decision of the House of Lords in *Russell* v. *Russell* (2) was referred to. In *Barker* v. *Barker* (1) an appeal came to the Divisional Court from a decision of justices finding that a husband had been guilty of persistent cruelty and of wilful neglect to maintain. Lord Merriman, P., in the course of his judgment said ([1949] 1 All E.R. 248) :

> " There was also, as I have said, included in the summons a charge of wilful neglect to maintain. The justices have not dealt specifically with that in their reasons, but, apparently, the order was based on both grounds. A question has arisen whether it is possible to separate these two grounds, so that, even if the wife does not succeed on the charge of persistent cruelty, she may, nevertheless, succeed on the ground of wilful neglect to maintain. I think that on the facts of this case no such distinction falls to be drawn and the case stands or falls as a whole on the finding of persistent cruelty, and so I propose to deal with it on that basis."

The learned President decided that there was no evidence of cruelty in that there was not a shred of evidence that the wife had suffered injury or reasonable apprehension of injury, and he allowed the appeal. He said nothing at all, except what I have read, on the alternative charge of wilful neglect to maintain. Hodson, J., at the end of his judgment said (*ibid.*, 250) :

> " On the other branch of this case, namely, wilful neglect to maintain, counsel for the wife argued that something less than cruelty would justify a wife remaining apart from her husband. I think that is an unsound proposition. It will not do to say that because a grave and weighty matter will justify one spouse in leaving the other, therefore something less than cruelty will do, The grave and weighty matter which justifies one spouse

in leaving the other is very often something different from cruelty, something which may even be regarded as more calculated to disrupt family life, such as the persistence in a false allegation of a criminal charge which was the subject of the decision in *Russell* v. *Russell* (2). Many people might regard this as something worse than cruelty involving the mere infliction of a physical injury causing injury to health. The existence of cruelty A depends not on the magnitude but rather on the consequence of the offence, actual or apprehended, and, dealing with conduct which is either cruelty or not cruelty, it is, in my view, not open to any court to say : 'This is not cruelty, but it is so near it that it amounts to a grave and weighty matter justifying separation.' There being, in my opinion, no other matter apart from persistent cruelty which justifies the wife in remaining B away from her husband in this case so as to put her in a position to claim separate maintenance, that ground of the order also fails, and the husband's appeal should succeed."

Counsel for the husband says that is his case, and that in the present case, the commissioner having found that the husband was not cruel, there was no C justification for the wife leaving. If HODSON, J., meant to say that, once a charge of cruelty has failed to be established, it is impossible for a wife to establish grounds justifying her in refusing to live with her husband, with great respect to the learned judge, it seems to me that that decision is inconsistent with the judgments in *Russell* v. *Russell* (2) and *Buchler* v. *Buchler* (4) which this court ought to follow. I myself think that that is not what the judge D meant to say. I think he meant to say in effect : "Here is a case where the blows inflicted by the husband on the wife either amounted to cruelty in that they injured her health, or were likely to injure it, or they were not of such a nature. If they were not of such a nature then, there being no other evidence in the case to justify desertion, the court ought not to say : 'Although they were, in effect, trivial blows, they justify her in leaving the husband'." If E that is the view which the learned judge was taking, I do not think there is anything in his judgment inconsistent with the judgments to which I have referred. Therefore, I think that the point of law which counsel has raised fails.

[HIS LORDSHIP held that there was evidence on which the commissioner could find that the wife was justified in leaving the matrimonial home, but that F he was entitled to exercise his discretion in refusing the wife a decree, and said that the appeal must be dismissed.]

COHEN, L.J. : I agree that the appeal fails.

ASQUITH, L.J. : I also agree.

Appeal dismissed.

G Solicitors : *Silkin & Silkin* (for the husband) ; *J. Cory Holcombe* (for the wife).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

YACHUK AND ANOTHER *v.* OLIVER BLAIS CO., LTD.

[Privy Council (Viscount Simon, Lord Porter, Lord du Parcq and Lord MacDermott), March 3, 7, 8, 9, April 11, 1949.]

Negligence—Contributory negligence—Novus actus interveniens—Child procuring petrol by untruth—Injury by explosion of ignited petrol—Liability of seller.

By an untrue statement a boy aged nine years, who was accompanied by his brother aged seven, prevailed on an employee of the defendant company to sell him a small quantity of petrol. The evidence indicated that the employee had doubts as to the propriety of the sale, for, before the two children were beyond recall, he told the assistant-manager about it and asked him to confirm that he had acted rightly. The children wanted the petrol for use in a game in which they enacted a Red Indian scene they had witnessed in a cinematograph theatre. In the result, the boy was seriously burned. The defendants contended that the real cause of the boy's injuries were his subsequent acts which constituted *novus actus interveniens*, or, alternatively, that he had been guilty of contributory negligence. All the Canadian courts in which the case was heard found that on the part of the employee who sold the petrol there had been negligence which had contributed to the boy's injuries.

Held : (i) in view of the fact that the boy's story was such as to arouse rather than to allay suspicion in the mind of a reasonable man, the fact that he told a lie to obtain the petrol could not avail the defendants.

(ii) the defendants' employee having given an explosive substance to a boy who had limited knowledge of the likelihood of an explosion and its possible effect and the boy having done that which a child of his age might be expected to do, the defendants could not avail themselves of the defence of contributory negligence.

Principle stated by Lord Denman, C.J., in *Lynch* v. *Nurdin* (1841) (1 Q.B. 38), *applied.*

(iii) in the light of the concurrent findings of fact of the Canadian courts (which it would be contrary to practice to reject, notwithstanding that the decision of one court was not unanimous) that the employee's negligence contributed to cause the injuries suffered by the boy, it was impossible to say that a new cause had intervened so as to relieve the defendant from all responsibility for the evil consequences which followed his wrongful act.

Robins v. *National Trust Co.* ([1927] A.C. 515), and *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* ([1946] A.C. 508), *applied.*

[As to Contributory Negligence as Applied to Children, see HALSBURY, Hailsham Edn., Vol. 23, pp. 688, 689, paras. 972, 973 ; and for Cases, see DIGEST, Vol. 36, pp. 71, 72, Nos. *466-470.*]

Cases referred to :

(1) *Robins* v. *National Trust Co.*, [1927] A.C. 515 ; 96 L.J.P.C. 84 ; 137 L.T. 1 ; Digest Supp.

(2) *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*, [1946] A.C. 508 ; [1947] L.J.R. 26 ; 176 L.T. 209 ; 2nd Digest Supp.

(3) *Lynch* v. *Nurdin*, (1841), 1 Q.B. 29 ; Arn. & H. 158 ; 4 Per. & Dav. 672 ; 10 L.J.Q.B. 73 ; 5 J.P. 319 ; 36 Digest 24, *118.*

Consolidated Appeals from the Supreme Court of Canada.

The Supreme Court restored the judgment of the trial judge awarding the plaintiffs damages but reducing them because of the infant plaintiff's contributory negligence. The plaintiffs appealed against the finding of contributory negligence and the defendant company against the finding of negligence. The Judicial Committee allowed the plaintiffs' appeal and dismissed the cross-appeal of the defendant company, which was ordered to pay the plaintiffs' costs of the appeal to the Supreme Court of Canada and of the appeal and cross-appeal to the Judicial Committee. The facts appear in the judgment.

Diplock, K.C., and *Quintin Hogg* for the plaintiffs.

Gahan for the defendant company.

The Board took time for consideration.

April 11. **LORD DU PARCQ** delivered the following judgment of the Board. William Yachuk, an infant who sued by his father as next friend, and Tony Yachuk (the father suing in his own right) were plaintiffs, and the Oliver Blais Co., Ltd., was defendant, in an action begun in January, 1943, in the Supreme Court of Ontario. Two other defendants who were also sued are no longer concerned in the proceedings, and no further reference need be made to them.

The plaintiffs' claim was for damages for negligence and breach of statutory duty. Of the alleged breach of statutory duty all that need now be said is that no argument was addressed to their Lordships in support of that head of the claim. The negligence alleged consisted in supplying the infant plaintiff, then a child of nine years of age, with a small quantity of gasoline, with the result that he suffered injury and his father was put to expense. The first hearing of the action was abortive, as a new trial was ordered on appeal. The case was ultimately tried by Urquhart, J., who, for reasons which are now irrelevant, discharged a jury before whom the hearing had begun and proceeded to hear and determine the case without their assistance. The learned judge found that there was negligence on the part of the defendant company, and that its negligence was a cause of the injuries which the infant plaintiff had sustained. He further found that there was contributory negligence on the part of the infant plaintiff. He assessed the damages at $8,000 in respect of the infant plaintiff and $2,712.75 in respect of the adult plaintiff, but, inasmuch as he regarded the infant plaintiff as "75 per cent. responsible" for his own injuries, he apportioned the damages, as between the defendant company and each of the plaintiffs, in proportion to the degree of negligence so found. It was, therefore, adjudged that the infant plaintiff should recover $2,000 and his father $678.19. The question whether the terms of the Negligence Act (R.S.O. 1937, c. 115) could justify, on any view of the facts, this reduction of the damages awarded to the father does not appear to have been argued before the learned judge. It was answered in the affirmative by two judges of the Supreme Court of Canada. As will appear, no other judge had occasion to pronounce on it, and their Lordships have not found it necessary to consider it.

The plaintiffs appealed, and the defendant cross-appealed, to the Court of Appeal for Ontario. A judgment with which Robertson, C.J. (Ontario), and Roach, J.A., expressed their agreement was delivered by McRuer, J.A. The appeal of the plaintiffs was allowed, the court holding that the defence of contributory negligence failed. The cross-appeal was dismissed. The order of the court was that judgment should be entered for the full amounts at which Urquhart, J., had assessed the damages, without deduction. From this order the defendant appealed to the Supreme Court of Canada. Of the five judges who heard the appeal two, the Chief Justice of Canada and Kerwin, J., were of opinion that the appeal should be allowed and the action dismissed, holding that negligence could not be imputed to the defendant's salesman. The other three (Hudson, Rand and Estey, JJ.) were all agreed that there was negligence on the part of the defendant's salesman, but whereas Hudson and Estey, JJ., thought that the trial judge was right in his finding of contributory negligence, and in reducing the damages accordingly, Rand, J., agreed with the decision of the Court of Appeal for Ontario. In the result an order was made restoring the judgment of Urquhart, J. This result satisfied neither plaintiffs nor defendant, and each side sought and obtained leave to appeal to His Majesty in Council, the defendant by way of cross-appeal.

It is now necessary to set out in a little detail the relevant facts as they were found by the learned judge at the trial. In the afternoon of July 31, 1940, the infant plaintiff, who was accompanied by a younger brother then aged seven, went to the respondent's gasoline station in Kirkland Lake. A youth named Black, who was employed by the respondent, was then serving customers. The boys bought from him five cents' worth of gasoline. It appears that the five cents were paid to Black by the younger boy, but " the transaction " (the learned judge found) " was with the larger boy " who twice told Black that he wanted the gasoline to put in his mother's car which " was stuck down the street." Black, who had been instructed that the gasoline in the pumps contained lead and ought not to be used for dry cleaning, then asked whether it was to be used for dry cleaning. The infant plaintiff replied that it was not and repeated that it was needed for his mother's car. Black repeated his question, and received the same reply. The boys had provided themselves with a lard pail with a closely fitting, but removable, lid and Black, not without " real doubts and misgivings . . . as to the propriety of his sale " (which, in the learned judge's view, were justified) supplied them with about a pint of gasoline, half filling the pail. That Black had doubts was indicated both by his question about dry cleaning and by the fact that before the boys had gone beyond recall he told the assistant-manager about the sale, and said : " That's all right, isn't it ? " The learned judge attached importance to the fact that the gasoline was not supplied in a " safety container," but in a receptacle which he found to be unsafe.

The story which the infant plaintiff told to Black was untrue. The boys' mother was, in fact, ill in bed. The five cents had been provided by her for the purchase of a confection known as chocolate milk. The boys wanted the gasoline in order to make use of it in a game in which they proposed to play the part of Red Indians, and to enact a scene which they had witnessed in a moving picture. For this purpose torches were required, and it had occurred to them that by soaking in gasoline some bulrushes which they had gathered and setting them alight with matches, satisfactory torches might be made. They had failed to obtain the necessary gasoline from another station in the neighbourhood, where it had been refused at first because they brought with them a glass container, and later, when they arrived with the lard pail, because (the learned judge thought) " they told a different story on this occasion." It was after the latter rebuff that they visited the defendant's station and were successful. The sequel may be told in the learned judge's own words ([1944] 3 D.L.R. 620) :

> " The boys took the pail of gasoline with which they started out in the general direction in which they had indicated that their mother's car was stranded. Then they went to a lane, out of sight of the gas station and some distance away from it. The infant plaintiff then sent his brother to the house for the bulrushes and some matches, and, when the brother returned, the infant plaintiff dipped one of the bulrushes in the pail of gasoline and handed the dripping bulrush to the smaller brother and then lighted it. The bulrush in the brother's hand flared up and he, being frightened, tried to beat it out on the ground. At that time, the boys were standing about four feet apart with the pail of gasoline open, midway between them. The gasoline in the pail, the boys say, caught fire from the bulrush with a swishing sound, although they say that when the bulrush was beaten on the ground there were no sparks."

The unhappy result was that " the infant plaintiff was most painfully and seriously burned."

On these facts the learned judge found " that under all the circumstances of the case, Black should have reasonably anticipated that the gasoline might be used for a dangerous purpose by these two young lads " and held that his negligence contributed to cause the injuries which the infant plaintiff suffered. As appears from the summary of the proceedings at the beginning of this judgment, all the courts in Canada have concurred in these findings, although the Court of Appeal for Ontario went further, holding that contributory negligence could not be imputed to the infant plaintiff and that his injuries must be attributed solely to the negligence of the defendant. It would be contrary to the well known rule of practice by which their Lordships are guided to reject these concurrent findings of fact. In their Lordships' opinion it is hopeless to contend that there was not evidence to support the findings. Not all the reasons given for them by the learned judge seem to their Lordships to be equally convincing, but the evidence, taken as a whole, in their view fully substantiates the conclusion at which both the judge and the two appellate courts in Canada arrived on these matters. The rule as to concurrent findings is none the less applicable when the decision of a court is not unanimous : see *Robins* v. *National Trust Co.* (1); *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* (2).

It was contended on behalf of the defendant at their Lordships' Bar, as it had been, without success, at the trial, that, assuming its employee to have been negligent, the subsequent acts of the infant plaintiff were the real cause of his injuries, and were an intervening cause, or *novus actus interveniens*, to which alone those injuries should be ascribed. Alternatively, the defendant relied on the finding of the learned judge, supported as it was by the judgment of the Supreme Court of Canada, that there was contributory negligence on the part of the infant plaintiff. The latter of these submissions accords with the judgment under appeal, and it is convenient to deal with it at once. The negligence of the defendant consisted in putting into the hands of a small boy a dangerous substance with which a reasonable man, taking thought, would have foreseen that the child was likely to do himself an injury. The fact that the boy told an untruth in order to persuade Black to give him the gasoline, a fact on which the defendant's counsel much relied, cannot avail the defendant in view of the learned judge's finding that Black's doubts as to the propriety of the sale were justified. To put a highly inflammable substance into the hands of a small boy is to subject him to temptation and the risk of injury and this is no less true if the boy has resorted to deceit in order to overcome the suppliers' scruples. The child's deceit can afford no excuse to the supplier when it is found that the story told was such as to arouse, rather than allay, suspicion in the mind of a reasonable man. In the circumstances, therefore, their Lordships think that McRuer, J.A., was right in applying to this case the principle stated by Lord Denman, C.J., in *Lynch* v. *Nurdin* (3) (1 Q.B. 38) :

> " The most blameable carelessness of his servant having tempted the child, he [the defendant] ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care ; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it."

The negligence of the defendant's servant in the present case may call for less severe condemnation than these words express, but the principle which they embody is none the less applicable.

Urquhart, J., was led to his finding of contributory negligence by the view which he formed as to the special characteristics of the infant plaintiff. He found that the boy was " mentally alert " and " bright," and said of him ([1944] 3 D.L.R. 620) :

> " He would be quite capable of being guilty of contributory negligence in the abstract and also in respect of the handling of gasoline and gasoline

> fires. He knew the dangers of matches. His father had gasoline in his workshop which was attached to the house. The [infant] plaintiff admitted that he had before the occurrence watched gasoline in his father's torch and had been with his father on a job or two, had seen his father lighting his torch and knew that there was gasoline in it, and had been told by his father to keep away from the torch. His father would not allow the children into the workshop [in which he worked as a plumber]. I have no doubt that the boy fully appreciated that gasoline was a dangerous substance, and had considerable knowledge that it burned in no ordinary manner."

It was contended on behalf of the plaintiffs that the learned judge's findings were illogical and inconsistent. Black was negligent because he ought to have recognised that a boy of the age of the infant plaintiff not only lacked knowledge and experience, but was likely to have mischievous propensities. These defects being characteristic of the normal boy, it was impossible (so ran the argument) to impute to this boy, whatever exceptional training or experience he might have had and however reckless he might appear to have been, any failure to take reasonable care for his own safety. In other words, he could not be found guilty of contributory negligence. Their Lordships do not find it necessary to decide whether there is a necessary inconsistency, in all cases in which the defendant owes a duty to show special care in his dealings with a child, in a finding of negligence by the defendant coupled with one of contributory negligence by an infant plaintiff. If the evidence had shown that the infant plaintiff in the present case had, in fact, greater knowledge of the dangerous properties of gasoline than would be imputed normally to a child of his age, a more debatable question would have arisen. A careful examination of the evidence has satisfied their Lordships that the boy had no knowledge of the peculiarly dangerous quality of gasoline. He knew, no doubt, that an object soaked in gasoline could be ignited with a match. He did not know, and there is no evidence that he had ever been told, that gasoline was a volatile liquid capable of producing a highly inflammable vapour likely to burst into flame if heat were brought near it. He knew (he said in his evidence) that "it would burn like a match . . . after you strike it." His father said that he had never warned him about gasoline, because he did not think that a boy could buy it. The boy himself said, what is likely enough, that his father had told him to keep away from his gasoline torch, but that he was "pretty sure" that neither of his parents had ever warned him "to be careful with gasoline." On the evidence it is, in their Lordships' view, impossible to regard him as any more capable of taking care of himself in the circumstances in which he was placed than a normal boy of his age might be expected to be. In the words of Denman, C.J., although he may be said to have acted "without prudence or thought", he "showed these qualities in as great a degree as he could be expected to possess them." It is a fair inference from the evidence that it was the very property of gasoline which he neither knew, nor could be expected to know, which brought about his misadventure. Their Lordships are, accordingly, of opinion, in agreement with the Court of Appeal for Ontario, that on the facts of this case the finding of contributory negligence cannot be supported.

It follows from what their Lordships have already said that the attempt to attribute the disaster which happened solely to the acts of the infant plaintiff must fail. That defence cannot, indeed, be maintained in the light of the concurrent findings of fact in this case, for, when once the negligence of the defendant's servant has been found to have contributed to cause damage to the plaintiff, it is impossible to say that a new cause has intervened so as to relieve the defendant of all responsibility for the evil consequences which followed his wrongful act. Their Lordships will add, however, that even without regard to the rule of practice as to concurrent findings they would have had no difficulty in arriving at the same conclusion. However the case is put, the answer made by McRUER, J.A., in the Court of Appeal for Ontario, seems to their Lordships to be conclusive in the light of the evidence when he said ([1945] Ont. Rep. 33) :

> " If one gives to a child an explosive substance and the child, with a limited knowledge in respect of the likely effect of the explosion, is tempted to meddle with it to his injury, it cannot be said in answer to a claim on A behalf of the child that he did meddle to his own injury, or that he was tempted to do that which a child of his years might be reasonably expected to do."

Their Lordships will humbly advise His Majesty that the plaintiffs' appeal should be allowed, the judgment and order of the Supreme Court of Canada B set aside, the judgment and order of the Court of Appeal for Ontario of Dec. 19, 1944, restored, and the cross-appeal of the defendant dismissed. The defendant must pay the plaintiffs' costs of the appeal to the Supreme Court of Canada and of the appeal and cross-appeal to His Majesty in Council.

Appeal allowed. Cross-appeal dismissed.

Solicitors : *Ridsdale & Son* (for the plaintiffs) ; *Lawrence Jones & Co.* (for C the defendant company).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

Affirmed. H.L. [1950] 1 All E.R. 1018.

D

SEAFORD COURT ESTATES, LTD. *v.* ASHER.

[COURT OF APPEAL (Lord Greene, M.R., Asquith and Denning, L.JJ.), May 2, 3, June 1, 1949.]

E *Rent Restriction—Permitted increase—Transfer of burden—Covenant by landlord to provide services previously supplied voluntarily—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (*c.* 17), *s.* 2 (3).

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3) : " . . . any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is F held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act."

By a lease dated Sept. 22, 1943, a flat which was subject to the Rent Restrictions Acts was let at a rent of £250 a year, the landlords covenanting *inter alia* to remove refuse and to provide hot water. From 1935 to 1939, G the flat had been let at a rent of £175 a year, but the lease of 1935 contained no covenants to be performed by the landlords save that of paying rates and taxes, although the landlords had, in fact, provided the extra services which they later covenanted to provide by the lease of 1943. In proceedings by the landlords to recover arrears of rent, the tenant contended that the landlords were not entitled to claim more than the standard rent of the H flat, *viz.*, the £175 a year. The landlords contended that their additional obligations under the lease of 1943 constituted the transfer to them of a " burden " previously borne by the tenant, within the meaning of s. 2 (3) of the Act of 1920, so that they were entitled to increase the rent.

HELD : (i) the word " terms " in s. 2 (3) of the Act of 1920 meant contractual terms, *viz.*, legal rights or obligations, and not mere *de facto* advantages or handicaps, and, therefore, in determining whether or not there had been a transfer to the landlords of a burden previously borne by the tenant within the meaning of the sub-section, the circumstance that before 1943 the landlords had voluntarily provided the services in question should not be taken into account, but, as the landlords could at any moment have ceased to provide the services, there was a contingent burden on the tenant to provide them himself or do without them, and, therefore, as the addition of the word "burden" in the phrase "burden or liability" in s. 2 (3) implied that something less than the transfer of a A strict legal obligation would meet the requirements of the sub-section, by the terms of the lease of 1943 the tenant was freed from a disadvantage which, in view of, *e.g.*, the rising cost of fuel, could be described as a "burden" within the meaning of s. 2 (3), and there was a transfer to the landlords of a burden previously borne by the tenant within the meaning of the sub-section and the terms on which the flat was held were on the B whole not less favourable to the tenant than the previous terms.

Winchester Court, Ltd. v. *Miller* ([1944] 2 All E.R. 106), *applied.*

Property Holding Co., Ltd. v. *Clark* ([1948] 1 All E.R. 165), *discussed.*

(ii) notwithstanding that the landlords had not consciously related the increase of rent and the burden, the words "in respect of" the transfer in s. 2 (3) of the Act were satisfied provided that there was an increase of rent C not greater than was commensurate with the *quantum* of the burden transferred and substantially contemporary with its transfer, and, therefore, the landlords were entitled to increase the rent under the sub-section, but, as the amount of the increase had not been expressly agreed between the parties, it was for the court to assess the value of the services to be provided and translate it in terms of rent. D

[As to Transfer of Burdens, see HALSBURY, Hailsham Edn., Vol. 20, p. 326, para. 387, and 1948 Supplement; and for Cases, see DIGEST, Vol. 31, p. 566, No. *7135*, and Supplement.]

Cases referred to:

(1) *First National Housing Trust, Ltd.* v. *Chesterfield R.D.C.*, [1948] 2 All E.R. 658; [1948] 2 K.B. 351. E

(2) *Winchester Court, Ltd.* v. *Miller*, [1944] 2 All E.R. 106; [1944] K.B. 734; 114 L.J.K.B. 152; 171 L.T. 150; 2nd Digest Supp.

(3) *Property Holding Co., Ltd.* v. *Clark*, [1948] 1 All E.R. 165; [1948] 1 K.B. 630; [1948] L.J.R. 1066.

(4) *Heydon's Case*, (1584), 3 Co. Rep. 7*a*; 42 Digest 614, *143*. F

(5) *Eyston* v. *Studd*, (1574), 2 Plowd. 463; 42 Digest 635, *379*.

Appeal by the landlords and cross-appeal by the tenant from an order of His Honour Judge Dale, at Bloomsbury County Court, dated Dec. 14, 1948.

By a lease dated Sept. 22, 1943, the landlords let a flat to the tenant at a rent of £250 a year payable quarterly in advance. In proceedings by the landlords to recover £62 10*s*., being one quarter's rent payable on June 24, 1948, G the tenant contended that the landlords were only entitled to rent at the rate of £175 a year, which was the standard rent of the flat, and he counterclaimed for the excess rent paid for the eleven quarters previous to June 24, 1948. The landlords contended that by the lease of 1943 there was a transfer to them of a burden previously borne by the tenant, within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3), and, therefore, H they were entitled to the extra rent. The county court judge held that the landlords were entitled to rent only at the rate of £175 a year, and that the tenant was entitled to recover excess rent paid in respect of six quarters. On the appeal and cross-appeal from this decision, the Court of Appeal now held that the increase of rent was permitted under s. 2 (3) of the Act of 1920 and allowed the landlords' appeal. The facts appear in the judgment of Asquith, L.J.

C. L. Henderson, K.C., *James MacMillan* and *Norman Richards* for the landlords.

John Stephenson for the tenant.

Cur. adv. vult.

June 1. The following judgments were read.

LORD GREENE: The relevant facts are stated in the judgments of A ASQUITH and DENNING, L.JJ., which I have had the advantage of reading. I agree with their conclusions and the reasoning on which they are based, and have only a few words of my own to add. I may say, however, that the true interpretation of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3), is a matter which appears to me to be left by the authorities in some obscurity and might well be the subject of consideration by the highest B tribunal.

The present question arises under the second limb of the sub-section, which deals with the case where there has been an increase of rent. In order to ascertain whether what is *de facto* an increase of rent ought, for the purposes of the Act, to be deemed not to be an increase of rent, we are required to compare the "terms" on which the dwelling-house was held previously to the *de facto* C increase of rent with the "terms" on which it is held subsequently to that increase. The meaning of the word "terms" in this context is not, in my opinion, open to doubt. It bears the ordinary meaning of that word when found in a lease, *i.e.*, the provisions of the lease which are binding in law. For the purpose of this comparison we are required to ascertain whether (i) the *de facto* increase of rent is in respect of a transfer to the landlord of a burden D or liability previously borne by the tenant, and (ii) whether the result of such transfer is to make the new terms not less favourable than the previous terms. This must, as it seems to me, involve a weighing of the "terms" in the new lease, one of which (the increase of rent) is detrimental, and the other of which (the assumption of a transferred burden or liability by the landlord) is beneficial to the tenant, and for the purpose of that operation I should have thought E that it is not permissible to go outside the "terms" and consider the effect of something which cannot properly be described as a term—in other words, the transfer of the burden or liability must be something which of itself operates to make a change in the "terms" of the lease capable of being weighed against the other relevant "term," *i.e.*, the increase in the rent.

In the present case there came into existence in the new lease a "term" F which was absent from the previous lease, *viz.*, the contractual liability of the landlords to provide the services in question, and for the reasons given by ASQUITH, L.J., the increase of rent, or, at any rate, an appropriate amount of it, must, I think, be taken as having been made "in respect" of that assumption of liability. In the circumstances, can it be said that there has been a "transfer" to the landlords of a "burden or liability previously borne by the G tenant"? There was, admittedly, no transfer of a "liability," since that word, in my opinion, means a legal liability enforceable by the landlords, or by a third party, *e.g.*, a local authority. The word "burden" is, however, in my judgment, apt to describe the position of the tenant. That word must, I should have thought, at any rate include a thing which the tenant as such reasonably desires to have provided for his benefit and for the provision of H which he has no legal right of recourse against anyone else, his landlord or a third party. In the present case the services in question were reasonably desired by the tenant, and he had no such right of recourse. If he wanted them, the burden, so far as his legal position was concerned, lay on his own shoulders, and the assumption of liability by the landlords relieved him of that burden. It is suggested, however, that we should take into account the circumstance that during the currency of the old lease the landlords were voluntarily providing the services. But there was no "term" in the old lease that they should do so, and for the purposes of the required comparison of " terms " I do not myself see how it is possible to introduce something which operated in fact but cannot in any way be regarded as a " term." I do not myself think that this conclusion is inconsistent with any decision by which we are bound. If, however, I am wrong in this, I am prepared to accept the views expressed by ASQUITH, L.J., in relation to that topic. The order will be as mentioned by ASQUITH, L.J. A

ASQUITH, L.J. : This is an appeal by the landlords and cross-appeal by the tenant from a decision of His Honour JUDGE DALE in the Bloomsbury County Court, whereby he adjudged that the landlords were entitled to succeed against the tenant to the extent of £43 15*s*. on a claim for one quarter's rent of a flat in Great Portland Street, and that the tenant's counterclaim in respect of rent overpaid in the past was entitled to succeed to the extent of £112 10*s*. B He, accordingly, gave judgment for the tenant for a balance of £68 odd. The flat in question was let by the landlords to the tenant by a lease of Sept. 22, 1943, at a rent of £250 per annum payable quarterly in advance. The landlords claimed £62 10*s*., being one quarter's rent at that annual rate payable on June 24, 1948, for the quarter beginning on that day. The tenant, who had been paying for a considerable time on that basis, set up that the landlords were C not entitled to claim more than the standard rent, which he alleged (and it is now agreed) was £175 per annum. At that annual rate the proper quarterly rent would be £43 15*s*., £18 15*s*. less than £62 10*s*., the quarterly rent claimed on £250 per annum. The tenant, accordingly, contended (i) that the landlords' claim for the quarter's rent should be reduced from £62 10*s*. to £43 15*s*. ; (ii) that he was entitled to counterclaim for each of eleven quarters previous to D June 24, 1948, an over-payment of £18 15*s*., making £206 5*s*. in all. The learned judge found the standard rent of the flat was £175 per annum, awarded the landlords £43 15*s*. for one quarter's rent on this basis, and sustained the counterclaim for repayment of £18 15*s*. quarterly, not for eleven quarters as claimed, but for six quarters only, on which footing, as stated, it totalled £112 10*s*., and £68 odd was due on balance to the tenant. Against this result the E landlords appealed and the tenant cross-appealed. The ground of the landlords' appeal was that they were entitled to charge rent at £250 per annum—£75 more than the standard rent—by reason of the provisions of s. 2 (3) of the Act of 1920, so far as that sub-section relates to transfers of burdens or liabilities from a tenant to a landlord. The grounds of the cross-appeal by the tenant were that the county court judge should have held that the £18 15*s*. repayment F per quarter was due not in respect of six quarters only, but of a longer period. His notice of cross-appeal argues for this repayment in respect of nine quarters, but the claim as to one of these quarters has been waived by the tenant, and, as to the difference between six and eight quarters, was conceded by the landlords in the course of the argument in this court.

The relevant facts are not in dispute. The flat in question was the property G of the landlords at least as long ago as 1935. By a lease of Sept. 23, 1935, they let it to one Edwards at £175 per annum, and it is conceded (the flat having a rateable value of £62) that it is subject as to rent to the Rent Restrictions Acts, and that this figure of £175 represented the standard rent. The 1935 lease contained no covenants to be performed by the landlords save a single one, to pay rates and taxes. Edwards' term expired on Sept. 29, 1938, but H he held over until December, 1939. The flat was vacant from then until September, 1943. It was then let to the present tenant at a rent of £250. This second lease contained a number of covenants to be performed by the landlords. *Inter alia* they covenanted to pay certain impositions other than rates and taxes, to repair the exterior of the house, to remove refuse, and (most important of all) to provide hot water, an onerous obligation at a time when the cost of fuel was rising and supplies precarious. The county court judge, however, found that, while the landlords, under their earlier lease to Edwards, had not yet assumed a legal obligation to provide any of these services, *de facto* and as an act of grace they did during that period provide all of them. This finding is important since the county court judge inferred from it that there had been no "transfer of a burden or liability" to the landlords within s. 2 (3) of the Act of 1920, and gave judgment in favour of the tenant on the basis of A this inference.

Section 2 (3) of the Act of 1920 reads as follows:

> "Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which B a dwelling-house is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased, whether or not the sum periodically payable by way of rent is increased, and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable C to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act."

While the construction of this provision is obscure and difficult, its broad aim is plain. First, a tenant who pays an unreduced money rent (*viz.*, the standard rent plus permitted increases, if any) must not get less for it. If he does, the rent is to be treated as reduced. This is the object of the first limb of the D sub-section. Secondly, the object of the second limb is that a landlord who charges an increased rent (more than the standard rent plus permitted increases if any) may not exact the increase unless, and save to the extent that, he gives more for it. Any increase of rent not justified on this basis need not be paid by the tenant, and, if paid, can be recovered back by him. The second limb of the sub-section is the relevant one in this case. The landlords had to E show that the increase of the rent from £175 (the standard rent) to £250 was an increase to which that limb applied and which in consequence of its application was to be "deemed not to be an" (unpermitted) "increase . . . for the purposes of this Act"—in other words, that it was to be deemed to be legally exigible by the landlords, and, if paid by the tenant, irrecoverable by him.

In order to bring the increase of rent within the relevant part of the sub-section F so that it can be "deemed" not to be an unpermitted increase, the landlords must establish four propositions: (i) that "*the terms on which* [*the*] *dwelling-house is held*," *though changed, are* "*not less favourable to the tenant*" than they were before the increase of rent; (ii) that the change in the terms is the "result" of a "*transfer to* [*the*] *landlord of* [*a*] *burden or liability*"; (iii) that this "burden or liability" was before the transfer "*borne by the tenant*"; (iv) that the G increase in the rent is an increase "*in respect of* [*the*] *transfer*" in question. I am of opinion, with my Lord, that in the first of these propositions "terms" means contractual terms, *viz.*, legal rights or obligations, not mere *de facto* advantages or handicaps. When a statute is speaking of the terms on which premises are held by a tenant from a landlord, there is a strong presumption that it means the first.

H Before inquiring, on this assumption, whether the above four propositions are established in relation to the facts of the present case and the provision therefore applies, it may be helpful to proceed by stages and to consider first whether the provision has any, and, if so, what, application on somewhat simpler facts. (*a*) It clearly *does* apply (and this is the simplest case) where a legal obligation is transplanted from the back of the tenant to the back of the landlord, provided the increase of rent does no more than compensate the landlord for this transplantation. For, in that case there is a transfer to the landlord of a "liability" previously borne by the tenant, this transfer "results" in new contractual "terms" which (after the increased rent has been allowed for) are "not less favourable to the tenant," and the increased rent is "in respect of" that transfer (a statement which I will try to make good later). (*b*) At the other end of the scale the provision clearly does not apply where no obligation enters into the picture, *e.g.*, where the landlord voluntarily begins to provide some service for the tenant with which the tenant had until then voluntarily provided himself or gone unprovided, because the provision clearly contemplates only cases in which the (contractual) "terms" are affected, and on the facts assumed they will not have been affected: see *First National Housing Trust, Ltd.* v. *Chesterfield R.D.C.* (1). (*c*) Between these extremes fall cases (of which the present is one example) where the landlord assumes a legal obligation previously not resting on the tenant, or the tenant is relieved of a legal obligation previously resting on him, which is not shifted as an obligation on to the shoulders of the landlord: *e.g.*, the present case, and *Winchester Court, Ltd.* v. *Miller* (2). In such cases there has clearly been a change in the (contractual) "terms" on which the dwelling-house is held, but does that change "result" from a "transfer to [the] landlord of [a] burden or liability previously borne by the tenant"? In approaching this question some significance must be attributed to the phrase "*burden or* liability." If "liability" (which suggests a legal obligation *stricto sensu*) had stood alone, the natural inference would be that there must, to satisfy the provision, never be less than what has been called the transplantation of an obligation as in case (*a*) above. The addition of the words "burden or" implies that something less or something looser than such a transplantation will suffice, and two cases decided directly under s. 2 (3) both bear out this view. One appears to say that the "something less" is enough; the other that the something less is essential and (possibly) that something more is necessary.

These two cases are *Winchester Court, Ltd.* v. *Miller* (2), and *Property Holding Co., Ltd.* v. *Clark* (3). In neither of them did the landlord, as in the present case, assume an obligation; in each case a party was released from one. In *Miller's* case (2) the tenant, who had previously been saddled with a full repairing covenant, was later released from that part of the obligation which covered "fair wear and tear." In *Clark's* case (3) the landlord, who had previously been under an obligation (*a*) to provide certain cooking and heating facilities, and (*b*) to do certain other things (*e.g.*, clean the common stair), was later released from these obligations. *Clark's* case (3), therefore, was one within the first limb of s. 2 (3) which treats of "transfer . . . of [a] burden" from the landlord to the tenant, but is none the less relevant for that when the question is what is meant by "transfer . . . of [a] burden," for presumably this phrase bears the same meaning in the second limb as in the first. In neither case did the obligation which one party had shaken off alight as an obligation on the shoulders of the other. The landlord in *Miller's* case (2) did not become bound in law to make good "fair wear and tear." The tenant in *Clark's* case (3) did not become bound in law to provide the cooking and heating facilities involved, or to do the other things referred to. Nevertheless, the court held in *Miller's* case (2) without reserve or qualification that there had been a "transfer to [the] landlord of [a] burden . . . previously borne by the tenant." *Miller's* case (2) decides that there is a sufficient "transfer" where the tenant divests himself of a legal obligation to provide a service previously incumbent on him without the assumption of a corresponding legal obligation by the landlord. It is enough if what passes to the landlord is the practical necessity, or, indeed, short of that, the mere expediency, of providing the service himself. This appears plainly from the argument when read in conjunction with the judgment of Scott, L.J. Counsel for the tenant in that case, arguing that there had been no "transfer," said ([1944] K.B. 739):

> "The liability to repair contained in Platini's covenant was not replaced in whole or in part by an undertaking . . . of the landlords."

In his reply counsel for the landlords submitted (*ibid.*) :

> "There is a transfer of a burden from tenant to landlord if a tenant ceases to be liable for repairs, since, if the landlord does not do the repairs, the property will lose value."

A In his judgment (with which MACKINNON, L.J., agreed), SCOTT, L.J., said ([1944] 2 All E.R. 108) :

> ". . . the words of [s. 2 (3) of the Act of 1920] are sufficient to cover the interpretation [of counsel for the landlords]."

Miller's case (2), therefore, decides that to constitute a "transfer" of a burden B it is sufficient if one party sheds an obligation to provide a service, and the other party thenceforward has, as a matter, not of contractual duty, but of practical need or even of mere prudence, to provide it for himself. For short we will speak of such a transfer as a transfer of the "practical burden." In *Miller's* case (2) the Court of Appeal seems to have thought it wholly immaterial whether in the sequel the transferee of the practical burden discharged that C burden by actually providing the service in question for himself or not. The "burden" would still have been transferred to the landlord if he had elected not to make good wear and tear, preferring to see his house deteriorate.

On this simple rule *Clark's* case (3) embroiders certain qualifications. That part of *Clark's* case (3) which is here relevant is contained in the judgment of EVERSHED, L.J., with which both of the other members of the court expressed D agreement, though the judgment of SCOTT, L.J., contains some remarks not easy to reconcile with his professed conformity, but the judgment of EVERSHED, L.J., is, at the lowest, a majority judgment. The learned Lord Justice (dealing with cases where there has been something less than the transplantation of an obligation) says in effect that the shifting of the "practical burden" is not merely something which may satisfy the words "transfer of a burden," but E that (*a*) nothing less will avail to satisfy them ; (*b*) something more is, or may be, needed to do so ; and he adds (*c*) that a transfer will not extend to services, the burden of which, though lifted from the landlord, the tenant is incapable in law of assuming. (*b*) and (*c*) require elaboration. What is (*b*) the *porro unum necessarium* ? In trying to answer this question, I will for simplicity state the answer in terms of the facts of *Clark's* case (3), in which (unlike the F present) the landlord did not assume, but was relieved of, an obligation. The court appeared to decide that in such a case not merely must the "practical burden" of supplying the relevant services shift to the tenant, but that he must in fact supply them. There is only a transfer of a burden to the extent (to quote the words of EVERSHED, L.J. ([1948] 1 All E.R. 175)) that :

G

> ". . . the various articles covenanted by the landlords in the relevant clause of the lease of 1934 to be provided . . . or other articles for corresponding purposes, must now be *and are* provided by the tenant."

The order made in pursuance of this decision of the Court of Appeal actually incorporates the words just quoted. As to (*c*), certain of the obligations of which, in *Clark's* case (3), the landlord was relieved were obligations to provide H services, such as that of lighting and cleaning the common stair and hall, the burden of which was incapable of transfer to the tenant, because as regards the common stair or hall he had (as against the landlords and the tenants of other flats) nothing more than a right of passage, and he could not light or clean without exceeding his rights. It seems possible that, when EVERSHED, L.J., (and, therefore, the majority of the court) said "must now be *and are*" (I italicise the last two words), he had in mind only these "non-transferable services" which "*are not*" provided by the tenant because he is legally incapable of providing them. If that is all the court meant, the limitation embodied in the words "*and are*" does not apply to the present case in which "untransferable services" play no part. It must, however, be acknowledged that in their literal grammatical sense the words "*and are*" are apt to include more than "untransferable services," and it is necessary to consider the position on the assumption that they do.

Parenthetically (before dealing with this possibility), I must consider whether and how far the decision in *Clark's* case (3) (which fell within the first limb of s. 2 (3)) applies to this case (which falls within the second). If in *Clark's* case (3) the facts had fallen, as in the present case they do, within the second limb of the sub-section, the court which decided *Clark's* case (3) would, no doubt, have applied a corresponding rule giving effect to the *de facto* position, and would, accordingly, have held that, if, before the landlord covenanted to provide the relevant services, it was he and not the tenant who in fact provided them, there could not have been said to be a "transfer to [the] landlord" from the tenant of the "burden" of providing them. Indeed, the most forcible way in which the case was put for the tenant was that you cannot speak of a "transfer to the landlord of a burden . . . previously borne by the tenant" when the burden in question was never borne by the tenant at any stage, but was borne by the landlord throughout, till 1943 *de facto*, and after 1943 *de jure* as well. Put in this way the argument sounds formidable. Nevertheless, for my part I think it ill-founded. Before the obligation was assumed by the landlord there was a contingent burden on the tenant, and, therefore, on the landlord's assumption of the obligation there was a transfer of a burden to him from the tenant, because, although *de facto* the landlord in the earlier period supplied hot water, etc., he could in that period at any moment have cut off the supply and forced the tenant to provide it for himself or go without. By the elimination of this risk in 1943 the tenant was emancipated from a disadvantage which can without abuse of language be described as a "burden," and one which, but for what happened in 1943, would very likely from being contingent have become actual owing to the rise in fuel prices. In consequence of what then happened, the tenant shed this burden which settled on the shoulders of the landlord having in its transit assumed the hard lineaments of a legally enforceable obligation.

It may be said that this conclusion is in conflict with the decision in *Clark's* case (3) embodied in the judgment of EVERSHED, L.J., which is a judgment of at least a majority of the court. In that judgment he appears to say that there is no transfer of burden except in so far as the alleged transferee thereof actually provides the services from the obligation to supply which the alleged transferor has been relieved. A possible interpretation of this statement, as has been noticed above, is one which identifies services, which after the alleged transfer "are not" provided by the tenant, with services which he is legally incapacitated from providing, as in the case of lighting or cleaning the common stair. If *Clark's* case (3) decided no more than that, it does not touch the present case. If, however, in *Clark's* case (3) the court is to be held to the literal scope of the words it used when it said "must now be *and are*," then its decision, in my view, conflicts with that in *Miller's* case (2), where the factual element reflected in the words "*and are*" was assumed to be wholly immaterial and a transfer of the (contingent) practical burden was held sufficient *per se* to satisfy the sub-section. If so, this court is at liberty to follow either of these conflicting decisions, and I am of opinion that it ought to follow that in *Miller's* case (2).

The foregoing concerns the issue whether or not there was in this case a transfer to the landlords of a burden previously borne by the tenant. There remains to be considered the contention of the tenant, that, even if there was such a transfer, the increase of rent, on the facts of the present case, was not "in respect of " such transfer, as it has to be to attract the operation of the subsection. The ground of this contention is the fact (and finding) that, when in 1943 the landlords raised the rent from £175 to £250, they had either forgotten, or, at all events, did not advert to, the terms on which the previous tenant, Edwards, had held from them. This reasoning assumes that an increase of rent cannot be " in respect of [the] transfer " of a burden unless the landlord increasing the rent consciously relates the two, the increase and the burden, to each other. I do not think that this is a legitimate assumption. " In respect of " is a very comprehensive expression. Provided there is (*a*) an increase of rent, (*b*) not more than commensurate with the *quantum* of the burden transferred, and (*c*) substantially contemporary with its transfer, the words " in respect of [the] transfer " are, in my view, satisfied, and this accords with the observations of SCOTT, L.J. ([1944] 2 All E.R. 109) in *Miller's* case (2) about the disturbance and readjustment of the equilibrium of the lease.

In the result, I think, first, that the landlords are entitled to succeed in their claim, not as to £43 15*s*. only, but *prima facie* as to £62 10*s*. ; and, secondly, that the tenant's counterclaim should fail except in so far as the county court judge may decide that the burden transferred is over-valued at £75 per annum. In such an event he may evaluate the landlords' claim for one quarter's rent at something intermediate between £43 15*s*. and £62 10*s*.

DENNING, L.J. : I agree with the judgments of my Lord and of ASQUITH, L.J. It is as well to bear steadily in mind the facts of this case. The flat was let from 1935 to 1939 at £175 a year. The landlord was then under no obligation to provide hot water, but he did in fact do so. The flat was empty from 1939 to 1943. Then it was let at £250 a year, but with the significant difference that the landlord bound himself to provide hot water. The cost of fuel and labour had, of course, greatly increased between 1939 and 1943, and, whilst in 1939 it was, no doubt, economically possible for the landlord to provide hot water free for his tenants, it may well have been economically impossible for him to do so in 1943 unless there was some increase in the rent. At any rate, the tenant then agreed to pay £250 a year for the flat. Now the tenant says that the increase from £175 to £250 was invalid. If his contention is correct, it means that in return for £175 a year he will not only get the benefits which the 1939 tenant got for that sum, but he will also get this additional benefit thrown in—he will be able to insist on the landlord providing hot water free of any cost to the tenant no matter how much the cost of fuel and labour has already increased or may hereafter increase, and he will be able to recover two years' over-payment at £75 a year. It is difficult to suppose that the legislature intended not only to peg rents at the 1939 level, but also to enable a tenant to get additional benefits without extra payment. If I thought that the legislature foresaw the situation and nevertheless intended that result, I would, of course, give effect to it, but the question is whether it did so. Section 1 of the Act of 1920 (as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sched. I), of course, pegs the rent at the 1939 level, but s. 2 (3) authorises the landlord to increase the rent in certain cases. The question is whether this is one of the cases in which an increase is authorised.

The courts have already done a good deal to define the scope of s. 2 (3). Two things are clearly necessary. First, it is necessary to compare the terms of the present tenancy with the terms of the previous tenancy which existed when the standard rent was payable. The sub-section is quite clear on this point. The " terms " on which the dwelling-house is held must be on the whole " less favourable " or " not less favourable " than the previous terms. " Terms " here means terms which are binding by contract or imposed by statute. Secondly, it is necessary that the change in the terms should result in, or be the result of, a transfer of a burden or liability from one to the other. For this purpose the transfer need not be a contractual transfer, nor need the burden be a contractual burden. The sub-section is satisfied if the change of terms puts on the one, as a matter of practice, the burden of doing work which had previously fallen on the other. In this case the first requisite is satisfied. The present terms are more favourable to the tenant than the previous terms because the landlord undertook a binding obligation to provide hot water, to remove refuse, and so forth. But was the second requisite satisfied ? Was the tenant previously under any " burden " which now falls on the landlord ? It is said that during the previous tenancy the landlord did, in fact, provide the hot water, and that, therefore, the tenant was under no burden. This is where the rub comes. I confess that, according to the ordinary meaning of the word " burden," the tenant was under no burden previously to provide hot water. But neither was the landlord. There was no legal obligation on the landlord to provide hot water, and if he, for any reason, good or bad, decided to cut it off, the tenant would have no legal ground of complaint. When the price of fuel rose, the landlord would both legally and morally have been justified in saying that he would not provide hot water unless he was paid a contribution towards the increase in cost. The tenant was, therefore, under the contingent burden, as a matter of practice, of providing the hot water himself, or paying a contribution towards the increased cost, or going without. Under the changed terms, all that burden falls on the landlord. No matter how much the price of fuel rises, no matter how difficult it is to obtain, the landlord can no longer cut off the hot water or ask the tenant for a contribution towards the increase in cost. The change of terms does, therefore, put on the landlord a burden which previously fell contingently on the tenant.

The question for decision in this case is whether we are at liberty to extend the ordinary meaning of " burden " so as to include a contingent burden of the kind I have described. Now this court has already held in *Winchester Court, Ltd.* v. *Miller* (2), that s. 2 (3) of the Act of 1920 is to be liberally construed so as to give effect to the governing principles embodied in the legislation, and I think we should do the same. Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give " force and life " to the intention of the legislature. That was clearly laid down (3 Co. Rep. 7b) by the resolution of the judges [Sir Roger Manwood, C.B., and the other barons of the Exchequer] in *Heydon's* case (4), and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his note (2 Plowd. 465) to *Eyston* v. *Studd* (5). Put into homely metaphor it is this : A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out ? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases. Approaching this case in that way, I cannot help feeling that the legislature had not specifically in mind a contingent burden such as we have here. If it had, would it not have put it on the same footing as an actual burden ? I think it would. It would have permitted an increase of rent when the terms were so changed as to put a positive legal burden on the landlord. If the parties expressly agreed between themselves the amount of the increase on that account, the court would give effect to their agreement, but if, as here, they did not direct their minds to the point, the court has itself to assess the amount of the increase. It has to say how much the tenant should pay "in respect of" the transfer of this burden to the landlord. It should do this by asking what a willing tenant would agree to pay and a willing landlord would agree to accept in respect of it. Just as, in the earlier cases, the courts were able to assess the value of the "fair wear and tear" clause and of a "cooker," so they can assess the value of the hot water clause and translate it fairly in terms of rent, and what applies to hot water applies also to the removal of refuse and so forth. I agree that the appeal should be allowed, and with the order proposed by ASQUITH, L.J.

Appeal allowed. Case remitted to the county court judge to determine whether and, if so, to what extent, the burden transferred to the appellants was over-valued at £75 per annum. The landlords to have the costs of the appeal. No costs of the cross-appeal. Costs of the first and second proceedings in the county court to be in discretion of the county court judge.

Solicitors : *Griffinhoofe & Brewster* (for the landlords) ; *Kennedy, Ponsonby & Prideaux* (for the tenant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. *v.* RAHMAN.

[LEEDS ASSIZES (Streatfeild, J.), May 7, 1948.]

Marriage—Solemnisation—Islamic ceremony—Ceremony in private house—Indictment—Marriage Act, 1836 (*c.* 85), *s.* 39.

By s. 39 of the Marriage Act, 1836 : "Every person who . . . shall knowingly and wilfully solemnise any marriage in England, except by special licence, in any other place than a church or chapel, in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in the notice [of marriage] and [registrar's] certificate . . . shall be guilty of felony."

A Mohammedan purported to perform a marriage ceremony in England in accordance with the Islamic faith between a Mohammedan, who was already married to a woman in India, and an English woman. The ceremony took place in a private house which was not registered for the solemnisation of marriages, and no special licence had been obtained. On the prosecution of the defendant for an offence under s. 39 the indictment charged him with solemnising the marriage without a special licence in a place other than a church or chapel in which marriages may be solemnised according to the rites of the Church of England "or than a registered building or office in which a marriage may validly be solemnised, namely, [the private house]."

HELD : although the indictment did not follow the exact wording of s. 39 it sufficiently defined the offence with which the defendant was charged and was good.

The trial proceeding, it was contended on behalf of the defendant that the ceremony was not the solemnisation of a marriage within the meaning of s. 39 since Mohammedan law recognised polygamy which was contrary to the English conception of marriage.

Held: the fact that by English law this marriage was invalid, the "husband" being already married, did not prevent the ceremony performed by the defendant being the solemnisation of a marriage within s. 39, and, therefore, there was a case for him to answer.

Dictum of Barnard, J., in *Srini Vasan* (*otherwise Clayton*) v. *Srini Vasan* ([1945] 2 All E.R. 23), *applied.*

[For the Marriage Act, 1836, s. 39, see HALSBURY'S STATUTES, Vol. 9, p. 347.]

Cases referred to:

(1) *Srini Vasan* (*otherwise Clayton*) v. *Srini Vasan*, [1945] 2 All E.R. 21; [1946] P. 67; 114 L.J.P. 49; 173 L.T. 102; 2nd Digest Supp.

(2) *Hyde* v. *Hyde and Woodmansee*, (1866), L.R. 1 P. & D. 130; 35 L.J. P. & M. 57; 14 L.T. 188; 11 Digest 413, *800*.

(3) *Sinha* (*Peerage*) *Case*, (1939), 171 Lords Journals, 350.

(4) *Berthiaume* v. *Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54; Digest Supp.

(5) *Brinkley* v. *A.-G.*, (1890), 15 P.D. 76; 59 L.J.P. 51; 62 L.T. 911; 11 Digest 414, *803*.

(6) *Warrender* v. *Warrender*, (1835), 2 Cl. & Fin. 488; 9 Bli. N.S. 89; 11 Digest 333, *218*.

(7) *Re Ullee*, (1885), 54 L.T. 286; 11 Digest 442, *1016*.

(8) *Re Bethell*, (1888), 38 Ch.D. 220; 57 L.J.Ch. 487; 58 L.T. 674; 11 Digest 413, *801*.

(9) *Baindail* (*otherwise Lawson*) v. *Baindail*, [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320; 2nd Digest Supp.

Submissions on Points of Law on a charge under the Marriage Act, 1836, s. 39.

The defendant was charged under the section that on Dec. 12, 1947, he "knowingly and wilfully did solemnise a marriage between Mohammed Hassan Mia and Mary Jane Brown without a special licence in a place other than a church or chapel in which marriages may be solemnised according to the rites of the Church of England or than a registered building or office in which a marriage may validly be solemnised, namely, [a private house]." Before the defendant had pleaded to the charge his counsel sought to quash the indictment on the ground that it did not follow the words of the section on which the charge was based, but this contention was overruled. It was then contended that the ceremony, which was conducted in accordance with the Islamic faith, was not a solemnisation of marriage within the meaning of s. 39. Streatfeild, J., ruled that "marriage" in s. 39 did not necessarily mean a marriage which was valid according to English law.

Hurwitz (*Sheikh Abdul Gafur* and *J. T. Williams* with him) for the defendant: The indictment as framed does not follow the words of the statute, but contains words which the learned draftsman has inserted, and, therefore, attempts to create an offence of which the defendant cannot be convicted. The indictment follows the words of s. 39 up to the word "office," and then substitutes the words "in which a marriage may validly be solemnised." The wording of the section is "other than a building or office specified in the notice and certificate." In this class of offence, which is highly technical, the prosecution must fail unless they can prove that the case comes within the four corners of the section.

Clough for the Crown: The wording of the indictment, involving, as it does, a slight deviation from the precise wording of the section, was chosen solely with a view to presenting the particulars of the alleged offence in the clearest possible way. The notice, which is referred to in s. 4 of the Act, deals with one way in which a marriage, as a result of a valid formality, may properly be solemnised, and it was unnecessary to set out the exact wording of s. 39 and refer to the notice as specified in s. 4.

STREATFEILD, J.: I consider that the indictment is drawn in such a way that, even although it does not follow the *ipsissima verba* of s. 39 of A the Act, it sufficiently defines what the alleged offence is, and in those circumstances I think the indictment is good.

On the trial proceeding it was contended for the defence that the ceremony, which was conducted in accordance with the Islamic faith, was not a solemnisation of marriage within the meaning of the Act of 1836.

B *Hurwitz*, *Gafur* and *J. T. Williams* for the defendant.
Clough for the Crown.

STREATFEILD J.: I have to rule as a matter of law whether there is a case for the defendant to answer under s. 39 of the Marriage Act, 1836, for which purpose it is necessary for me to construe the meaning of the word C " marriage ", particularly in the context " solemnise any marriage in England." It has been submitted to me that, this being a penal Act, one may not read into the statute any words which are not there, and with that submission I agree. The word " marriage," however, is not defined, and it seems, therefore, that I have to construe the word in relation to the objects of this penal Act. It has been submitted that this was not a marriage or a solemnisation of a D marriage because it was a marriage between a Mohammedan and an English woman who had been converted to Islam, by Mohammedan law limited polygamy is recognised, and that cuts at the root of the English conception of the word " marriage " which is said to be the union of one man and one woman and no other. In construing the word " marriage " in this sense I must be influenced by corresponding words in the Offences against the Person Act, E 1861, whatever may be the construction of the word when used in Acts concerning matrimonial causes, and on looking at s. 57 of the Act of 1861, which creates the offence of bigamy, one sees the word " marriage " used as meaning two different things. The words in s. 57 are:

> " Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall F have taken place in England or Ireland, or elsewhere, shall be guilty of felony . . ."

Clearly the words " being married " mean " being lawfully married " and the words " shall marry " and " second marriage " refer to a marriage which is not only unlawful and void, but which in itself gives rise to a criminal offence, and therefore must mean a purported marriage or a form of marriage. G It matters not whether the bigamous marriage takes place in a registry office or whether it takes place in a church or a synagogue or other place of worship. It seems clear, therefore, that in that penal Act the word " marriage " means a purported marriage, and, although that Act is of later date than the one which I am construing, that is of assistance in determining the meaning of the words " solemnise any marriage in England " in the Act of 1836.

H Reference has been made to how far the law has recognised Hindu marriages, and certainly it appears that in 1866 LORD PENZANCE laid down that because of its intrinsically polygamous nature a Hindu marriage could not be recognised in this country. Later decisions, however, appear to have put a different interpretation on a Hindu marriage than were there stated. In 1946 BARNARD, J., in giving judgment in *Srini Vasan* (*otherwise Clayton*) v. *Srini Vasan* (1), after reciting LORD PENZANCE'S decision in *Hyde* v. *Hyde and Woodmansee* (2) and quoting from the speech of LORD MAUGHAM in the *Sinha*

(*Peerage*) case (3), came to the conclusion that the textbook view that the only kind of marriage which English law recognises is a monogamous one was wrong. He continued ([1945] 2 All E.R. 23) :

> " . . . and, relying as I do on the above passages from LORD MAUGHAM's speech, I ought, therefore, to recognise this Hindu marriage as a valid marriage . . . To deny recognition of a Hindu marriage for the purpose in hand would, in my opinion, be to fly in the face of common sense, good manners and the ordered system of tolerance on which the Empire is based." A

With those words I respectfully agree. In these days it would be intolerable if we in this country were to refuse to recognise the validity of a Hindu marriage because polygamy is recognised under that faith and not under the faith of B the Established Church of England. It is noticeable that in that case there was a Hindu marriage which was celebrated or performed in England, although it is true it was performed at a registry office and in compliance with the requirements of the Marriage Act, 1836.

Counsel for the Crown relies also on the words of VISCOUNT DUNEDIN delivering the judgment of the Privy Council in *Berthiaume* v. *Dastous* (4) C where he states ([1930] A.C. 83) :

> " If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicil of one or D other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicil would be considered a good marriage."

There is, therefore, nothing to support the view that merely because this was a Mohammedan marriage—or purported to be a Mohammedan marriage E —it is not recognisable in this country on the ground that polygamy is permitted in India, and, indeed, this bridegroom was married to a woman in India already. It does not prevent this from being the solemnisation of a marriage, even although it should turn out that by the law of this country, he already being married, it was an invalid marriage. It was, in my opinion, none the less the solemnisation of a marriage and I construe the word " marriage " in s. 39 of F the Act of 1836 as having the same meaning as it does in the Offences against the Person Act, 1861, s. 57.

His Lordship, accordingly, ruled that there was a case for the defendant to answer.

Solicitors : *Saffman, Fielding & Co.*, Leeds (for the defendant) ; *O. A.* G *Radley*, town clerk, Leeds (for the Crown).

[*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

HORTON *v.* LONDON GRAVING DOCK CO., LTD.

[KING'S BENCH DIVISION (Lynskey, J.), May 25, 26, June 2, 1949.]

Negligence—Invitee—Duty of occupier—Protection against "unusual danger"—Workman slipping from staging.

A welder had been employed for some months in welding strips of steel on the ribs of a trawler lying in a wet dock. The contractors (to whom the welder's employers were sub-contractors) had provided a staging on which the welder could work, comprising four boards, five feet apart, each about twenty feet long by eleven inches wide and three inches deep, supported on iron beams or angle-irons, 3½ ins. by three inches, across the fish house (part of the hold) in which he worked, at a height of five feet five inches. The only means of getting from one board to another was by stepping on an angle-iron. When handing a tool-box to a fellow welder on the adjoining board the welder put one foot on the angle-iron, but his foot slipped and he fell astride the angle-iron, sustaining injuries. In an action by the welder for damages for negligence against the contractors :

HELD : the duty owed by the contractor as invitor to the welder as invitee was to prevent damage from unusual danger, and "unusual danger" meant a danger unusual from the point of view of the particular invitee and not appreciated by him, acting reasonably and exercising due care for his safety, in the circumstances in which he was availing himself of the invitation ; the welder had been engaged in similar work all his life and had worked on the staging for some weeks before the accident, using the angle iron when stepping from one board to another ; the danger, therefore, was known to him and one usual in his daily work ; it was immaterial whether or not he had freely and voluntarily, expressly or impliedly, agreed to incur that danger ; and, consequently, he could not succeed.

Indermaur v. *Dames* (1866) (L.R. 1 C.P. 274), and *dictum of* PHILLIMORE, L.J., in *Norman* v. *Great Western Ry. Co.* ([1915] 1 K.B. 596), *applied.*

[AS TO DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858 ; and FOR CASES, see DIGEST, Vol. 36, pp. 41, 42, Nos. *247-258.*]

Cases referred to :

(1) *Indermaur* v. *Dames*, (1866), L.R. 1 C.P. 274 ; Har. & Ruth. 243 ; 35 L.J.C.P. 184 ; 14 L.T. 484 ; *affmd.*, (1867), L.R. 2 C.P. 311 ; 36 L.J.C.P. 181 ; 16 L.T. 293 ; 31 J.P. 390 ; 36 Digest 35, *208.*

(2) *Norman* v. *Great Western Ry. Co.*, [1915] 1 K.B. 584 ; 84 L.J.K.B. 598 ; 112 L.T. 266 ; 38 Digest 352, *580.*

(3) *Letang* v. *Ottawa Electric Ry. Co.*, [1926] A.C. 725 ; 95 L.J.P.C. 153 ; 135 L.T. 421 ; Digest Supp.

ACTION for damages for negligence.

The plaintiff was a boiler-maker who for 34 years had been an electric-welder. He was employed by the Thames Welding Co., Ltd., who, in December, 1946, had a sub-contract with the defendants to do welding work on the trawler "Valmont" lying in a wet dock of the East India Docks. The defendants had contracted with the owners to re-convert the "Valmont" into a fishing trawler after its release from requisition during the war. The plaintiff's work was primarily to weld strips of steel to the ribs of the trawler. When in use by the Navy the trawler had had a false deck (since removed) built in the fish house (part of the hold) supported by two thwart ship iron beams or angle-irons. The angle-irons were 3½ ins. by three inches in size and five feet five inches from the cement lining at the bottom of the trawler. A staging had been provided by the defendants for use, *inter alios*, by the plaintiff in carrying out the work. It had been erected by shipwrights employed by them and neither the plaintiff nor any of the employees of the Thames Welding Co., Ltd., had any right to interfere with it, any alterations or additions being carried out by the defendants at the request of the Thames Welding Co., Ltd. The staging comprised four boards or deals, about twenty feet long by eleven inches wide and three inches thick. They rested on the two angle-irons in the fish house, one being placed eighteen inches from the port side and the others at intervals of five feet to within eighteen inches of the starboard side. A ladder ran from the cement lining of the ship to the deck, and there was no other moveable ladder. To cross from one board to another and to use the ladder it was necessary to step on an angle-iron. No serious complaints were made by the plaintiff as to the insufficiency of the staging supplied, and after the accident hereinafter referred to he returned to work almost immediately and continued on the same work with the staging in the same condition for eight months.

On Dec. 16, 1946, the plaintiff had, while standing on one of the middle boards on the starboard side, been welding an iron under the deck and had been using a wooden tool box eighteen inches by fourteen inches by nine inches deep, containing a hammer, chisel and welding rod and weighing in all about fourteen pounds. His fellow welder, one Fletcher, climbed on the board adjoining his, ready to take his (the plaintiff's) place in accordance with the usual practice, and the plaintiff picked up the tool box to hand it to Fletcher. To do so, the plaintiff placed one foot on the angle iron and leaned across. Fletcher took the box, but the plaintiff, in attempting to replace his foot on the staging, slipped, fell, and was injured. The plaintiff received medical attention the same day, and later returned to work. He continued to do the same work on the staging until August, 1947, making no claim for damages until Mar. 23, 1948. LYNSKEY, J., held that the defendants were not liable.

Edgedale, K.C., and *C. J. Doughty* for the plaintiff.
R. M. Everett for the defendants.

Cur. adv. vult.

June 2. **LYNSKEY, J.**, read a judgment in which he dealt with the facts and continued :—The only explanation of the plaintiff's slip and fall is either the comparatively narrow foot-hold available to him on the angle-iron or some inattention or carelessness on his part. The plaintiff says that in these circumstances his injury was caused by a breach of duty which the defendants, as invitors, owed to him as an invitee. The duty to an invitee is stated in that oft-quoted passage from the judgment of WILLES, J., in *Indermaur* v. *Dames* (1) and is (L.R. 1 C.P. 288) :

> " . . . that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know ; and that, where there is evidence of neglect, the question whether such reasonable care had been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

From this passage it seems clear that the only duty imposed on the invitor, or occupier, is to prevent damage from unusual danger. This, of course, raises the question of what is unusual danger. Is it danger unusual generally, or is it danger unusual in premises of the type, description and use, to which the invitation is extended, or is it a danger unusual from the point of view of the particular invitee, regard being had to the type, description and use of the premises to which he has been invited ? In my view, " unusual danger " means a danger unusual from the point of view of the particular invitee : see

PHILLIMORE, L.J.'s judgment ([1915] 1 K.B. 596) in *Norman* v. *Great Western Ry. Co.* (2). It must be, from his point of view, unexpected in the particular circumstances in which he is availing himself of the invitation. It may be that other persons might expect such dangers or might know of their existence in the premises on which he goes, but if he, acting reasonably and exercising due care for his own safety, did not appreciate the existence of the danger, or its nature, or its extent, it would be to him an unusual danger. On the contrary, if an invitee does appreciate the existence on the premises to which he is invited of a danger and its nature and extent, it cannot be to him an unusual danger.

In the case before me the plaintiff was an experienced ship-welder who, at the time of the accident, was 67 years of age and had worked all his life as a ship's boiler-maker or ship's welder. He had been employed on the "Valmont" from about August, 1946, and for more than a month had been welding in the fish house and had seen the staging provided. He had worked on that staging for some weeks before the accident and knew from experience that he had to use the angle-irons if he desired to step from one deal to another, or from the ladder provided to a deal, or *vice versa*. He knew, if not by measurement at least by vision, the size of the deals, their distance apart, and the size of the angle-irons. Such risk as there was in using such angle-irons with his experience was, in my view, obvious to him. Whatever might have been the position on the first day he worked on the staging, by the date of the accident the danger, such as it was, had become one of the usual dangers of his daily work and could not be regarded, so far as he was concerned, as an unusual one.

Counsel for the plaintiff contended before me that, even though the plaintiff knew of the danger, it would remain to him an unusual one unless it could be shown that he, freely and voluntarily, with a full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it. In other words, unless a defence of *volenti non fit injuria* would succeed, the risk remained to the plaintiff an unusual one, and he cited in support of his contention *Letang* v. *Ottawa Electric Ry. Co.* (3) and other cases where the defence of *volenti* had been set up and failed. It is enough, in my view, that the invitee appreciates the existence of the danger and its nature and extent, even although he did not freely and voluntarily, expressly or impliedly, agree to incur it. It was said before me that if a workman is put in the position of either having to incur the known risk or lose his work, he does not freely and voluntarily, expressly or impliedly, agree to incur it. That may or may not be true, but in these days of trade unions and shop stewards I very much doubt if there are many cases where a workman would be placed in such a position. Even if he were, I do not think it would operate to extend the duty owed to him by an invitor. There was no evidence before me that the plaintiff would lose his employment if he refused to work on the staging provided. He never complained to his own foreman and even after his accident he worked on the same staging without complaint either by himself or any of his fellow workers. The plaintiff did not suggest that his failure to complain was due to any fear of losing his work. If it were necessary to decide it I should have held on the facts of this case that the plaintiff did freely and voluntarily impliedly agree to accept the risk of working on the staging with full knowledge of the nature and the extent of the risk he ran.

In the result, I find that there was no breach of duty on the part of the defendants to the plaintiff, and the plaintiff's claim, therefore, fails, and there must be judgment for the defendants, with costs.

Judgment for the defendants with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Carpenters* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Disapproved. JONES v. HERXHEIMER [1950] 2 K. B. 106

[1950] 1 All E.R. 323.

LANDEAU v. MARCHBANK AND OTHERS.

[KING'S BENCH DIVISION (Lynskey, J.), June 3, 4, 1948, May 27, 1949.]

Landlord and Tenant—Covenant to repair—Breach—Measure of damages—Determination of lease—Conversion of premises into flats—Premises not in good repair—Value of reversion not diminished—Lessee liable in nominal damages—Landlord and Tenant Act, 1927 (*c.* 36), *s.* 18 (1).

By the Landlord and Tenant Act, 1927, s. 18 (1): "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

On the determination of a lease the premises were sold for £7,000, which was admitted by the parties to be a good price, for conversion into two flats and two maisonettes. When delivered up by the lessees the premises were not in good state of repair as required by the covenants contained in the lease, and the assignee of the benefit of the covenants brought an action for damages for the breach. Holding himself bound by the provisions of the Landlord and Tenant Act, 1927, s. 18, the master, in assessing the amount due to the lessor, excluded from his calculations the cost of effecting repairs rendered valueless by the contemplated conversion but included all such repairs as were not so rendered useless.

HELD: lack of repair was not in itself *prima facie* evidence of damage to the reversion, and before the lessor could recover any sum the court must be satisfied not only that there had been a breach of the covenant to repair but also that, as the result of that breach, there had been a diminution in the value of the reversion; the plaintiff had not proved any such diminution; and, accordingly, she was only entitled to an award of nominal damages.

Espir v. *Basil Street Hotel, Ltd.* ([1936] 3 All E.R. 91), *applied.*

[AS TO DAMAGES FOR BREACH OF A COVENANT TO LEAVE PREMISES IN REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 219-221, paras. 240-242.

FOR THE LANDLORD AND TENANT ACT, 1927, s. 18 (1), see HALSBURY'S STATUTES, Vol. 10, p. 389.]

Cases referred to:

(1) *Espir* v. *Basil Street Hotel, Ltd.*, [1936] 3 All E.R. 91; Digest Supp.

(2) *Witham* v. *Kershaw*, (1886), 16 Q.B.D. 613; 54 L.T. 124; 31 Digest 360, *5058*.

(3) *Salisbury* v. *Gilmore*, [1942] 1 All E.R. 457; [1942] 2 K.B. 38; 111 L.J.K.B. 593; 166 L.T. 329; 2nd Digest Supp.

MOTIONS to accept and to vary the report of a master or to remit the matter for re-consideration in an action by the assignee of the benefit of the covenants for breach of a covenant to repair.

The question of the amount due to the plaintiff had been referred to a master who in his report assessed the damages at £148 5*s.* 0*d.* It was contended by the lessees that failure to keep the premises in good repair was in itself no proof that there had been damage to the reversion, and, therefore, the master acted on a wrong principle in assuming that all repairs not rendered valueless by reason of the contemplated conversion of the premises must be regarded as damage to the reversion. LYNSKEY, J., held that the contention of the lessees was right and made an award of nominal damages for the breach.

Raeburn, K.C., and *Hackforth-Jones* for the plaintiff.
L. R. Miller for the defendants.

A **LYNSKEY, J.:** This case came before me so long ago as June 3 and 4, 1948, and I then made an order referring to a learned master the question of the amount arising thereunder for decision. In my judgment, after referring to the terms of s. 18 (1) of the Landlord and Tenant Act, 1927, as to the rights of a landlord to recover damages for breach of covenant to repair or keep in repair, I then said this:

> B "That right was a right under s. 18 of the Act to recover the value of the repairs necessary, in so far as such repairs did not exceed in value the amount, if any, by which the value of the reversion in the premises was diminished. In those circumstances, that being the test that must be applied under this section, and also structural alterations being at that time in contemplation, and having, in fact, been made, which would C render at least some of these repairs valueless, in my view, the plaintiff is entitled to recover such sum, if any, by which the value of the reversion had been depreciated in value, regard being had to the fact that alterations were then in contemplation—and, indeed, authorised—to transform the premises into two flats and two maisonettes, so that some of the repairs, if not all of them, would be rendered valueless. That, in my D view, is the right the plaintiff has to damages, and to ascertain what that is in money means an investigation, first, into the conditions statement; secondly, into the dilapidations statement; thirdly, into the particulars set out in the statement of claim and what repairs it is there said are necessary; fourthly, an investigation whether the value of the reversion was diminished at all, and, if so by what amount . . . and, E finally, an investigation in view of the fact that the premises were to be structurally altered, whether those repairs, if they had been undertaken, would have been valueless, so far as improving the value of the property was concerned. That matter, it is agreed by the parties, should be referred to a master for a report."

I made an order accordingly and the matter was dealt with by Master F SIMNER. In his report dated Feb. 25, 1949, he dealt with the various items of lack of repair alleged by the plaintiff, and considered in each case whether that particular item had been rendered valueless or reduced in value from the point of view of the owner of the reversion by reason of the contemplated, and, in fact, actual, conversion of the premises. Having done that, he found that £148 5*s.* 0*d.* would be the cost of doing so much of the repairs to the G premises as had not been rendered valueless by the scheme for conversion. He also found that that was the amount by which the value of the reversion had been diminished. That report having been made, the defendants have given notice under the provisions of R.S.C., Ord. 36, r. 54, to move to vary the report, or to remit the matter for re-consideration by Master SIMNER or some other master. The defendants seek to vary the report mainly because there was H no evidence of diminution in the value of the reversion to the extent of £148 5*s.* 0*d.*, or at all. It is clear that the master, in arriving at this figure of the damage to the reversion, has adopted the cost of what I may call the useful repairs which were not rendered useless by reason of the conversion scheme, and has taken the view that that, in the circumstances of this case, was the damage to the reversion. The defendants say that that is the wrong test to apply. They say that there must be evidence of actual damage to the reversion, either by expert evidence of the value of the reversion without the repairs and of its value if the premises had been in good state of repair, in order to be able to subtract one from the other, or there must be direct evidence that, in fact, the price realised for the reversion has been influenced by the fact that the premises were in that bad state of repair, or not in a better state of repair.

It seems to me that the master has not applied the tests which are laid down by the authorities in *Espir* v. *Basil Street Hotel, Ltd.* (1), where the question had to be considered by the Court of Appeal on appeal from a county court what was the principle on which damages should be assessed for breach of a covenant not to make structural alterations. SLESSER, L.J., said in his judgment ([1936] 3 All E.R. 94) :

> " . . . the right principle appears to me that which has been enunciated in the case of *Witham* v. *Kershaw* (2). That was an action for waste brought by the reversioner against the tenant upon a covenant by the tenant not to commit waste on the demised property, and the question arose as to what was the proper measure of damage. It is pointed out by LORD ESHER (16 Q.B.D. 616) that : 'It would be wrong to say that the reversionary value had necessarily been diminished by the cost of restoring the property to its original condition.' He seemed to think, as I understand him in that case, that : 'The value of the reversion might be diminished, but the question of how much injured would be a question of value, and the proper way to ascertain the damages would be to ask skilled valuers to say how much the property has been diminished in value '."

SCOTT, L.J., in giving judgment agreeing, said (*ibid.*, 96) :

> "I think it is quite clear, from the terms of the judge's note that he was taking the view that the cost of restoring the premises, and particularly replacing the flooring which had been cut away, was germane to the measure of damages. I conclude from that, that he was rejecting the true measure of damages, namely, the injury to the reversion, in the sense of the present depreciation in the present value of the ultimate reversion. That being so, I think he was guilty of an error of law in applying the measure which he did apply."

That case was followed by *Salisbury* v. *Gilmore* (3), where MACKINNON, L.J., adopts the same idea, and he said ([1942] 1 All E.R. 462) that :

> "In my opinion, there was no evidence at the trial of any diminution in the value of the reversion by reason of any breach of covenant to repair, or yield up in repair, by the defendant. There was in fact no evidence for the plaintiff of any breach of (*a*) the covenant to keep in repair during the term. No complaint of any such breach had ever been made. The plaintiffs' surveyors had inspected the property in July, 1937, but they gave no evidence of finding any breach then. The only evidence as to breach was under (*b*) the covenant to deliver up in repair, upon a survey and schedule of dilapidations made after such delivery up. As to the effect of this breach on the value of the reversion, the first surveyor could only say that the depreciation was 'the cost of doing the repairs,' but on cross-examination said 'I am not in a position to answer' (as to the depreciation) 'because it is a question of the value of the premises, and as a surveyor assessing dilapidations, I was only concerned with the cost of making the repairs '."

Then the learned Lord Justice deals with the evidence of the other surveyor, and comes to the conclusion that there was no evidence of any diminution in value to the reversion before HILBERY, J., from whom that appeal lay.

It seems to me that, having regard to those decisions, the fact that repairs are necessary is not in itself even *prima facie* evidence of damage to the value of the reversion. In certain circumstances it may be an important factor, but of itself the fact that a certain amount of repair needs to be done does not, in my view, necessarily mean that there is damage to the reversion. If very extensive repairs were necessary to a small property, then, of course, A the inference would be clear; if one had very small repairs to a very large property of great value, the inference might be impossible to draw. It must depend on the circumstances.

In the present case the property changed hands for about £7,000, which, everybody agrees, was a good price. The actual value of the repairs which were useful was £148 5*s.* 0*d.* as found by the master. The total repairs B necessary were some £242, according to the claim by the plaintiffs, and this property was bought with the idea of conversion into flats and maisonettes. No witness called before the master gave any evidence that there had been a depreciation in the value of the reversion, and not one of the experts called attempted to quantify any depreciation in that value. In those circumstances, I am compelled to hold that there was no evidence before the master of any C depreciation in the value of the reversion. Before the plaintiffs can recover any sum they must satisfy the court that not only has there been a breach of the covenant, but, as the result of that breach, there has been a diminution in the value of the reversion. That being so, it seems to me the master's report cannot be supported.

Judgment for the plaintiff for nominal damages for breach of covenant. D *Defendants to have costs of reference to and proceedings before the master and of his report and of the motion.*

Solicitors: *Cosmo Cran & Co.* (for the plaintiff); *W. G. Street & Co.* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

E

DAVIES *v.* LIVERPOOL CORPORATION.

F [COURT OF APPEAL (Tucker, Somervell and Denning, L.JJ.), May 24, 1949.]

Negligence—Tramcar—Starting signal given by unauthorised person—Conductor absent from platform—Injury to plaintiff.

As the plaintiff was attempting to board a tramcar belonging to the defendant corporation at a request stopping place an unauthorised person G (a passenger) gave the driver the starting signal by ringing the bell. The car started when the plaintiff had one foot on the step of the car and she fell and was injured. At the time of the occurrence the conductor was on the upper deck of the car collecting fares.

HELD: as there was an appreciable time while the car was halted at the stopping place during which the conductor, in breach of his duty and H without sufficient excuse, was absent from the platform of the car from which he should have given the starting signal, and as he might have foreseen that an unauthorised person might ring the starting bell if he absented himself from the platform, the conductor was negligent, and the corporation was liable to the plaintiff.

[AS TO DUTIES OF CARRIERS OF PASSENGERS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 656, 657, paras. 926, 927; and FOR CASES, see DIGEST, Vol. 8, pp. 80-85, Nos. *554-585.*]

Cases referred to :

(1) *Watt* v. *Glasgow Corpn.*, 1919, S.C. 300.
(2) *Gray* v. *Glasgow Corpn.*, 1926, S.C. 967.
(3) *Mottram* v. *South Lancashire Transport Co.*, [1942] 2 All E.R. 452 ; 2nd Digest Supp.

Appeal by defendants from a decision of the Assistant Presiding Judge of the Liverpool Court of Passage by which he gave judgment for the plaintiff A for £38 12*s*. in an action in which the plaintiff claimed damages for personal injuries as a result of the negligence of a servant of the defendant corporation.

A tramcar belonging to the corporation stopped at a request stop at which five women, including the plaintiff, were waiting to board it. Three of the women boarded the tramcar, but when the plaintiff had one foot on the step the car started. At the time the conductor was not on the platform of the B car, but was collecting fares on the upper deck, and the bell signal to the driver to start was sounded by one of the passengers, an unauthorised person. The appeal was dismissed.

Gerrard, K.C., and *G. Bean* for the corporation.
Miss R. Heilbron, K.C., and *Pappworth* for the plaintiff.

C

TUCKER, L.J., stated the facts and continued : The learned judge found that the conductor was in breach of his duty and had made no effort to come down to the platform. In his notes on the grounds for his judgment he amplified that by saying :

> "I was not satisfied that the conductor made any endeavour to come from the top deck for the purpose of re-starting the car, but I was of D opinion that, notwithstanding that a number of persons were boarding it, he showed gross indifference. I was of opinion in all the circumstances that, the car having stopped for an appreciable time while a number of persons were boarding it, he could have come down from the upper deck to see to it that it was safe for the car to re-start."

E

I think that we ought to accept that finding of the judge, who saw the witnesses and heard them, with regard to the conduct of the conductor. There was no evidence given with regard to the number of the passengers in this tramcar or how many fares the conductor had to collect on the top deck. It was not his case that it was physically impossible for him in the proper performance of his duties to be on the platform. His case was that he was trying to get there F after having collected a few fares upstairs, but was prevented from doing so by the presence of someone coming up the stairs. The learned judge has rejected that explanation and has found that there was an appreciable time while these persons were boarding the car during which the conductor, in breach of his duty and without sufficient excuse, was absent from the place where he should have been, he being the only person authorised to give the starting signal G when the time had come for the tramcar to start. On the basis of that finding it appears to me that the defendants are clearly liable, because I think that one of the reasons why the attendance of the conductor on the platform is desirable—I do not say always essential ; there may be reasons which excuse his absence—at all stopping places where practicable is because he is the only person authorised to give the starting signal. In view of the finding that some H unauthorised person had started the tramcar during the appreciable time for which the conductor was absent, I think the plaintiff succeeds, because I think that that is one of the things against the happening of which the conductor is required to be on the platform. In those circumstances, I think that on the facts of this particular case the judgment must stand.

SOMERVELL, L.J. : I agree. The case raised, I think, some difficulty for reasons which have been referred to by Tucker, L.J. The actual decision by the learned judge is not wholly satisfactory, because he seems to have rejected evidence which was not really disputed at the hearing. I have, however, on the whole come to the conclusion that the appeal fails, and I can state my reasons very shortly. We must, I think, accept the learned judge's finding that the conductor made no attempt to do what the conductor himself by his evidence impliedly admitted was his duty, namely, to come down with reasonable speed to the platform, the tramcar having stopped. I think we must accept that finding in this court. If he had done as he said, namely, started to come down at or about the time when the tramcar stopped, there would have been evidence of the period of time which had elapsed between the stopping of the tramcar and the ringing of the bell by the unauthorised person. If he had started to come down and the bell had been rung before he could get to the platform, the court might have come to the conclusion that he had done everything which was reasonable and that the defendants were not liable, but, the learned judge having found that he made no attempt to come down, we have no satisfactory evidence as to time, and, therefore, the defendants cannot ask us to assume that the time was necessarily so short that the carrying out by the conductor of his duty could have made no difference to the result. I have some sympathy with the conductors of tramcars and omnibuses in these days. They have a number of things to do and they cannot be in two places at once. It, however, is accepted that on an occasion like this, unless there is some special circumstance which makes it impracticable or impossible, it was the conductor's business to make his way to the platform. The judge having found that he did not attempt to carry out that duty, for the reasons which I have given I think the appeal must fail.

DENNING, L.J.: I agree. It is the duty of the corporation to use reasonable care in the way in which they run their cars so as not to involve their passengers or intending passengers in danger. The plaintiff was injured without any fault on her part because the tramcar started off before she had time to get on. That does not ordinarily happen if those who run the tramcars use reasonable care, and I think it was for the corporation to explain how the accident happened. They failed to satisfy the Assistant Presiding Judge on that point. It was clearly the conductor's business to get down to the platform as quickly as he reasonably could so as to see to the safety of the people who were boarding the car and to start it when they had boarded it. He did not do so, and an unauthorised stranger rang the bell. The conductor might reasonably have foreseen that that might happen if he did not come down quickly. The corporation are, therefore, liable for the consequences. An unauthorised or wrongful act of a third person does not break the chain of causation if it might reasonably have been foreseen. Nor in like case are the consequences too remote. The conductor here, as a reasonable man, should have said to himself: "It is quite possible that, if I don't go down quickly, someone else may ring the bell." That is enough to make him liable. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Cree, Godfrey & Wood*, agents for *T. Alker*, town clerk, Liverpool (for the corporation); *Watkins, Pulleyn & Ellison*, agents for *Rayner & Wade*, Liverpool (for the plaintiff).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re SELBY-WALKER (*deceased*). PUBLIC TRUSTEE *v.* SELBY-WALKER AND OTHERS

[Chancery Division (Roxburgh, J.), May 13, 1949.]

Will—Legacy—Interest—Legacy payable at 21—Trustees empowered to use legacy or any part thereof for education of legatee until he shall attain the age of 21—Payment of interest from date of testator's death.

By his will the testator gave to his sister and her husband "£1,000 in trust until my godson St. J. shall attain the age of 21 years to use the said sum or any part thereof in their absolute discretion before that time for purposes of the education of the said St. J. and upon his attaining the age of 21 years to hold the sum of £1,000 or the residue after any such payment as aforesaid for my godson absolutely." The godson was still an infant and the question to be determined was whether the legacy carried interest as from the date of the testator's death or only as from the expiration of a year after his death.

Held : the legacy carried interest as from the death of the testator. *Re Churchill* ([1909] 2 Ch. 431), *applied.*

[As to Interest on Legacies, see HALSBURY, Hailsham Edn., Vol. 14, pp. 353, 354, paras. 661, 662 ; and for Cases, see DIGEST, Vol. 23, pp. 453-455, Nos. *5271-5287.*]

Case referred to :

(1) *Re Churchill*, [1909] 2 Ch. 431 ; 79 L.J.Ch. 10 ; 101 L.T. 380 ; 23 Digest 455, *5287.*

Adjourned Summons to determine (*inter alia*) whether a legacy of £1,000 bequeathed by cl. 3 of the testator's will carried interest as from the date of his death or only as from the expiration of a year after his death.

By his will, dated Jan. 25, 1938, the testator, Kenneth Selby-Walker, appointed the Public Trustee and George Francis Medlam (who later renounced probate) executors and trustees and directed that within one month of his death his widow should be paid £500, free of all duty, for her absolute use and benefit. By cl. 2 he gave a small pecuniary legacy. By cl. 3 he gave to his half-sister, Mrs. Ethel Arcedeckne-Butler, and her husband "£1,000 in trust until my godson St. John Patrick Arcedeckne-Butler shall attain the age of 21 years to use the said sum or any part thereof in their absolute discretion before that time for purposes of the education of the said St. John Patrick Arcedeckne-Butler and upon his attaining the age of 21 years to hold the sum of £1,000 or the residue after any such payment as aforesaid for my godson absolutely." Subject to the payment of his debts, funeral and testamentary expenses and the legacies given by his will, the testator left the residue to his widow for life and on her death (in the events which had happened) to such of the children of his sister who should attain the age of 21 years in equal shares, and, in default of any such children, to his sister absolutely.

The testator, a newspaper correspondent, was resident in Singapore at the outbreak of the war. Immediately before the occupation of Singapore by the Japanese in February, 1942, he escaped to Java, but nothing was heard from or of him since the capitulation of Java, and by an order of Barnard, J., dated May 7, 1947, the Public Trustee was given leave to swear that the testator's death occurred "on or since Mar. 7, 1942." The will was proved on Oct. 21, 1947. The testator had no issue and left surviving him his widow and his half-sister who had three children (all of whom were still infants, one of them being the testator's godson, St. John Patrick). The other questions asked by the summons were settled by compromise, the compromise being approved by the judge in chambers, as the interests of infant beneficiaries were concerned.

ROXBURGH, J., now held that the legacy given by cl. 3 carried interest as from the date of the death of the testator.

Wilfrid Hunt for the plaintiff, the Public Trustee.

Cross, K.C., for the first defendant, the widow.

Graetz for the other defendants, the testator's half-sister, her husband and three infant children.

ROXBURGH, J. : The question to be decided is whether this legacy carries interest as from the date of the testator's death or only as from the expiration of a year after his death. If the word " maintenance " were to be substituted for the word " education " in cl. 3 of the will, this case would, in effect, be covered by *Re Churchill* (1). The headnote to that case is :

> " Testatrix by her will devised and bequeathed the residue of her real and personal estate to trustees upon trust to sell and convert and out of the proceeds to pay certain pecuniary legacies, including a legacy of £200 to her grand-nephew C.P., and she directed that the interest of males under her will should vest at 21 years and of females at that age or marriage. The testatrix empowered her trustees at their discretion ' to apply the whole or any part of the share to which any beneficiary hereunder may be contingently entitled in or towards the advancement in life or otherwise for the benefit of such beneficiary whether male or female and whether under the age of 21 years or not.' The testatrix died in 1908. At the date of her will and the date of her death C.P. was an infant : *Held*, that interest was payable on the legacy from the death of the testatrix and that the trustees were entitled to apply the interest in or towards the maintenance of C.P. during his infancy."

But it was submitted to me that " education " is in a different category from " maintenance," and there is no authority one way or the other. In *Re Churchill* (1), the direction was " to apply the whole or any part of the share " to which the legatee might be entitled and it was held that interest was payable from the death of the testatrix. In the present case there is a direction to " use the said sum or any part thereof . . ." In my judgment, the directions in the two cases are sufficiently similar and " education " and " maintenance " are so closely akin that the same principle ought to apply. Accordingly, I will declare that the legacy of £1,000 bequeathed by cl. 3 of the will carries interest as from the death of the testator.

Declaration accordingly.

Solicitors : *Fladgate & Co.* (for the Public Trustee) ; *Guscotte, Fowler & Cox* (for the widow) ; *Vernor Miles & Clark* (for the other defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

SMITH AND ANOTHER *v.* RIVER DOUGLAS CATCHMENT BOARD.

[COURT OF APPEAL (Tucker, Somervell and Denning, L.JJ.), May 24, 25, 26, 27, June 3, 1949.]

Sale of Land—Covenant running with land—Contract with catchment board to widen, deepen and make good banks of river—Bursting of banks—Flooding of adjoining land owned by successor in title to party to contract—Liability of board—Law of Property Act, 1925 (*c.* 20), *s.* 78 (1).

In 1938, in order to prevent flooding, eleven owners of land through which a river ran, made an agreement with a catchment board whereby the board covenanted to widen, deepen and make good the banks of the river and thereafter to maintain them, the landowners paying a contribution towards the cost. In 1940 the first plaintiff took a conveyance from one of the landowners of her land, which was expressly stated to be conveyed with the benefit of the agreement made in 1938. In 1944 the first plaintiff let the land to the second plaintiff as a yearly tenant. In 1946, when the river was in flood, the banks burst, flooding the plaintiffs' land. In an action by the plaintiffs for breach of contract, the board contended that, if there was a breach, there was no privity of contract between the plaintiffs and the board and that the covenant did not run with the land so as to give the plaintiffs a cause of action.

Held : (i) on the facts, the board had performed the work badly and had broken their implied obligation to use reasonable care and skill in its execution and maintenance.

(ii) on construction the covenant affected the use and *per se* the value of the lands and showed that the intention of the parties to the agreement of 1938 was that the benefit of the obligation to maintain should attach to the lands into whosesoever hands they came ; the covenant was binding on the board although they were strangers to the conveyance to the first plaintiff ; and, therefore, the covenant was enforceable against the board by the first plaintiff as successor in title of the original landowner, and, under the Law of Property Act, 1925, s. 78 (1), by the second plaintiff as a person deriving title under the first plaintiff.

Dictum of Farwell, J., in *Rogers* v. *Hosegood* ([1900] 2 Ch. 395), *applied.*

(iii) although the deed containing the covenant did not expressly identify the particular land to be benefited the maxim " *Id certum est quod certum reddi potest* " applied so as to make admissible extrinsic evidence to prove the extent and situation of the lands of the parties to the contract of 1938 ; the land owned and occupied respectively by the plaintiffs was capable of identification ; and, therefore, the board were liable to the plaintiffs.

[As to Covenants which Run with the Land, see HALSBURY, Hailsham Edn., Vol. 7, pp. 312, 313, paras. 437-441 ; and for Cases, see DIGEST, Vol. 31, pp. 141-148, Nos. *2769-2824.*]

Cases referred to :

(1) *The Prior's Case,* (1368), 1 Sm. L.C. (13th ed.), 55 ; Co. Litt. 385*a*.

(2) *Spencer's Case,* (1583), 5 Co. Rep. 16*a* ; 1 Sm. L.C. (13th ed.), 51 ; 31 Digest 144, *2798.*

(3) *Rogers* v. *Hosegood,* [1900] 2 Ch. 388 ; 69 L.J.Ch. 59 ; 81 L.T. 515 ; *affmd.,* 69 L.J.Ch. 652 ; 83 L.T. 186 ; 40 Digest 312, *2664.*

(4) *Congleton Corpn.* v. *Pattison,* (1808), 10 East, 130 ; 31 Digest 144, *2794.*

(5) *Mann* v. *Stephens,* (1846), 15 Sim. 377 ; 40 Digest 314, *2676.*

(6) *Vyvyan* v. *Arthur,* (1823), 1 B. & C. 410 ; 2 Dow. & Ry. K.B. 670 ; *sub nom., Vivyan* v. *Arther,* 1 L.J.O.S.K.B. 138 ; 31 Digest 218, *3567.*

(7) *Fleetwood* v. *Hull,* (1889), 23 Q.B.D. 35 ; 58 L.J.Q.B. 341 ; 60 L.T. 790 ; 54 J.P. 229 ; 31 Digest 104, *2416.*

(8) *White* v. *Southend Hotel Co.,* [1897] 1 Ch. 767 ; 66 L.J.Ch. 387 ; 76 L.T. 273 ; 31 Digest 111, *2460.*

(9) *Shayler* v. *Woolf,* [1946] 2 All E.R. 54 ; [1946] Ch. 320 ; [1947] L.J.R. 71 ; 175 L.T. 170 ; 2nd Digest Supp.

(10) *Austerberry* v. *Oldham Corpn.,* (1885), 29 Ch.D. 750 ; 55 L.J.Ch. 633 ; 53 L.T. 543 ; 49 J.P. 532 ; 31 Digest 142, *2769.*

(11) *East Suffolk Rivers Catchment Board* v. *Kent,* [1940] 4 All E.R. 527 ; [1941] A.C. 74 ; 110 L.J.K.B. 252 ; 165 L.T. 65 ; 105 J.P. 129 ; 2nd Digest Supp.

(12) *Formby* v. *Barker,* [1903] 2 Ch. 539 ; 72 L.J.Ch. 716 ; 89 L.T. 249 ; 40 Digest 306, *2626,*

(13) *Tulk* v. *Moxhay*, (1848), 2 Ph. 774 ; 1 H. & Tw. 105 ; 18 L.J.Ch. 83 ; 13 L.T.O.S. 21 ; 40 Digest 313, *2667*.

(14) *Tweddle* v. *Atkinson*, (1861), 1 B. & S. 393 ; 30 L.J.Q.B. 265 ; 4 L.T. 468 ; 25 J.P. 517 ; 12 Digest 42, *218*.

(15) *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.*, [1915] A.C. 847 ; 84 L.J.K.B. 1680 ; 113 L.T. 386 ; 12 Digest 207, *1662*.

(16) *Dutton* v. *Poole*, (1678), 1 Freem. K.B. 471 ; T. Jo. 102 ; 1 Vent. 332 ; 3 Keb. 786 ; 2 Lev. 210 ; T. Raym. 302 ; 12 Digest 45, *241*.

(17) *Martyn* v. *Hind*, (1779), 1 Doug. K.B. 142 ; 2 Cowp. 437 ; 19 Digest 428, *2652*.

(18) *Rabone* v. *Williams*, (1785), 7 Term Rep. 360, *n.* ; 1 Digest 573, *2154*.

(19) *George* v. *Clagett*, (1797), 7 Term Rep. 359 ; Peake, Add. Cas. 131 ; 1 Digest 570, *2140*.

(20) *Tomlinson* v. *Gill*, (1756), Amb. 330 ; 24 Digest 657, *6840*.

(21) *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York*, [1933] A.C. 70 ; 102 L.J.P.C. 21 ; 148 L.T. 169 ; Digest Supp.

(22) *Les Affreteurs Reunis Societe Anonyme* v. *Leopold Walford (London), Ltd.*, [1919] A.C. 801 ; 88 L.J.K.B. 861 ; 121 L.T. 393 ; 41 Digest 349, *1985*.

(23) *Re Schebsman*, [1943] 2 All E.R. 768 ; [1944] Ch. 83 ; 113 L.J.Ch. 33 ; 170 L.T. 9 ; 2nd Digest Supp.

(24) *Prudential Staff Union* v. *Hall*, [1947] K.B. 685 ; Digest Supp.

(25) *White* v. *Bijou Mansions, Ltd.*, [1938] 1 All E.R. 546 ; [1938] Ch. 351 ; 107 L.J.Ch. 212 ; 158 L.T. 338 ; 2nd Digest Supp.

(26) *Dyson* v. *Forster*, [1909] A.C. 98 ; 78 L.J.K.B. 246 ; 99 L.T. 942 ; 34 Digest 686, *799*.

(27) *Re Miller's Agreement*, [1947] 2 All E.R. 78 ; [1947] Ch. 615 ; 177 L.T. 129 ; 2nd Digest Supp.

APPEAL by the plaintiffs from a judgment of MORRIS, J., dated Oct. 15, 1948, in an action for damages for breach of contract and for negligence.

By an agreement under seal dated April 25, 1938, and made between a Mrs. Smith and ten other owners of land adjoining the Eller Brook in the area of the defendant catchment board, the board covenanted to " widen and deepen and make good the banks of the Eller Brook . . . take over the control of the brook and maintain for all time the work when completed." In 1940 Mrs. Smith conveyed her land to the first plaintiff purporting to transfer therewith the benefit of the agreement of 1938. In 1944 the first plaintiff let the land to the second plaintiff, Snipe Hall Farm, Ltd. In 1946, owing to faulty work by the board, the banks burst flooding the plaintiffs' land.

MORRIS, J., held that the contractual obligations of the board were not to be regarded as running with the land, and, therefore, the plaintiffs had no right of action in contract, and, further, following the decision in *East Suffolk Rivers Catchment Board* v. *Kent* (11), the board were not liable in tort. The Court of Appeal now held that the covenant was binding as between the board and the plaintiffs, that the board had been guilty of a breach of the covenant, and that in those circumstances, the question of liability in tort did not arise. The facts appear in the judgment of TUCKER, L.J.

Gerrard, K.C., and *Baucher* for the plaintiffs.
Nield, K.C., and *Youds* for the catchment board.

Cur. adv. vult.

June 3. The following judgments were read.

TUCKER, L.J. : By an agreement under seal dated Apr. 25, 1938, made between Mrs. Ellen Smith and ten other owners of certain lands situate between the Leeds and Liverpool Canal and the River Douglas and adjoining the Eller

Brook in the parish of Lathom in the county of Lancaster, of the one part, and the defendant board, of the other part, in consideration of the landowners undertaking to pay the sums set out in the schedule to the agreement as contributions towards the cost incurred, or to be incurred, by the board in widening, deepening, improving and maintaining the Eller Brook, the board covenanted to :

> "Replace the present defective outfall from the Low Meadows situate A
> near the junction of the Eller Brook with the River Douglas by a new outfall of not less capacity and modern design. (ii) Widen and deepen and make good the banks of the Eller Brook from its junction with the River Douglas to Brook Bridge Carr Lane Burscough. (iii) Take over the control of the brook from its junction with the River Douglas to Brook Bridge Carr Lane Burscough and maintain for all time the work when completed." B

The agreement contains the following recitals :

> "Whereas (1) Certain lands belonging to the parties of the first eleven parts hereto (hereinafter called 'the landlowners') situate between the Leeds and Liverpool Canal and the River Douglas and adjoining the Eller Brook in the parish of Lathom in the county aforesaid are liable to flooding. C
> (2) The board is a drainage board duly constituted under the Land Drainage Act, 1930, and the lands subject to flooding lie within the catchment area of the board. (3) A proposal has been made that the board in order to improve the drainage of the land liable to flood and to prevent future flooding should undertake the widening deepening improvement and future maintenance of the Eller Brook Carr Lane Burscough aforesaid to which the D
> board have agreed subject to the landowners paying a proportion of the cost thereof in manner hereinafter appearing. (4) The landowners have agreed to contribute towards the cost of the works to be carried out by the board as hereinafter contained. (5) For the purpose of giving effect hereto the board have applied to the Minister of Agriculture and Fisheries to make Eller Brook a 'main river' under the control of the board." E

The consent of the Minister was duly obtained, and the board proceeded with the work of widening, deepening and improving the Eller Brook. The work was carried out on the lines of a plan which had been prepared by Mr. Eaton, the board's engineer, in June, 1934.

On Apr. 1, 1940, the first plaintiff, Smith, took a conveyance from Mrs. Ellen Smith of her land, which was expressly stated to be conveyed with the benefit F
of the said agreement of Apr. 25, 1938. By Apr. 12, 1940, the work of cleaning and deepening the brook was practically completed as is shown by the board's minute of that date, which read as follows :

> "Cleaning and deepening of Eller Brook and Wham Ditch. The work on the above brook is practically completed. On Dec. 5 a breach occurred G
> in the bank of the Eller Brook, but the flooding that took place was slight, and the breach was closed in a few hours. About 300 acres of land on and adjoining the Low Meadows have been ploughed, and one owner has commenced to build a farm and buildings near Wanes Blades Bridge to better enable him to farm his land."

In May, 1944, the second plaintiffs, Snipes Hall Farm, Ltd., was incorporated, H
and it holds the land in question in the present proceedings under an oral agreement as yearly tenant at a rent of £158 5*s*. 0*d*. per annum. Some 250 acres of land were brought under cultivation by these plaintiffs prior to the flooding which gave rise to this action. The minute of Apr. 12, 1940, recorded a breach in the bank of the Eller Brook on Dec. 9, 1939. Further and more serious breaches occurred in January, 1944, February, 1945, and on Sept. 1 and 2, 1946. It is in respect of the damage suffered on this last occasion when the

plaintiffs' lands were flooded to a depth of over five feet that this action was brought.

In so far as the plaintiffs' claim is based on breach of contract, it is alleged that, by the agreement of Apr. 25, 1938, the board agreed for a monetary consideration to execute certain works and to maintain for all time the work when completed, and that, there being no specification incorporated in the agreement, there was an implied obligation on the part of the board to use reasonable care and skill in the execution and maintenance of the work having regard to the purpose for which it was required. It is said, and I do not think this was contested, that the duty of the board under this contract, voluntarily entered into for a monetary consideration, is not to be measured by the standard to be taken for the purpose of ascertaining its liability in tort in the performance of its statutory powers under the Land Drainage Act, 1930. Its duty is, accordingly, not limited to avoiding the creation of new danger or damage in the performance of work which it had the power, but was under no duty, to carry out. Nor can it be relevant in this connection to consider the financial resources of the board or its other commitments. The board must be presumed to have taken all these matters into account before it fixed the contributions to be paid by the landowners as consideration for its undertaking to perform the work and maintain it for all time. Therefore, it is clear that the plaintiffs are right in their contention as to the measure of the board's duty under the contract.

I pass, therefore, to consider whether the plaintiffs established a breach of this duty. [HIS LORDSHIP reviewed the evidence and continued :] Having regard to the effect of the evidence to which I have referred, it appears to me to be clear that the board were in breach of their contractual duty. I am not clear what, in the learned judge's view, was the measure of the board's obligations under the contract, but he appears to have absolved it from liability on the ground that it was not trifling with the situation or heedless or inactive. However this may be, I think that on the undisputed evidence and the judge's findings the board were in breach under the contract, and that such breach caused the damage complained of.

It remains to consider whether, in these circumstances, the plaintiffs, or either of them, can sue in respect of this breach. It is said for the board that the benefit of the covenant does not run with the land so as to bind a stranger who has not and never had an interest in the land to be benefited and there being no servient tenement to bear the burden. Further it is contended that such a covenant must by the terms of the deed in which it is contained relate to some specific parcel of land, the precise extent and situation of which can be identified by reference to the deed alone. It is first necessary to ascertain from the deed that the covenant is one which " touches or concerns " the land, that is, it must either affect the land as regards mode of occupation or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land, and it must then be shown that it was the intention of the parties that the benefit thereof should run with the land. The deed shows that its object was to improve the drainage of land liable to flooding and prevent future flooding. The location of the land is described as situate between the Leeds and Liverpool Canal and the River Douglas and adjoining the Eller Brook. In return for lump sum payments the board covenants to do certain work to the banks of the Eller Brook, one of such banks being, in fact, situate upon and forming part of the plaintiffs' lands, and to maintain for all time the work when completed. In my view, the language of the deed satisfies both tests. It affects the value of the land *per se* and converts it from flooded meadows to land suitable for agriculture, and shows an intention that the benefit of the obligation to maintain shall attach thereto into whosesoever hands the lands shall come.

With regard to the covenantor being a stranger, *The Prior's Case* (1) is referred to in *Spencer's Case* (2) in these words as set out in Smith's Leading Cases (13th ed., vol. 1, p. 55) :

> [In the case of a] grandfather, father and two sons : The grandfather being seised of the manor of D, whereof a chapel was parcel : a prior, with the assent of his convent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, etc. ; the grandfather did enfeoff one of the manor in fee, who gave it to the younger son and his wife in tail ; and it was adjudged that the tenants in tail, as terre-tenants (for the elder brother was heir), should have an action of covenant against the prior, for the covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor, as it is there said."

The notes to *Spencer's* case (2) in Smith's Leading Cases, at p. 73, state :

> " When such a covenant [namely, covenants running with the land made with the owner of the land to which they relate] is made, it seems to be of no consequence whether the covenantor be the person who conveyed the land to the covenantee, or be a mere stranger."

In vol. 5 of Bythewood & Jarman's Conveyancing, 4th ed., p. 268, the following passage from the third report of the Real Property Commissioners is quoted with approval :

> " Expressions found in some books would lead to the opinion, that, in considering this class of covenant with reference to the benefit of them, there is a distinction between those cases where the covenantor is a party by whom the estate is, or has been, conveyed, and those in which he is a stranger to the estate. We think the authority of Lord Coke on this point (which is express (Co. Litt. 384*b*)) sufficient to warrant us in disregarding this distinction."

In *Rogers* v. *Hosegood* (3) Farwell, J., in a passage where he refers, among others, to *The Prior's Case* (1)—and I quote from his judgment because, although the case went to the Court of Appeal, the Court of Appeal had to deal with a rather different point—after stating what are the requirements in order that the covenant may run with the land, says ([1900] 2 Ch. 395) :

> " It is not contended that the covenants in question in this case have not the first characteristic, but it is said that they fail in the second. I am of opinion that they possess both. Adopting the definition of Bayley, J., in *Congleton Corpn.* v. *Pattison* (4) the covenant must either affect the land as regards mode of occupation, or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land. It is to my mind obvious that the value of Sir J. Millais's land is directly increased by the covenants in question. If authority is needed, I would refer to *Mann* v. *Stephens* (5), a case very similar to the present ; *Vyvyan* v. *Arthur* (6) ; *The Prior's Case* (1) ; *Fleetwood* v. *Hull* (7) ; *White* v. *Southend Hotel Co.* (8). I see no difficulty in holding that the benefit of a covenant runs with the land of the covenantee, while the burden of the same covenant does not run with the land of the covenantor."

In this state of the authorities it seems clear, despite some *dicta* tending to the contrary view, that such a covenant, if it runs with the land, is binding on the covenantor though a mere stranger, and that this point will not avail the board.

As to the requirement that the deed containing the covenant must expressly identify the particular land to be benefited, no authority was cited to us and in the absence of such authority I can see no valid reason why the maxim " *Id certum est quod certum reddi potest* " should not apply so as to make admissible extrinsic evidence to prove the extent and situation of the lands of the respective landowners adjoining the Eller Brook situate between the Leeds and Liverpool Canal and the River Douglas. On this part of the case MORRIS, J., said :

> " In my judgment, the contractual obligations of the board are not to be regarded as covenants running with the land. They do not differ from obligations which by agreement a firm of contractors might agree to discharge in reference to some particular land. The catchment board do not own any land and there is no question of any obligation in relation to or connection with any land of theirs. The circumstances are different from those in *Shayler* v. *Woolf* (9). Section 78 of the Law of Property Act, 1925, does not affect the question as to what are covenants relating to the land of a covenantee. Furthermore, much of the reasoning of LINDLEY, L.J., in *Austerberry* v. *Oldham Corpn.* (10) (1885) (29 Ch.D. 780, 781) is applicable. Although work might have to be done on the land which formerly belonged to Mrs. Ellen Smith, and now belongs to the first plaintiff, equally it might be that for the effectual preventing of flooding of Low Meadows work on the banks of Eller Brook at some place considerably higher up the Brook might have to be undertaken."

I do not find anything in the judgments in *Austerberry* v. *Oldham Corpn.* (10) which conflicts with the law as I have endeavoured to set it out above, and I have, accordingly, arrived at the conclusion that the covenant by the board in the agreement of April 25, 1938, is one which runs with the land referred to therein, which land is capable of identification, and that it is binding on the board ; and, further, that by virtue of s. 78 (1) of the Law of Property Act, 1925, it can be enforced at the suit of the covenantee and her successors in title and the persons deriving title under her or them so that both the plaintiff Smith and the plaintiff company can sue in respect of the damage resulting to their respective interests therein by reason of the board's breach of covenant. For these reasons, I would allow this appeal, and remit the assessment of damages to an official referee.

Having regard to the conclusion I have reached on the contractual aspect of the case, I find it unnecessary to express any view with regard to the application of the principles laid down in *East Suffolk Catchment Board* v. *Kent* (11) to the work carried out by the board had it been performed solely in the exercise of its statutory powers and in the absence of the agreement of April, 1938.

SOMERVELL, L.J. : The plaintiffs claimed in contract and in tort for damages done by floods in the early part of September, 1946, caused by water flowing through a breach made in the walls containing a stream or river known as the Eller Brook. The learned judge held that the claim under both heads failed. He considered first the claim in tort. I have come to the conclusion that the claim in contract succeeds, and on that view it is unnecessary to consider the claim in tort.

[HIS LORDSHIP stated the facts and continued:] The first question is : What was the obligation of the board under the agreement ? They had, in my opinion, to construct banks which might reasonably be expected both by their height and their strength to prevent flooding. The construction of such a bank was the purpose for which the landowners paid their money. If they had been told that the bank to be constructed was one doomed to failure in the event of floods, or a bad bank under any conditions, they would presumably have kept their money for some other more useful purpose. The phrase " doomed to failure " was one used of the outer banks as constructed by Mr. Waters, one of the plaintiffs' witnesses. The learned judge saw no reason to doubt the general reliability of Mr. Waters and of Mr. Ashcroft, the other witness on this subject for the plaintiffs. That does not mean he accepted everything they said. The evidence on both sides as to these banks can be shortly summarised. Mr. Ashcroft said the outer banks had no reasonable chance of standing up to their work. Mr. Waters regarded the banks as inadequate, as doomed to failure. So far as the board are concerned, when there was a burst in January, 1944, a statement appears in their minutes that "the bank is a bad one under any conditions." Mr. Eaton, the board's engineer, agreed with that. He said of the work when originally done : "I knew it was dangerous," he adds, "but I was well satisfied with what we had done." He assented to a leading question put by counsel for the board that the bank was the best that could be produced with the money available. The question of the financial resources of the board seems to me to have little or no relevance to their liability under the agreement. If a party, whether a catchment board or an individual, undertakes for consideration to produce a certain result it is no answer if a claim is based on his failure to produce that result for him to show that he had not the money. Everyone was agreed that with extra expense a reasonably strong bank could have been constructed. This is in fact now being done.

If I have rightly construed the contract, then, in my view, there was on this evidence as accepted by the learned judge a breach. The judge held that whatever might be the liability under the agreement the plaintiffs could not sue on it. It was not, therefore, necessary for him to deal in detail with the question of breach. He expresses his opinion that there was no breach, but I think that this was on the basis of a different construction of the contract. If, therefore, Mrs. Ellen Smith had remained in possession, she could have recovered damages. Does the covenant run with the land so that the first plaintiff can sue on it ? If the answer to this is "Yes," has s. 78 of the Law of Property Act, 1925, enabled the second plaintiffs to sue in that that section covers not only successors in title of the covenantee but persons deriving title under successors in title ? We are concerned here with the question whether the benefit of a covenant runs with the land benefited as against the original covenantor. The learned judge said this :

> "In my judgment, the contractual obligations of the board are not to be regarded as covenants running with the land. They do not differ from obligations which by agreement a firm of contractors might agree to discharge in reference to some particular land."

In the ordinary case a firm of contractors who had undertaken to construct and thereafter maintain certain works would receive for the latter service an annual sum. Such a contract clearly would not run with the land so as to bind a transferee to continue to pay the annual sum. The board also differs from a firm of contractors, in that they have a statutory power to do such work as is in question here on other people's land. If one seeks the intention of the parties in the agreement, I should have thought it was plain that the benefit of the covenant was intended to run with the land. If it was not, a landowner who sold a month after the agreement had no legal right which he could transfer and claim value for. If one assumes a single landowner who transferred the land, the board having taken his money would be under no liability to the transferee, and I do not see how the transferor could establish any damage. The undertaking is to maintain "for all time the work when completed," and not to maintain "so long as you remain owner." In *Rogers* v. *Hosegood* (3), Farwell, J., said ([1900] 2 Ch. 395) :

> "Covenants which run with the land must have the following characteristics : (1) they must be made with a covenantee who has an interest in the land to which they refer ; (2) they must concern or touch the land."

Both these conditions seem to me to be satisfied. The learned judge goes on to say that in addition there must be an intention that the covenant should so run. I have already dealt with this.

It is said, rightly, that the land intended to be protected must be described so as to be ascertainable with reasonable accuracy. It was submitted that it was not so described in the present case. It is true that evidence outside the instrument itself would be necessary to show what were the parcels covered by the agreement. This was true of the agreement in *Rogers* v. *Hosegood* (3) where the covenant was with named owners (a partnership) . . . " to all or any of their lands adjoining or near to the said premises." There are many cases in which the lands to be benefited are not identified by descriptions with reference to a map or plan.

There is another point. What is the scope of the covenant ? Suppose the breach through which A's land was damaged occurred in the banks where they run through B's lands, can A sue ? In my view, he could. Under the agreement the lands to be drained and protected are treated as a unit, though, of course, not in single ownership. The covenant as to widening and deepening is clearly a covenant with each owner that the brook will be widened and deepened throughout the whole length covered by the agreement and not merely that portion of the brook which adjoins his lands.

On the question whether the covenant ran with the land, counsel for the board submitted that if the benefit of a covenant is to run with the land it must either be with a previous owner or as against the owner of another parcel. The authorities do not seem to me to support these propositions. Counsel also relied on *Formby* v. *Barker* (12). That was dealing with a different point. In that case a vendor had parted with the whole of his land, the purchaser agreeing to restrict its user. The vendor's executor sought to enforce the covenant. It was held that the covenant was personal and the principle of *Tulk* v. *Moxhay* (13) inapplicable. In that case, the vendor having parted with all his land, there was no land with which the benefit of the covenant could run. The sentences on which counsel relied must be read with regard to the type of covenant with which the case was concerned. On the basis that the benefit of the covenant ran with the land, counsel did not argue that the cause of action was restricted to the first plaintiff. I, therefore, think that the appeal should be allowed, and that the claim based on the agreement succeeds. It is unnecessary to consider what would have been the position if the plaintiffs had had no contract to rely on. The learned judge considered that the claim would have failed on the principles laid down in *East Suffolk Rivers Catchment Board* v. *Kent* (11). Various questions might have arisen. Was there a failure to take reasonable or ordinary care ? Does the main principle in the *East Suffolk* case (11) apply where damage is caused by a negligent defect in works constructed ? If any duty was owed to the plaintiffs it might well be less onerous than the duty which the board assumed under the contract. Was the danger to the plaintiffs' land increased or diminished, or increased in some respects and diminished in others ? I express no opinion on these points beyond saying that the issues raised would, in my opinion, have not been easy.

DENNING, L.J., stated the facts and continued : This action is brought by the second plaintiffs, the tenants of the field, against the board to recover the value of the crops they have lost. The first plaintiff, the present owner, joins in the action claiming his loss of rent, but the substantial claim is by the tenants. It is my opinion that the board broke their contract. It was an implied term that they should do the work with reasonable care and skill so as to make the banks reasonably fit for the purpose of preventing flooding. The proper way of doing this, according to the experts, was to put a clay core in the banks, or to make them very much wider, but they did not do either. It may be that the board had not sufficient funds available to carry out such works, but that seems to me to be an irrelevant consideration, or, at any rate, just as irrelevant in the case of a public board as in the case of a private contractor. No private contractor who was engaged to make works for a specific purpose could excuse himself for bad results by saying that he had not sufficient money to erect proper works. It follows, therefore, that if the original landowner with whom the agreement was made had himself cultivated the fields and suffered damage by the breach he could recover from the board, but he sold the land and he has suffered no damage. The damage has been suffered partly by the first plaintiff, the man who purchased the land, but principally by the tenants, the second plaintiffs, and the question is whether the second plaintiffs can sue on the contract.

Counsel for the board says that the plaintiffs cannot sue. He says that there is no privity of contract between them and the board, and that it is a fundamental principle that no one can sue on a contract to which he is not a party. That argument can be met either by admitting the principle and saying that it does not apply to this case, or by disputing the principle itself. I make so bold as to dispute it. The principle is not nearly so fundamental as it is sometimes supposed to be. It did not become rooted in our law until the year 1861 (*Tweddle* v. *Atkinson* (14)) and reached its full growth in 1915 (*Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* (15)). It has never been able entirely to supplant another principle whose roots go much deeper. I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise ; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences that may be open on the merits. It is on this principle, implicit if not expressed, (i) that the courts ever since 1368 have held that a covenant made with the owner of land for its benefit can be enforced against the covenantor, not only by the original party, but also by his successors in title : see *The Prior's Case* (1) which is set out by Lord Coke in his work on Littleton, at p. 384*a*, and in his report of *Spencer's* case (2) : in Smith's Leading Cases, 13th ed., p. 55 ; (ii) that the courts of common law in the 17th and 18th centuries repeatedly enforced promises expressly made in favour of an interested person : see *Dutton* v. *Poole* (16), approved by Lord Mansfield in *Martyn* v. *Hind* (17) ; (iii) that Lord Mansfield held that an undisclosed principal is entitled to sue on a contract made by his agent for his benefit, even though nothing was said about agency in the contract : see *Rabone* v. *Williams* (18), cited in *George* v. *Clagett* (19) ; and (iv) that Lord Hardwicke, L.C., decided that a third person is entitled to sue if there can be spelt out of the contract an intention by one of the parties to contract as trustee for him, even though nothing was said about any trust in the contract, and there was no trust fund to be administered : see *Tomlinson* v. *Gill* (20). Throughout the history of the principle the difficulty has been, of course, to say what is sufficient interest to entitle the third person to recover. It has sometimes been supposed that there must always be something in the nature of a "trust" for his benefit: see *Vandepitte* v. *Preferred Accident Insurance Corpn. of New York* (21) ([1933] A.C. 79), but this is an elusive test which does not explain all the cases, and it involves the trustee being made a nominal party to the action either as plaintiff or defendant, unless that formality is dispensed with, as it was in *Les Affrcteurs Réunis Société Anonyme* v. *Leopold Walford (London), Ltd.* (22). The truth is that the principle is not so limited. It may be difficult to define what is a sufficient interest. While it does not include the maintenance of prices to the public disadvantage, it does cover the protection of the legitimate property, rights and interests of the third person, although no agency or trust for him can be inferred. It covers, therefore, rights such as the following which cannot justly be denied—the right of a seller to enforce a commercial credit issued in his favour by a bank under contract with the buyer ; the right of a widow to sue for a pension which her husband's employers promised to pay her under contract with him : see *Dutton* v. *Poole* (16) and *cf. Re Schebsman* (23) ([1943] 2 All

E.R. 779) ; or the right of a man's servants and guests to claim on an insurance policy, taken out by him against loss by burglary, which is expressed to cover them : *cf. Prudential Staff Union* v. *Hall* (24) ([1947] K.B. 689, 690). In some cases the legislature itself has intervened, as, for instance, to give the driver of a motor car the right to sue on an insurance policy taken out by the owner which is expressed to cover the driver, but this does not mean that the common law
A would not have reached the same result by itself.

The particular application of the principle with which we are concerned here is the case of covenants made with the owner of the land to which they relate. The law on this subject was fully expounded by Mr. *Smith* in his note to *Spencer's Case* (1) which has always been regarded as authoritative. Such covenants are clearly intended, and usually expressed, to be for the benefit of whomsoever
B should be the owner of the land for the time being ; and at common law each successive owner has a sufficient interest to sue because he holds the same estate as the original owner. The reason which LORD COKE gave for this rule is the reason which underlies the whole of the principle now under consideration. He said in his work on LITTLETON (p. 385 *a*) that it was " to give damages to the party grieved." If a successor in title were not allowed to sue it would mean that
C the covenantor could break his contract with impunity, for it is clear that the original owner, after he had parted with the land, could recover no more than nominal damages for any breach that occurred thereafter. It was always held, however, at common law that, in order that a successor in title should be entitled to sue, he must be of the same estate as the original owner. That alone was a sufficient interest to entitle him to enforce the contract. The
D covenant was supposed to be made for the benefit of the owner and his successors in title, and not for the benefit of anyone else. This limitation, however, was, as is pointed out in SMITH'S LEADING CASES, p. 75, capable of being " productive of very serious and disagreeable consequences," and it has been removed by s. 78 of the Law of Property Act, 1925, which provides that a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and
E his successors in title " and the person deriving title under him or them " and shall have effect as if such successors " and other persons " were expressed. The covenant of the catchment board in the present case clearly relates to the land of the covenantees. It was a covenant to do work on the land for the benefit of the land. By the statute, therefore, it is to be deemed to be made, not only with the original owner, but also with the purchasers of the land and
F their tenants as if they were expressed. Now, if they were expressed, it would be clear that the covenant was made for their benefit, and they clearly have sufficient interest to entitle them to enforce it because they have suffered the damage. The result is that the plaintiffs come within the principle whereby a person interested can sue on a contract expressly made for his benefit.

I would not wish to leave this subject without referring also to s. 56 (1) of the
G Law of Property Act, 1925, which provides :

> " A person may take . . . the benefit of any . . . covenant or agreement over or respecting land or other property, although he may not be named as a party to the . . . instrument."

That section is, no doubt, as SIR WILFRID GREENE, M.R., said in
H *White* v. *Bijou Mansions, Ltd.* (25) ([1938] 1 All E.R. 554), confined to cases when the person seeking to take advantage of it is a person " within the benefit " of the covenant or agreement, but, subject to that limitation, there is no reason why the section should not be given its full scope, just as LORD DUNEDIN was prepared to give full scope to its narrower predecessor, s. 5 of the Real Property Act, 1845 : see *Dyson* v. *Forster* (26) ([1909] A.C. 103). Section 56 means, therefore, that a person may enforce an agreement respecting property made for his benefit, although he was

not a party to it. So construed it is a clear statutory recognition of the principle to which I have referred and it is applicable to this case. If the principle had been canvassed in *Re Miller's Agreement* (27), it should, I think, have been held there that the daughters had a right at common law to sue for their pension, a right which was reinforced by s. 56. I cannot believe that the covenantors there could break their contract with impunity.

So much for the question of principle. Counsel for the board did urge that the benefit of the covenant should not run with the land here because there was no clearly defined piece of land to which it was attached. It is true that the agreement did not describe the lands by metes and bounds, but it did give a description of them which was capable of being rendered certain by extrinsic evidence, and that is sufficient. *Id certum est quod certum reddi potest.* Counsel also argued that there was no servient tenement, but that is only material when there is a question whether the burden of a covenant runs with the land. This is a question of the benefit running, and ever since *The Prior's Case* (1) it has been held that the covenantor is liable because of his covenant given to the owner of the dominant tenement and not because of his relationship to any servient tenement

In my opinion, therefore, the board are liable to the plaintiffs in damages for breach of covenant. It is thus unnecessary to consider whether they are liable in tort, but I will add a word about it. The decision of the House of Lords in the *East Suffolk* case (11) shows that, in the absence of a contract, a catchment board is under no duty to exercise its powers with efficiency or despatch or at all, but it also shows that, if it does exercise its powers, it must use reasonable care not to injure persons likely to be affected by its operations. The present case is very different from that one, because here the landowners, in consequence of the works done by the board, ploughed up the land and cultivated the fields, and in the result suffered damage which they would not have done if the board had done nothing, for in that case they would have had no crops there. But the decision of the House of Lords does show, however, that, in considering whether the board broke its duty in tort, it is material to inquire into the expense of the works which it is said they ought to have constructed. An adjacent landowner must not be too critical if the board prefers thrift to efficiency, I suppose on the principle that he should not look a gift horse in the mouth, and must be prepared to take it with some faults, but the duty in contract is a very different thing. There is no question of a gift horse there. The landowner paid his contribution in return for the board's promise, and they are in duty bound to fulfil it. I agree, therefore, that the appeal should be allowed.

Appeal allowed with costs here and below.

Solicitors: *Ellis & Fairbairn* (for the plaintiffs); *Norton, Rose, Greenwell & Co.*, agents for *A. H. Jolliffe*, County Offices, Preston (for the catchment board).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

JENNINGS *v.* COLE.

[KING'S BENCH DIVISION (Lynskey, J.), May 31, June 1, 1949.]

Negligence—Invitee—Duty of occupier—Unusual danger—Neighbour entering premises at request of occupier to tend occupier's bedridden wife—Fall and injury to leg.

The occupier of a house, having to go to work, asked a neighbour to go into the house from time to time to look after his wife, who was bedridden. The neighbour slipped on a landing and injured her leg.

HELD: as the occupier of the house had a material interest in having the neighbour on the premises, the neighbour was an invitee, and, therefore, had her injuries been caused by any unusual danger on the premises of which the occupier knew or ought to have known, the occupier would have been liable, but, on the facts, no unusual danger existed.

[AS TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-605, paras. 851-853; and FOR CASES, see DIGEST, Vol. 36, pp. 35-41, Nos. *208-246.*]

Cases referred to:

(1) *Indermaur* v. *Dames*, (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; *affd.*, (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, *208.*

(2) *Weigall* v. *Westminster Hospital*, [1936] 1 All E.R. 232; 52 T.L.R. 301; Digest Supp.

ACTION for damages for negligence.

The plaintiff was injured as a result of an accident on the defendant's premises which she was visiting in order to look after the defendant's wife who was bedridden. She claimed to have been an invitee to the premises and to have suffered her injury through an unusual danger, having slipped on a rug placed on a floor which was said to have been highly polished. LYNSKEY, J., held that the plaintiff was an invitee, but on the facts he held that the accident had not arisen from any unusual danger.

Pearl for the plaintiff.

Jukes for the defendant.

LYNSKEY, J.: Doris Edith Jennings, who is the wife of Leonard Edward Jennings, claims damages for injury in respect of an accident which occurred to her on Jan. 11, 1946. Her claim is that she visited the defendant's premises on that date as an invitee, and, while there, she slipped on a rug which had been placed on a floor which was highly polished, whereby she sustained injuries to her ankle and leg. Counsel for the defendant suggests, first, that she was not an invitee but a licensee, and, secondly, that, if she was an invitee, there was no unusual danger on these premises and that the accident was not caused by any negligence on the part of the defendant.

The plaintiff and the defendant are next door neighbours at Greenway, Southgate. The plaintiff lives at 60, Greenway, and the defendant at 58, and they have lived in these houses and been friendly for many years. In September, 1945, the defendant's wife, Mrs. Cole, became ill. Her condition gradually got worse, and shortly after Christmas, 1945, she became entirely bedridden and she died in the following month. The defendant was a master tailor and had to go out to his work. As no one else was living in the house with him and his wife, he arranged that the charwoman should come every morning on five days a week soon after nine o'clock and remain until noon and that his sister-in-law should come as early as she could in the afternoon, which was not until after two o'clock, to look after Mrs. Cole. The defendant himself came home to attend to his wife whenever it was possible, but on the days when he could not get home there was a gap between twelve and two o'clock when there was nobody to look after her. Therefore, according to the plaintiff, she was asked by the defendant to go in to look after his wife whenever she could. She said that she was asked many times and pressed to do it both by the defendant and his wife. The defendant himself says that the plaintiff was asked from time to time to go in to look after his wife, and he went on to say:

> "I asked Mrs. Jennings to come in and be with Mrs. Cole when she was ill. I asked Mrs. Jennings to come in when she could. I did not ask her to come in on the particular day when the accident occurred."

In re-examination, in answer to his own counsel, as to what he would expect Mrs. Jennings to do when she came in, he said:

> "I would expect her to see if my wife wanted anything, and to make her comfortable."

It is said by the defendant that the relationship between the parties was purely social, that the plaintiff went to do what she could for his wife out of Christian charity and social obligation, and that she was simply there as a social guest, and, therefore, in the position of a licensee. The plaintiff contends that she was there at the request of the defendant to assist him. Many tests have been applied as to what is the distinction between "licensee" and "invitee." It seems to me that a request was made by the defendant to the plaintiff to go into his house to see if his wife wanted anything, and, if she did, to do it for her, and also to comfort her and assist her when no one else was available. Applying the test of material interest, the defendant, in my view, had a material interest in having the plaintiff on the premises to look after his wife while she was incapacitated from looking after herself. That being so, the plaintiff entered the premises as an invitee and not as a licensee.

The law to be applied has been repeated many times, and appears in *Indermaur* v. *Dames* (1) in the judgment of Willes, J., where he said (L.R. 1 C.P. 288):

> ". . . with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

Applying that test in this case, the first question is whether there was unusual danger. The plaintiff says that the landing on the first floor of the defendant's premises, outside Mrs. Cole's bedroom, was covered with linoleum polished to a very high degree. She says there was a rug which measured 3 ft. 11 ins. long and 3 ft. 2 ins. wide, which usually rested opposite the gas-fire in Mrs. Cole's bedroom, but which, on the day in question, for some unexplained reason had been taken from that position and placed on the landing on this highly polished surface. Mrs. Jennings went into the premises at about one o'clock, taking with her a junket which she had prepared for Mrs. Cole, and went across the landing to the bedroom. She says she did not notice that the rug was there, and when she had put one foot on its edge the rug slipped and she fell and suffered a fracture of the fibula. If that was an account which I could accept, it would show the existence of an unusual danger, but the case for the defendant was that this rug was put in this position on the landing some time before 1939 and had been there since and that the landing was not highly polished under the rug, but only polished round it. I am satisfied that the floor was polished round, and not underneath, the rug, and that the plaintiff had been coming to these premises regularly for years and even more often during the period just before her accident. I am satisfied that she knew exactly what the conditions were. I am not satisfied that a rug in a position like that is an unusual danger in a house. I am satisfied that the plaintiff fell, but how she fell I do not know—whether she tripped on the rug or whether she was turning quickly to go from the front bedroom to the back bedroom. People do slip on carpets and rugs, and A even on linoleum which has been highly polished. I am not satisfied here there was any unusual danger of which the defendant knew or ought to have known or for which he was in any way to blame. The result is there will be judgment for the defendant.

Judgment for the defendant with costs.

Solicitors: *Hamilton-Hill & Evershed* (for the plaintiff); *Hair & Co.* (for B the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Applied. TURNER *v.* ARDING & HOBBS, LTD. *post* p. 911.

STOWELL *v.* RAILWAY EXECUTIVE.

C [KING'S BENCH DIVISION (Lynskey, J.), June 1, 2, 1949.]

Negligence—Invitee—Duty of occupier—Unusual danger—Person visiting railway station to meet passenger—Oily patch on platform.

The plaintiff went to a railway terminus belonging to the defendants to meet his daughter and her family who were arriving there by train. D As he walked along the platform at which the train had arrived looking into each compartment for his daughter, he slipped on an oily patch which he had not seen and fell, sustaining injury. He now claimed damages for negligence. It was found as a fact that the oily patch ought not to have been there, and that, if the defendants' servants had taken proper care, it could have been removed or rendered innocuous to persons on the E platform.

HELD: (i) inasmuch as it was a convenience to their passengers, and as the plaintiff, by assisting with the luggage of the persons whom he had come to meet, would help to clear the platform, the defendants had an interest in the plaintiff's entering the station which was sufficient to make the plaintiff an invitee.

F *Dictum of* DENMAN, J., in *Watkins* v. *Great Western Ry. Co.* (1877) (37 L.T. 195), *applied.*

(ii) the oily patch was an unusual danger in the circumstances because the plaintiff could not be expected to be looking on the ground at every step and he was entitled to expect that the platform would be free from obstruction. The plaintiff was taking reasonable care for his own protection, G and the defendants were liable.

Horton v. *London Graving Dock Co.* (*ante*, p. 169), *applied.*

[AS TO DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 41, 42, Nos. *247-258*, and see also Vol. 8, pp. 85-87, Nos. *586-594*.]

Cases referred to:

H (1) *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74; 92 L.J.K.B. 50; 128 L.T. 386; 87 J.P. 21; 36 Digest 37, *213*.

(2) *Watkins* v. *Great Western Ry. Co.*, (1877), 46 L.J.Q.B. 817; 37 L.T. 193; 36 Digest 39, *235*.

(3) *Bolch* v. *Smith*, (1862), 7 H. & N. 736; 31 L.J.Ex. 201; *sub nom.*, *Bolett* v. *Smith*, 6 L.T. 158; 36 Digest 47, *293*.

(4) *Corby* v. *Hill*, (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 36 Digest 49, *304*.

(5) *Smith* v. *London and St. Katharine Docks Co.*, (1868), L.R. 3 C.P. 326; 37 L.J.C.P. 217; 18 L.T. 403; 36 Digest 37, *215*.

(6) *Indermaur* v. *Dames*, (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; *affmd.*, (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, *208*.

(7) *Horton* v. *London Graving Dock Co.*, [1949] 2 All E.R. 169.

ACTION for damages for negligence. A

The plaintiff's daughter and her husband and children were travelling from Cornwall to London and the train was due to arrive at Paddington Station at 5 p.m. on Tuesday, Mar. 30, 1948. The plaintiff and his wife had taken their car to the station to meet the daughter and her family and to take them to the address a short distance away at which they were to stay. After consulting the platform indicator they went to the proper platform, and the plaintiff, B while walking along the platform after the train had come in, looking into compartments and watching the passengers walking towards him, slipped on a patch of oily substance which might have come from boxes of fish which had been unloaded from trains at that platform on the morning of the same day. The plaintiff fell and was injured. Some of the fish boxes had been loaded on to open trucks from which water, slime and oil could have got on to the C platform. After the unloading of the fish trains, water and other liquids had been removed from the platform by means of squeegees, the whole length of the platform had been swept by three sweepers, and wet or damp patches remaining had been sanded over by three porters with a fine sand. LYNSKEY, J., found as a fact that, if this practice had been carried out efficiently on the day in question, there would have been no patch containing an oily substance D to afford a danger to the plaintiff. He also found that, as forty porters received every train, the Railway Executive had ample opportunity of knowing that the patch was there and of removing it or rendering it innocuous to passengers before the plaintiff was injured. He held that the patch should not have been there, that the plaintiff was an invitee, and that the Railway Executive were liable to him for negligence in not protecting him against an unusual danger. E

Dare for the plaintiff.

Humfrey Edmunds for the defendants, the Railway Executive.

LYNSKEY, J. [having stated the facts]: The question arises whether in those circumstances the Railway Executive are liable and that depends to some degree, though not entirely, on the legal question whether the plaintiff F when visiting these premises did so as a licensee or an invitee. What is an invitee and what is a licensee has been considered many times and I suppose the best definition of invitee is that of LORD BUCKMASTER in *Fairman* v. *Perpetual Investment Building Society* (1) ([1923] A.C. 80)—that an invitee is a person who enters on the premises by the permission of the occupier granted in a matter in which the occupier has himself some business or material interest. He is a person G who receives permission from the occupier as a matter of business and not as a matter of grace. Did the plaintiff enter this station for the purposes of the occupier? Did he receive permission from the occupier as a matter of business and not as a matter of grace? One has to be satisfied, first, that he received an invitation or was given permission to be on the premises, but no direct evidence has been led as to that. I have been requested to exercise the general knowledge H which I have, if not as a judge, as a jury, of what happens at large railway termini, particularly at Paddington Station. It is clear that the Railway Executive do permit persons to go into their stations both to see people off and to welcome people on arrival. In most of the large railway stations, and particularly at Paddington, they provide an indicator announcing the arrival of trains so as to indicate to people on the premises to which platform they should go to meet any particular train which is coming in. Also people may take platform tickets for the privilege of going on departure platforms, thus becoming contractors with the Railway Executive.

I am satisfied that the Railway Executive do invite anybody who desires to go and meet persons coming off trains, particularly to help them with their luggage, to do so. In my view, the Railway Executive had an interest in the plaintiff's going on their premises. It was, first of all, a convenience to their passengers. It was also an assistance to the Railway Executive because he would help to carry the passengers' luggage and so to clear the platform. In my view, therefore, there was sufficient interest between the plaintiff and the Railway Executive to make him an invitee for that purpose. I am confirmed in that view by the judgment of DENMAN, J., in *Watkins* v. *Great Western Ry. Co.* (2). There a mother was accompanying her daughter to the train. She had taken a ticket for her daughter. She was not going to travel herself, but she was going to see her daughter off, and while going along the platform for that purpose she walked into a plank on which a porter was standing and sustained injuries. The Divisional Court did not agree as to facts, nor as to the result, but in stating the law DENMAN, J., said (37 L.T. 195):

> "The question then arises whether the plaintiff in the present case was in the same position as the plaintiff in the case of *Bolch* v. *Smith* (3), as a mere licensee, or whether any other such relation existed as to deprive the defendants of the right to rely upon the doctrine there relied upon. I am of opinion that a railway company, keeping open a bridge over their line for the use of their passengers, is bound to keep that bridge reasonably safe, and that if in practice the friends of passengers are allowed by the company's servants to see passengers off by the trains, and to cross the bridge without asking special permission, the duty of the company in that respect cannot be put down towards them otherwise than it is towards those whom they accompany for such not unreasonable purpose. I think that this view is consistent with the cases of *Corby* v. *Hill* (4), and *Smith* v. *London and St. Katharine Docks Co.* (5). I regard the passenger's friend so permitted to go along the bridge by constant acquiescence on the part of the railway company as not being in the nature of a person barely licensed to be there, but as being invited to go to the same extent as the passenger whom he accompanies, and is there on lawful business in which the passenger and the company have both an interest."

Applying the reasoning of that statement to the facts of the present case, it seems to me that, where a father of a girl who is travelling goes to meet her to collect her luggage and help her out of the station, he is there on exactly the same terms as the person who has got a ticket to travel. He is there as an invitee. The Railway Executive have a common interest with him in his being there, and in those circumstances they owe him the duty owed by an invitor to an invitee.

That duty has been often stated, and, in particular, by WILLES, J., in *Indermaur* v. *Dames* (6) ((1866) L.R. 1 C.P. 287). The duty is (the invitee taking reasonable care for his own safety) to prevent damage to the invitee from any unusual danger of which the occupier knew or ought to have known. It seems to me that this was an unusual danger. When using a railway platform one does not expect to find patches of slippery substance which cause one to fall. It is in general unusual to find them there, but the test of what is unusual is, as I held in *Horton* v. *London Graving Dock Co.* (7) (p. 169, *ante*):

> " . . . the only duty imposed on the invitor, or occupier, is to prevent damage from unusual danger . . . Is it danger unusual generally, or is it danger unusual in premises of the type, description and use, to which the invitation is extended, or is it a danger unusual from the point of view of the particular invitee, regard being had to the type, description and

> use of the premises to which he has been invited ? In my view, ' unusual danger ' means a danger unusual from the point of view of the particular invitee . . ."

It is said by counsel for the Railway Executive that this could not be an unusual danger because it was an obvious danger. If the thing is obvious it is not unusual to the person who has seen it, but it may be unusual to a person who has not seen it even although he could have seen it if acting reasonably A and taking reasonable care for his own protection. What is acting reasonably must depend on the circumstances of each case. If one is walking along a dockside where one expects mooring ropes and other obstructions one must watch every step, but if one is walking down a railway platform provided for the purpose of those who use the trains one is entitled to expect that it will be free from obstruction. It would not be reasonable to require that those using B the platforms should be looking down at the ground at every step they take. If one were expected to be looking at one's feet when a train comes in one would often not get a seat in one of the crowded compartments. It is not reasonable to ask people to watch every step they take. One must expect them to be looking about—looking at and meeting passengers coming off the train. Anyone who has been caught in the rush of a crowded train arriving C at Paddington Station shortly after a holiday can realise the difficulties of trying to watch every yard of the way when walking against the stream of the traffic. In my view, this patch on the platform was an unusual danger and the plaintiff was acting reasonably in the look-out he was keeping. In the circumstances it was an unusual danger to him, and the Railway Executive were in breach of the duty they owed to him. He was not guilty of contributory D negligence, and, therefore, he is entitled to have damages for the injury he has sustained as a result of their breach of duty.

[His Lordship then assessed the damages at £523 15*s*. and gave judgment for the plantiff with costs].

Judgment for the plaintiff with costs.

Solicitors : *Tatton, Gaskell & Tatton* (for the plaintiff) ; *Roger Chitty* (for E the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

F

SYDENHAM *v.* SYDENHAM AND ILLINGWORTH.

[Court of Appeal (Bucknill, Asquith and Denning, L.JJ.), June 14, 15, 1949.]

Divorce—Maintenance—Assessment—Factors to be considered—Conduct of parties —Guidance by trial judge—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), *s.* 190 (1). G

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1) : " The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court H may deem to be reasonable . . ."

A husband petitioned for divorce on the ground of adultery, asking for the discretion of the court. By her answer the wife admitted the act of adultery, but pleaded that it was condoned, and she also asked for a divorce on the adultery confessed to by the husband in his discretion statement. Although the commissioner found that the husband had not condoned his wife's adultery, he refused to grant him a decree, and, exercising his discretion in favour of the wife, granted a decree to her. On appeal by both parties the Court of Appeal held that each spouse was entitled to a decree.

Per Denning, L.J. : Though nominally concerned with other matters this appeal is in fact only concerned with the question of maintenance. Under the present practice of the Divorce Court maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1), is not awarded on the making of a decree as the statute provides, but at a later stage by the registrar. If a decree is pronounced in a wife's favour she is in a strong position to get maintenance even though she has committed adultery. Similarly a guilty husband granted a decree is usually able to resist a claim for maintenance unless a compassionate allowance is granted. The form of decree may be misleading and no real guide to the conduct of the parties or the merits of the claim. The current phrase whereby it is said the court exercises its discretion " in favour of " one side only means that it is exercising its discretion to grant a divorce and is not a finding that the conduct of one party is less heinous than that of the other. There is statutory power to award maintenance to a guilty wife as well as to an innocent one, and regard must be had to the conduct of both parties. Under present practice the registrar has to do the best he can from the decree and the shorthand note of the judgment, and there is no reason why the trial judge, who has the best means of knowing the conduct of the parties, should not, in his judgment, make any observations he thinks fit to guide the registrar on the point.

[As to the Granting of Maintenance to a Wife after a Decree, see HALSBURY, Hailsham Edn., Vol. 10, pp. 785-809, paras. 1244-1292 ; and for Cases, see DIGEST, Vol. 27, pp. 500-512, Nos. *5355-5512*.]

Appeal by the husband from a decision of Mr. Commissioner Grazebrook, K.C., dated Nov. 10, 1948.

The court, in the exercise of its discretion having regard to the facts, now made a decree in favour of both husband and wife. The case is only reported on the question of maintenance after decree referred to in the judgment of Denning, L.J., and the short statement of the facts relevant to that issue is contained in the headnote.

R. F. Levy, K.C., and *John Latey* for the husband (petitioner).
Karminski, K.C., and *Eric Myers* for the wife (respondent).

BUCKNILL, L.J., delivered a judgment (with which **ASQUITH, L.J.**, agreed) allowing the husband's appeal and granting decrees to both parties.

DENNING, L.J. : This appeal is nominally concerned with the question whether the husband or the wife should be granted a decree, but it is, in fact, really concerned with the question of maintenance. Everybody concerned realises that the marriage must be dissolved, but under the present practice of the Divorce Court maintenance is not awarded on the making of the decree as the statute provides it shall be. It is awarded at a later stage by the registrar, who is naturally influenced by the form in which the decree is pronounced. If the decree is pronounced in favour of the wife, she is in a strong position to get some maintenance from the husband even though she has herself committed adultery. If the decree is pronounced in favour of the husband, he is usually able to resist a maintenance order even though himself guilty of adultery, unless the wife can persuade the judge to award her a compassionate allowance. There is, however, no hiding the fact that the form of the decree is often no real guide to the conduct of the parties or to the merits of a claim for maintenance.

I have myself tried several cases where a husband left his wife and, unknown to her, committed adultery. She thereafter, in her loneliness, herself committed adultery. He then obtained a divorce against her for that adultery. She knew she was guilty and did not defend the case, but she did not know that he was equally, and even more, guilty than she was. The innocent-looking request in his petition that the court should use its " discretion " conveyed nothing to her. Hence she was deprived of maintenance which she ought to have had, or rather she would have been deprived of maintenance if I had not asked her to come to court and explained the position to her.

Such cases show how misleading the form of the decree may be. The current phrase whereby the court says that it exercises its discretion "in favour of" one side conveys the impression that the court is saying that that party's conduct is excusable, or, at any rate, not so heinous as that of the other, whereas the court is often saying no such thing. It is only saying what the statute authorises it to say, namely, that it is exercising its discretion to grant a divorce. It leaves any claim to maintenance entirely undecided. There is nothing in the statute to say that a wife against whom a decree has been made cannot be awarded maintenance, and there is nothing in it about discretion being exercised " in favour of " one side or the other or about a " compassionate allowance." All it says is that on a decree of divorce the court may award maintenance to the wife. This includes a guilty wife as well as an innocent one, but in awarding maintenance the court must have regard, of course, to the conduct of the parties. If the state of work in the Divorce Court does not enable the maintenance to be awarded by the judge who tries the case—and so has the best means of knowing the conduct of the parties—then the registrar must do the best he can, not merely from the form of the decree but also from the shorthand note of the judgment. I see no reason why the judge should not in his judgment make any observations he thinks fit to guide the registrar on this important point.

The form of decree pronounced by the commissioner in this case does not give a correct picture of the conduct of the parties. It seems to me to be eminently a case in which the court, in the exercise of its discretion, should pronounce a decree *nisi* on both petition and answer. That leaves the registrar free to assess maintenance without being embarrassed by the form of the decree. He should have regard to the conduct of the parties and to their respective resources. The wife's adultery in 1944 and her conduct later in refusing sexual intercourse, did a good deal to lead to the breakdown of this marriage, and full weight must be given by the registrar to those facts. It does not follow that she should get nothing. The husband's subsequent conduct in committing adultery put any reconciliation out of the question. The wife may get something or nothing. It is for the registrar to say.

Appeal allowed. The wife to receive costs up to £100.

Solicitors : *Capel Cure, Glynn Barton & Co.* (for the husband) ; *S. Myers & Son* (for the wife).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

JONES *v.* BELLEGROVE PROPERTIES, LTD.

[Court of Appeal (Lord Goddard, C.J., Tucker and Singleton, L.JJ.), June 15, 1949.]

Limitation of Action—Debt—Acknowledgment—Balance sheets of debtor company handed to shareholder creditor—Parol evidence to explain entries—Debt due to creditor included in sum set out as total of company's debts—Limitation Act, 1939 (c. 21), *ss.* 23 (4), 24 (1), (2).

By the Limitation Act, 1939, s. 2 (1) (*a*) actions founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. By s. 23 (4) : " Where any right of action has accrued to recover any debt or . . . pecuniary claim

. . . and the person liable or accountable therefor acknowledges the claim . . . the right shall be deemed to have accrued on and not before the date of the acknowledgment . . ." By s. 24 : " (1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment. (2) Any such acknowledgment . . . may be made by the agent of the person by whom it is required to be made . . . and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged . . . "

In 1936 and 1937 the plaintiff lent £1,807 to a company in which he was a shareholder. At the annual general meeting of the company on Dec. 31, 1946, at which the plaintiff was present as a shareholder, the accounts for the years 1939 to 1945 were presented to the meeting and included in the total sum shown as due to creditors, but not specifying it, the company's debt to the plaintiff. In an action by the plaintiff to recover the money lent, the company pleaded that the action was barred by the Limitation Act, 1939, s. 2 (1) (*a*), but the plaintiff contended that the entry in the balance sheet presented to him at the meeting constituted an acknowledgment of his debt within the meaning of s. 24 (2) of the Act, notwithstanding that it was presented to him in his capacity as a shareholder and not as a creditor, and, therefore, by s. 23 (4), his right of action must be deemed to have accrued on the date of the acknowledgment.

Held : (i) parol evidence was admissible to show that part of the sum shown in the balance sheet as due to creditors was owed to the plaintiff.

(ii) the balance sheet presented to the plaintiff at the meeting of the company fulfilled all the requirements of s. 24, and, therefore, there was an acknowledgment by the company of the plaintiff's debt within the meaning of s. 24 (1) and (2), and, by s. 23 (4), the plaintiff's right of action must be deemed to have accrued on the date of acknowledgment, so that his claim was not barred under s. 2 (1) (*a*) of the Act.

Re Atlantic and Pacific Fibre Importing and Manufacturing Co., Ltd. ([1928] Ch. 836) and *dictum* of Maugham, J., in *Re Coliseum* (*Barrow*), *Ltd.* ([1930] 2 Ch. 47), *applied.*

Decision of Birkett, J. ([1949] 1 All E.R. 498), *affirmed.*

[As to What Acknowledgments are Sufficent, see HALSBURY, Hailsham Edn., Vol. 20, pp. 631-636, paras. 800-805, and 1948 Supplement ; and for Cases, see DIGEST, Vol. 32, pp. 359-377, Nos. *426-607*.]

Cases referred to :

(1) *Re Coliseum* (*Barrow*), *Ltd.*, [1930] 2 Ch. 44 ; 99 L.J.Ch. 423 ; 143 L.T. 423 ; Digest Supp.

(2) *Re Atlantic and Pacific Fibre Importing and Manufacturing Co., Ltd.*, [1928] Ch. 836 ; 97 L.J.Ch. 369 ; 140 L.T. 18 ; Digest Supp.

(3) *Spencer* v. *Hemmerde*, [1922] 2 A.C. 507 ; 91 L.J.K.B. 941 ; 128 L.T. 33 ; 32 Digest 364, *484*.

(4) *Green* v. *Humphreys*, (1884), 26 Ch.D. 474 ; 53 L.J.Ch. 625 ; 51 L.T. 42 ; 32 Digest 361, *449*.

(5) *Bowring-Hanbury's Trustee* v. *Bowring-Hanbury*, [1942] 1 All E.R. 516 ; [1942] Ch. 276 ; 111 L.J.Ch. 152 ; 167 L.T. 188 ; *affmd.*, [1943] 1 All E.R. 48 ; [1943] Ch. 104 ; 112 L.J.Ch. 37 ; 168 L.T. 72 ; 2nd Digest Supp.

(6) *Re Beavan*, [1912] 1 Ch. 196 ; 81 L.J.Ch. 113 ; 105 L.T. 784 ; 23 Digest 360, *4273*.

(7) *Hartley* v. *Wharton*, (1840), 11 Ad. & El. 934 ; 3 Per. & Dav. 529 ; 9 L.J.Q.B. 209 ; 32 Digest 377, *613*.

(8) *Read* v. *Price*, [1909] 2 K.B. 724 ; 78 L.J.K.B. 1137 ; 101 L.T. 60 ; 32 Digest 377, *610*.

(9) *Ledingham* v. *Bermejo Estancia Co., Ltd.*, *Agar* v. *Bermejo Estancia Co., Ltd.*, [1947] 1 All E.R. 749 ; 2nd Digest Supp.

APPEAL by the defendant company from a judgment of BIRKETT, J., dated Feb. 4, 1949.

In 1936 and 1937 the plaintiff lent £1,807 to the defendant company in which he was a shareholder. At the annual general meeting of the company in December, 1946, the plaintiff was handed by a director certain accounts of the company, signed by the accountants and two directors of the company. These accounts included the balance sheets for the years 1939 to 1945, in each of which was the entry : " Sundry creditors £7,638 8*s.* 10*d.*" In an action begun by the plaintiff in 1948 to recover the money lent, parol evidence was admitted to show that the sum mentioned in this entry included the debt due to the plaintiff. The company pleaded that the action was barred by the Limitation Act, 1939, s. 2 (1) (*a*), it having been brought more than six years from 1936 and 1937 when the cause of action accrued, but the plaintiff contended that the entry in the balance sheets constituted a written acknowledgment of the debt within the meaning of s. 24 (1) and (2) of the Act, so that under s. 23 (4) his right of action must be deemed to have accrued in December, 1946. BIRKETT, J., gave judgment for the plaintiff and the Court of Appeal now upheld his decision.

Gardiner, K.C., and *S. Terrell* for the defendant company.
Marshall, K.C., and *I. H. Jacob* for the plaintiff.

LORD GODDARD, C.J. : In my opinion, this appeal must fail. The case may appear to have some general importance with regard to the ability of companies to rely on the Limitation Act, 1939, but it really depends on its own facts and I wish to make it clear that our decision is based on those special facts. At various dates in 1936 and 1937 the plaintiff lent to the defendant company sums of money which amounted in all to £1,807. Those loans have not been repaid, and in 1948 the plaintiff brought this action to recover them. The defendant company relied for its defence on the Limitation Act, 1939, s. 2 (1) (*a*), and contended that, as the cause of action had arisen more than six years before action brought, the claim was barred. To that the plaintiff replied that the defendant company had acknowledged the claim during the six-years period, and, therefore, by s. 23 (4) of the Act, the right of action must be deemed to have accrued on, and not before, the date of the acknowledgment.

It appeared that at the annual general meeting of the defendant company on Dec. 31, 1946, at which the plaintiff was present in his capacity of shareholder, accounts for the years 1939 to 1945 inclusive were presented to the meeting. These accounts were signed by the company's accountants and two directors of the company. They showed that during each of the years 1939 to 1945 the company owed sums of money to creditors. No particular creditors were named, but the plaintiff contended, and it was not disputed, that the sums shown as due to creditors generally included the sum of £1,807 which was due to the plaintiff. He contended that the balance sheet presented to him at the meeting constituted an acknowledgment of his debt within the meaning of s. 24 (2) of the Act of 1939, notwithstanding that it was presented to him in his capacity as a shareholder and not as a creditor, and, therefore, his claim was not barred.

By s. 23 (4) of the Limitation Act, 1939 :

> " Where any right of action has accrued to recover any debt or . . . pecuniary claim . . . and the person liable or accountable therefor acknowledges the claim . . . the right shall be deemed to have accrued on and not before the date of the acknowledgment . . ."

Section 24 (1) requires that an acknowledgment must be in writing and signed by the person making the acknowledgment. By s. 24 (2) the acknowledgment may be made by the agent of the person by whom it is required to be made, and it must be made to the person whose claim is being acknowledged or to his agent. For the defendant company it is argued that the balance sheet is not such a document as can amount to an acknowledgment. I do not see why it cannot. Whether or not the document is an acknowledgment must A depend on what the document states, and a balance sheet presented to a creditor at a meeting of the company, as happened in this case, fulfils all the requirements of s. 24. The signed accounts show that the company admits that it owes a certain sum, and parol evidence was admitted, and rightly so, which showed that part of that sum was owed to the plaintiff. The statute does not extinguish a debt. It only bars the right of action.

B In *Re Coliseum* (*Barrow*), *Ltd.* (1), MAUGHAM, J., said ([1930] 2 Ch. 47):

> "It is now well settled . . . that the acknowledgment must be made to the creditor or to his agent: that is beyond dispute. In the present case the directors of the company, at various board meetings held from time to time, passed the balance sheets before them and two of them signed the balance sheets on behalf of the board pursuant to s. 113 of the C Companies (Consolidation) Act, 1908. Accordingly, had the statement been made in the balance sheet that the company owed a specified sum to a shareholder to whom the balance sheet was sent in the usual way that would have amounted, I think, to a sufficient acknowledgment within the authorities."

D In *Re Atlantic and Pacific Fibre Importing and Manufacturing Co., Ltd.* (2) CLAUSON, J., said ([1928] Ch. 839):

> "In my judgment the issue of the balance sheets constituted, in the circumstances, a sufficient acknowledgment of the company's indebtedness to the plaintiff and the other debenture holders under the debentures."

For these reasons, I think that the appeal should be dismissed.

E **TUCKER** and **SINGLETON, L.JJ.,** concurred.

Appeal dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the defendant company); *Harold Miller & Fraser*, agents for *Weigall & Inch*, Margate (for the plaintiff).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

F

Re MANNERS (*deceased*). PUBLIC TRUSTEE *v.* MANNERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ.), June 20, 21, 1949.]

G *Will—Satisfaction—Satisfaction of debt by legacy—Annuity under deed—Bequest of sum for purchase of annuity of same amount—Direction in will to pay debts—Effect of words "give and bequeath."*

The testator, having been divorced from his wife, by a deed dated Feb. 17, 1937, covenanted by way of provision for her and in consideration of her releasing any right she might have under an order of the court H or otherwise in respect of maintenance to pay to her during her life £250 per annum less income tax payable by equal monthly instalments from Nov. 1, 1936. It was provided that the obligations under the deed should continue notwithstanding that the testator might, as happened, predecease the wife. In July, 1944, the testator made a will by which he provided, *inter alia*: "I direct that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease." He further provided: "I give and bequeath £5,000 to purchase an annuity of £250 per annum less tax for [the wife] the balance of this £5,000 after the purchase of this annuity of £250 per annum less tax I give and bequeath to my grandchildren that is the children of my son Eric." There followed a number of legacies, each introduced by the words "I give and bequeath," and there was a residuary bequest to various persons and corporations. On the testator's death it was argued that the annuity bequeathed to the wife satisfied her annuity under the deed of 1937.

Held: although the fact that the annuity referred to in the gift to the wife was identical in amount with the annuity under the deed *prima facie* would give rise to the presumption that the latter was satisfied by the testamentary gift, the direction to pay the testator's debts (of which the obligation to pay the annuity under the deed was one) rebutted that presumption, and that view was supported by the fact that the gift to the wife was, not of an annuity equal in amount to the annuity under the deed, but of an interest in a sum set aside altogether from the residue, and also by the use of the words "give and bequeath" which were used throughout the will in relation to each gift.

Horlock v. *Wiggins*, (1888), (39 Ch.D. 142), *applied.*

Re Hall, ([1918] 1 Ch. 562) and *Re Hargreaves*, (1890), (44 Ch.D. 236), *distinguished.*

[As to Satisfaction of a Debt by a Legacy, see HALSBURY, Hailsham Edn., Vol. 13, pp. 171-175, paras. 158-160; and for Cases, see DIGEST, Vol. 20, pp. 478-480, Nos. *2033-2049.*]

Cases referred to:

(1) *Horlock* v. *Wiggins*, *Wiggins* v. *Horlock*, (1888), 39 Ch.D. 142; 58 L.J.Ch. 46; 59 L.T. 710; 20 Digest 481, *2064.*

(2) *Atkinson* v. *Littlewood*, (1874), L.R. 18 Eq. 595; 31 L.T. 225; 20 Digest 487, *2146.*

(3) *Chichester* (*Lord*) v. *Coventry*, (1867), L.R. 2 H.L. 71; 36 L.J.Ch. 673; 17 L.T. 35, H.L.; 20 Digest 449, *1744.*

(4) *Re Hall*, [1918] 1 Ch. 562; 87 L.J.Ch. 393; 118 L.T. 700; 20 Digest 485, *2120.*

(5) *Re Hargreaves*, (1890), 44 Ch.D. 236; 59 L.J.Ch. 375; 62 L.T. 819; 23 Digest 369, *4385.*

(6) *Re Dowse*, (1881), 50 L.J.Ch. 285; 20 Digest 483, *2097.*

Appeal by persons interested in the testator's residuary estate against an order of Wynn-Parry, J., dated Jan. 24, 1949.

Wynn-Parry, J., held that, on the true construction of the will, the bequest in the will of a sum for the purchase of an annuity of £250 per annum less tax, did not satisfy an obligation incurred by the testator under a deed to pay an annuity of the same amount to the legatee during her life. The Court of Appeal now dismissed the appeal. The facts, which are summarised in the headnote, appear in the judgment of Sir Raymond Evershed, M.R.

Newsom for residuary legatees and the testator's grandchildren.

Raymond Jennings, K.C., and *Lionel Edwards* for the testator's wife.

McMullen for the Public Trustee, executor of the will.

SIR RAYMOND EVERSHED, M.R.: This appeal raises a question of the application of what has been called the rule as to the satisfaction of debts by legacies. Counsel for the residuary legatees, indeed, has gone further and said that the rule, of which there have been many expressions of disapproval, ought now by this court to be given a new stimulus and clothed anew with vigour. The rule (and I quote it as I find it in Theobald on Wills, 10th ed., p. 541) is stated as follows:

> "The doctrine of satisfaction also applies to a legacy to a creditor. In such a case the legacy, if of equal or greater amount is *prima facie* considered a satisfaction of the debt."

Counsel for the residuary legatees says that the onus is on the creditor to show some ground why there should be inferred an intention on the part of the testator to give a bounty by will in addition to his obligation existing by contract. I A should add that the rule, which, as I say, has not been favoured by the courts, has, no doubt consequentially, become subject to exceptions which by reason of their artificiality themselves have not been the subject of much encomium. However, the main question in the present case is whether or not, on the facts, the rule (which has been established for a very long time) applies.

The testator married a woman from whom he was subsequently divorced. B After the divorce proceedings arrangements in one form or another were made for the provision by the testator of alimony for his former wife, and a final provision was made by deed of covenant dated Feb. 17, 1937. By that deed Mrs. Manners gave up any right she might have under a previous order of the court or otherwise in respect of maintenance, and in consideration of that release the testator convenanted that during her life he would pay her £250 C per annum less income tax. It was further provided that that provision should be given effect to as from October, 1936, and that the money should be payable by equal monthly instalments of £20 16*s*. 8*d*., beginning on Nov. 1, 1936. It was expressly provided that the obligations under the covenant should continue notwithstanding that the testator might, as, in fact, happened, predecease Mrs. Manners. The testator's will was made in July, 1944. After revoking D previous wills and appointing the Public Trustee as executor, he proceeded :

> "I direct that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease."

He then made the bequest which has given rise to the present question :

> "I give and bequeath £5,000 to purchase an annuity of £250 per annum E less tax for Amelia Martha Manners the balance of this £5,000 after the purchase of this annuity of £250 per annum less tax I give and bequeath to my grand-children that is the children of my son Eric James Manners."

I should interpolate here, first, that when the testator died (which was some few years after the will) having regard to the age of Mrs. Manners, the purchase price of the annuity was a figure of some £3,000 odd, so that there was, if the F annuity were bought, a substantial balance on which the remainder of the language which I have read would operate. Secondly, "the children of my son Eric James Manners" would be grand-children of the testator by the named son who was a child of his marriage to Mrs. Manners. It is unnecessary to read the rest of the will, but I observe that the form of it is that there follow a number of pecuniary legacies, each and every one of them introduced by the G same formula, "I give and bequeath . . ." Finally, the testator "gave and bequeathed" his residue in shares to various persons and corporations, and the appellants in this case represent two charities who were entitled to shares of residue.

The substance of the argument on behalf of the residuary legatees is that the annuity provided for by this will on the face of it was of the same amount H exactly, £250 per annum, less tax, as the subject of the contractual obligation, and, therefore, *prima facie* the rule would apply, and it is said that there is nothing in the will which takes it out of the rule. If their contention is correct and Mrs. Manners elects for the bequest to her in the will, the amount of the residue will be enhanced by the consequent satisfaction of the deed of 1937. Counsel for the residuary legatees has referred to *Horlock* v. *Wiggins* (1) which appears to be the last case when this subject-matter was discussed in this court. There by a deed of separation a husband had covenanted that on his decease his estate should pay to his wife, should she survive him, £100, with a proviso that if £6 per month was paid to her for six months from his death, the balance should only be paid at the end of that period. The relevant words of the will set out in the headnote were :

> " . . . after all my just debts, funeral and testamentary expenses are paid, I bequeath to my wife £100 payable within six months after my decease, £6 to be paid to her or her order until my estate is finally settled, the same to be deducted from the said £100 as per indenture stated in our mutual separation." A

It is to be noted that the deed and the will were substantially contemporaneous, and that was a matter strongly relied on by the Court of Appeal. But Bowen, L.J., in deciding against the application of the general rule in that case, also founded himself on the circumstance that the will there, as this will, B immediately before the relevant bequest directed payment of debts—and I observe that it is " debts " and not " debts and legacies." Bowen, L.J.'s language is (39 Ch.D. 147) :

> " The will directs payment of the bequest after payment of the testator's just debts, and the £100 in the separation deed was a debt existing when C the will was made."

In that passage Bowen, L.J., clearly indicated that that circumstance is one which is of great importance, to put it no higher, in considering whether the rule applies or not.

From a consideration of other cases and of the text books I think that it seems now to be tolerably clear that the presence of a direction for payment D either of debts and legacies or of debts *simpliciter* is treated as being, whether or not artificially—and I do not think it is particularly artificial—something which takes the case out of the rule. It is convenient to cite the passage which counsel for Mrs. Manners referred to in Hawkins on Wills, 3rd ed., p. 347. It is stated there in the form of a rule :

> " A direction by the testator that his debts and legacies should be paid, is E sufficient to rebut the presumption that a debt is satisfied by a legacy."

The learned author then deals with the distinction at one time thought to have existed between a direction to pay debts and legacies, and a direction to pay debts *simpliciter*. In the same connection I will refer to a decision the other way, that of Sir R. Malins, V.-C., in *Atkinson* v. *Littlewood* (2). That was a case in which the benefits given by the legacy were identical F in all respects with the subject of the obligation, which was, as here, an annual sum or annuity. In the course of his judgment the learned Vice-Chancellor referred to *Chichester* (*Lord*) v. *Coventry* (3) in the House of Lords as being an authority for the view that a direction for the payment of debts had the effect of taking out of the operation of the rule a case where there was a legacy to the creditor. He said (L.R. 18 Eq. 604) : G

> " This being, then, a settled rule, I am not at liberty to depart from it unless I can clearly satisfy myself that there is such an intention in the will as to warrant me in coming to a different conclusion. If this testator had directed his debts to be paid, and then had given this annuity, I should have found sufficient warrant, because that is the very point decided H in *Chichester* (*Lord*) v. *Coventry* (3)."

In my judgment, therefore, it must now be treated as settled that a direction of this kind does have the effect stated. By way of answer to that point, however, counsel for the residuary legatees has said that this obligation which existed under the deed of 1937 at the date of the testator's death was not in strictness a debt or was not a debt within the formula in the will. I am afraid I cannot agree with him. It is true that at the date of the testator's death, if there was not a monthly instalment then unpaid, there was nothing immediately owing for which Mrs. Manners could sue, but the effect of the covenant was that month by month, so long as Mrs. Manners lived, there came into existence obligations in debt which could have been enforced against the estate, as they could have been enforced against the testator. It seems to me impossible to say that a direction to pay debts was not intended to comprehend all kinds of contractual obligations to which the testator's estate was subject.

Counsel for the residuary legatees relied on a decision of ASTBURY, J., in *Re Hall* (4). I think he went so far as to say that, if we were to hold that the direction in this will to pay debts applied to the obligation under the deed of 1937, and, accordingly, operated to take this case out of the general rule, we must disapprove, if not overrule, the decision in *Re Hall* (4). It does not seem to me, however, that that is so. *Re Hall* (4) was a somewhat special case. By an ante-nuptial settlement a husband had settled on trust certain property whereof the wife enjoyed the income, but he had covenanted with the trustees that, if his wife survived him, his executors would yearly during her life pay to the trustees a sum sufficient to make up the income to £1,000 per annum less income tax. By the terms of the will the testator left his estate so that the income went to the wife and that income, added to the income of the settled property, produced a total figure considerably in excess of £1,000 a year. The real question was whether the directions the testator made by his will operated to fulfil and perform the obligations entered into by the ante-nuptial settlement to make up the income of the settled fund. The learned judge held that they did. I cite one passage from the judgment ([1918] 1 Ch. 566) :

> "The real question here is whether the direction to pay the income of the 'clear residuary estate' to his wife—it is quite true it is not through the medium of the trustees, but to her direct—ought to be regarded in the events that have happened, there being ample money for the purpose, as a performance in fact of the covenant entered into three years before his will. The doctrine of satisfaction, strictly so called, as distinct from performance applies to a legacy to a creditor, in which case the legacy, if of equal or greater amount, is *prima facie* considered to be a satisfaction of the debt. This general rule has often been disapproved, but it is a binding rule upon the court today."

I think by that passage the learned judge indicated that *Re Hall* (4) was not in strictness a case of the same kind as the case which is now before us. The particular significance of that case from the point of view of the residuary legatees is that in the course of it ASTBURY, J., dealt with the contention that, as the will contained a direction to pay debts, the presumption of satisfaction was rebutted so that the widow could claim both the benefit of the obligation under the settlement and the benefit under the will. The learned judge held that the direction could not fairly be said to cover the kind of obligation that might arise under the settlement, if, but only if, it turned out that there was anything to pay the wife to make up her income to £1,000 per annum. It seems to me clear that there is a world of difference between an obligation to pay £250 per annum by equal instalments and an obligation that, if an income does not reach a certain figure, that deficiency will be made good. In the latter case it is plain that at any given point of time it cannot be said whether or not there is in the future going to be any obligation on the estate. It is merely a contingent liability. Therefore, it seems to me that *Re Hall* (4) is wholly distinct from the present case, but the language used by the learned judge which I have read seems to me to support and confirm the view that I have ventured to express—that where one has an obligation to pay debts then that direction *prima facie*, at any rate, takes the case out of the general rule. In the same connection counsel for the residuary legatees also cited *Re Hargreaves* (5). That case again seems to me to be quite different from the present. The question there was whether a person who was entitled to an annuity could prove for the value of the annuity against the estate of the covenantor, not confining himself to the actual accrued liability, but claiming to value the whole annuity and future obligations thereunder, and then to prove for that sum as though it were a debt presently payable.

It seems to me, therefore, that on the authorities the presence of the direction to pay debts applies to take this case out of the general rule and that the direction to pay debts must be taken to cover the testator's obligation under the deed of 1937. It would, of course, have been open to counsel for the residuary legatees to show that other passages in the will indicated a contrary intention and that the testator meant, nevertheless, that the benefit under the will should be taken conditionally on its being treated as a satisfaction of the debt, but it seems to me that further examination of the will leads entirely in the opposite direction. I refer particularly to the fact that what is here given is not an annuity of an amount equal to the contractual annuity. It is not even a direction to the executors to provide a sum equivalent to such an annuity. It is a bequest of a sum of money out of which the annuity is to be purchased, and the balance of it is then given to other persons. That seems to me an indication against satisfaction, for the testator is not merely providing out of one and the same source, namely, the residue of his estate, a testamentary annuity in addition to the contractual annuity. He is, in effect, providing something like a settled legacy, setting aside for all purposes (and whether, indeed, there be satisfaction or whether there be not) a sum of £5,000 in which the residuary legatees will have no interest whatever. No case has been cited in which the doctrine of satisfaction has applied where the legacy is an interest in a sum set aside altogether and for all purposes from residue. I regard that as an element supporting the view that there is here no intention that the legacy should operate in satisfaction of the obligation. I add, finally, that the use of the words "give and bequeath," to which I have already alluded, which are adopted throughout the will in relation to each benefaction, seems to me to support the view that what the testator intended was in any case to give his wife a benefit under his will apart from and quite regardless of any contractual obligation he might be under by virtue of the covenant.

For these reasons it seems to me that the residuary legatees fail to make out a case for the application of the rule, and I can see no ground on the authorities which have been cited to me for giving a new stimulus to the rule which, as I have indicated, has many times been disapproved. Wynn-Parry, J., placed particular reliance on a matter to which I have not found it necessary to allude, namely, that there were differences in the times of payment and in the dates on which the annuitant could enforce her respective rights. On that point the learned judge followed the decision of Hall, V.-C., in *Re Dowse* (6). That point may provide another ground for supporting the view which I take, but for my part I prefer to rest my judgment on the grounds which I have stated, and to say nothing one way or the other on the question of times of payment and the soundness of the decision in *Re Dowse* (6). In my judgment, the conclusion of the learned judge was right, and this appeal must fail.

SOMERVELL, L.J.: I agree.

JENKINS, L.J.: I also agree. *Appeal dismissed with costs.*

Solicitors: *Drysdale, Lamb & Jackson* (for the residuary legatees); *Field, Roscoe & Co.* (for the grandchildren); *E. W. Parkes*, agent for *Farrington & Winterton*, Brighton (for Mrs. Manners); *W. J. Woodhouse & Co.* (for the Public Trustee).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Statement, at p. 210, *corrected*. R. *v.* Deputy Recorder of Wolverhampton. [1951] 1 All E.R. 627.

R. *v.* H. SHERMAN, LTD.

[Court of Criminal Appeal (Lord Goddard, C.J., Streatfeild and Devlin, JJ.), June 20, 1949.]

Criminal Law—Company—Trial—No written order giving leave to prefer bill of indictment—Validity of indictment—Duty of clerk of assize before signing bill of indictment—Criminal Justice Act, 1925 (c. 86), s. 33 (1)—*Administration of Justice (Miscellaneous Provisions) Act,* 1933 (c. 36), s. 2 (2).

A company was charged before a magistrate with offences under the Betting Act, 1853. At the end of the hearing the magistrate purported to commit the company for trial. No written order was made at the time empowering the prosecutor to present a bill of indictment at the assizes against the company, as required by the Criminal Justice Act, 1925, s. 33 (1), and, in fact, the order was not drawn up until the morning of the arraignment after the bill of indictment had been signed by the clerk of assize. When the company was called on to plead, its counsel contended that the indictment was bad because s. 33 (1) had not been complied with, but the judge overruled the objection and held that a written order was not necessary and that the magistrate's statement that he committed the company for trial was a sufficient compliance with the Act.

Held : (i) where a statute made an order of a particular character a necessary condition precedent to the doing of some act, that order must be drawn up in writing, and an order under s. 33 (1) must be in writing under the hand of the magistrate and authenticated with the seal of the court, though it was not necessary that it should be drawn up on the same day as the committal and it would be valid even if it were drawn up some considerable time afterwards.

(ii) an order under s. 33 (1) must be made before the bill of indictment was signed by the clerk of assize ; that was not done in the present case ; and, therefore, the indictment was bad.

Per curiam : where it is proposed to indict a company the clerk of assize must be satisfied, before signing the bill of indictment, that the order giving leave to prefer it has been made.

[As to the Criminal Liability of Companies, see HALSBURY, Hailsham Edn., Vol. 8, pp. 111-113, paras. 178, 179.

As to the Preferring of Indictments, see (*ibid.*), Vol. 9, pp. 125-130, paras. 162-168 ; and for Cases, see DIGEST, Vol. 13, pp. 408-411, Nos. *1286-1308*, and Vol. 14, pp. 199-201, Nos. *1788-1801*.]

Case referred to :

(1) *R.* v. *Daily Mirror Newspapers, R.* v. *Glover*, [1922] 2 K.B. 530 ; 91 L.J.K.B. 712 ; 127 L.T. 218 ; 86 J.P. 151 ; 14 Digest 95, *650*.

Appeal against conviction.

The appellant company was tried and convicted before Sellers, J., at the Glamorgan Assizes of offences against the Betting Act, 1853, and now complained that the indictment was bad. The appeal was allowed and the conviction quashed. The facts appear in the judgment of the court delivered by Lord Goddard, C.J.

Beyfus, K.C., and *Roderic Bowen* for the appellants.

Arthian Davies, K.C., and *Meurig Evans* for the Crown.

LORD GODDARD, C.J. : The appellant company was indicted at Glamorgan Assizes in respect of certain offences against the Betting Act, 1853. The company being called upon to plead, counsel for the company took the point that the indictment against the company was bad because certain statutory provisions had not been complied with. It was said that there was no order in force by the examining magistrate giving leave to the prosecutor to prefer the bill of indictment, and that, as there was no order, no bill of indictment could be preferred. Sellers, J., overruled that contention, held that a written order was not necessary, and further held that, as the magistrate had said when the case was before him that he committed the defendants for trial, there was sufficient compliance with the provisions of the Criminal Justice Act, 1925.

The company, with two directors of the company, had been charged before the magistrate with the offence. The magistrate did not deal with the offence himself, but at the end of the hearing, on Jan. 25, 1949, he committed all the defendants for trial. On the afternoon before the trial at the assizes the solicitor for the defence asked the magistrate's clerk whether any order had been made by the magistrate under the Criminal Justice Act, 1925, s. 33 (1), empowering the prosecutor to prefer a bill at the assizes, and he was told that no order had been made. By the next morning, however, before the arraignment, an order had been made by the magistrate in writing which would comply with the provisions of the statute and dated *nunc pro tunc*, that is to say, dated back to Jan. 25, 1949. I do not think there is any reflection on him for having done that, nor do I think the fact that he did not draw up the order on the day he heard the case would make any difference. If the order had to be made he could make it at a date subsequent to the date on which he actually announced his decision provided it was otherwise made in time.

We have no information when the indictment was actually signed by the clerk of assize. Before dealing with that point I will state what I understand the law to be. At common law it was possible for anybody to prefer a bill of indictment to a grand jury against either an individual or a corporation, and if the grand jury returned a true bill that converted the bill into an indictment to which the defendant had to plead. That was the common law, subject to the Vexatious Indictments Act, 1859, which restricted the right of a person to prefer a bill to a grand jury in respect of certain offences. It remained the law until the passing of the Administration of Justice (Miscellaneous Provisions) Act, 1933, which abolished grand juries. During the war of 1914/18, for the purpose of saving manpower the Grand Juries (Suspension) Act, 1917, was passed and while that Act remained in force the position was in substance the same as it became after the passing of the Act of 1933. After 1933 (and also during the time when the Grand Juries (Suspension) Act, 1917, was in force) it was no longer open to any subject of the King to prefer a bill of indictment of his own motion to a grand jury. An indictment could only be preferred if one or other of certain preliminary steps had been taken. There must either have been a committal for trial by examining justices sitting under the Indictable Offences Act, 1848, or leave must have been granted by a judge of the High Court, or there must have been a committal for trial under the Perjury Act, 1911, by the court before whom the perjury was committed. The voluntary bill, as it used to be called, no longer existed. It is still open to a person who desires to prefer a voluntary bill—as, for instance, in a case where magistrates have refused to commit for trial—to apply to a judge for leave to prefer a bill, but it will no longer be a voluntary bill because it will be preferred by permission of a judge. The old position under which any person on the first day of assizes could take a bill of indictment and hand it to the clerk of assize and require that it should be put before the grand jury has gone.

While the Grand Juries (Suspension) Act, 1917, was in force, a company called Daily Mirror Newspapers, Ltd., was indicted at Hertford Quarter Sessions for an offence, and objection was taken that the indictment was bad because there could have been no committal for trial of the company.

"Committed for trial" is defined in the Interpretation Act, 1889, s. 27, as follows :

> "In every Act passed after the commencement of this Act, the expression 'committed for trial' used in relation to any person shall, unless the contrary intention appears, mean, as respects England and Wales, committed to prison with the view of being tried before a judge and jury, A whether the person is committed in pursuance of s. 22 or of s. 25 of the Indictable Offences Act, 1848, or is committed by a court, judge, coroner, or other authority having power to commit a person to any prison with a view to his trial, and shall include a person who is admitted to bail upon a recognizance to appear and take his trial before a judge and jury."

A company cannot be committed to prison and cannot be held to bail, and, B therefore, it was decided in *R.* v. *Daily Mirror Newspapers, Ltd.* (1), that so long as the Grand Juries (Suspension) Act, 1917, was in force, a bill could not be preferred to a court except in three circumstances—either a committal for trial, or an order of a judge, or an order made under the Perjury Act, 1911. As there had been no order by the judge it followed that, unless there had been a committal for trial, the indictment was bad because there was no power C to prefer it, and the court held that the indictment was bad. Possibly in consequence of that decision, the Criminal Justice Act, 1925, s. 33 (1), provided :

> "Where a corporation is charged, whether alone or jointly with some other person, with an indictable offence, the examining justices may, if they are of opinion that the evidence offered on the part of the prosecution is sufficient to put the accused corporation upon trial, make an order D empowering the prosecutor to present to the grand jury at assizes or quarter sessions, as the case may be, a bill in respect of the offence named in the order, and for the purpose of any enactments referring to committal for trial (including this Act) any such order shall be deemed to be a committal for trial . . ."

E It seems to me that that Act did not take away the old common law right of preferring a bill against a corporation. It was dealing with a case where a corporation had been charged before magistrates and the magistrates had determined to send the case for trial.

Then came the Administration of Justice (Miscellaneous Provisions) Act, 1933, which abolished grand juries. Section 1 provides :

> F "Subject to the provisions of this section grand juries are hereby abolished, but where a bill of indictment has been signed in accordance with the provisions of this Act, the indictment shall be proceeded with in the same manner as it would have been proceeded with before the commencement of this Act if it had been found by a grand jury . . ."

G By s. 2 (1) :

> "Subject to the provisions of this section, a bill of indictment charging any person with an indictable offence may be preferred by any person before a court in which the person charged may lawfully be indicted for that offence, and where a bill of indictment has been so preferred the proper officer of the court shall, if he is satisfied that the requirements of H the next following subsection have been complied with, sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly : Provided that if the judge or chairman of the court is satisfied that the said requirements have been complied with, he may, on the application of the prosecutor or of his own motion, direct the proper officer to sign the bill and the bill shall be signed accordingly."

The important sub-s. (2) is :

> "Subject as hereinafter provided no bill of indictment charging any

> person with an indictable offence shall be preferred unless either (*a*) the person charged has been committed for trial for the offence ; or (*b*) the bill is preferred by the direction or with the consent of a judge of the High Court or pursuant to an order made under s. 9 of the Perjury Act, 1911."

So there again the same position arises that the old common law right is taken away and a bill can be preferred only if there has been a committal for trial A
or an order of a judge.

In the present case, the first point that was argued by counsel for the Crown in support of the indictment was that the magistrate in committing for trial had in effect given leave to the prosecutor to prefer a bill under the provisions of the Criminal Justice Act, 1925, s. 33 (1). He supported that by saying that the statute did not require the order to be in writing, and SELLERS, J., so B
held. With all respect to the learned judge, this court is unable to take that view. Where a statute makes an order of a particular character a necessary condition precedent to the doing of some other act, we think that we must construe that statute as meaning that the order must be in writing drawn up under the hand of the presiding magistrate and with the seal of the court. The order must be authenticated, and if any question arises whether or not C
an order has been made, the right way of proving that order is by producing it. That can be done only if it is in writing. This court does not feel any doubt that they ought to construe s. 33 (1) as meaning that the court must make the order in the way that an order of the court is usually—in fact, I think, invariably—made, that is to say, it must be drawn up and be in writing and authenticated. There was no order drawn up and authenticated at the time. D
What the magistrate did was to commit for trial, and, on the analogy of the *Daily Mirror Newspapers* case (1), he had no power to do that, because a corporation cannot be committed for trial. He ought to have made an order, and I say at once that if, having made up his mind that there was a case to go for trial, he had drawn up the order afterwards, no good objection could have been made based on the mere fact that he did not draw up the order on the E
actual day. If a court gives its decision verbally, as it almost invariably does, the order is drawn up afterwards. It may be drawn up the same day ; it may be drawn up one day, or two or three days, or even a considerable time, after. In the High Court orders (for instance, in the Chancery Division, which have to be passed by the registrar and so forth) are not drawn up until a considerable time after the learned judge has given his judgment. In the King's Bench F
Division orders are very often not drawn up till some days after the trial.

As we now know, this order giving leave to prefer a bill was not drawn up until the morning of the arraignment, and I think we must assume that the bill of indictment by that time had been signed, because I am certain that, if the bill of indictment had not been signed and the clerk of assize had been waiting for this order to come through, he would have told the learned judge G
that the order had come through that morning and he had signed the bill after he had got it. In any case we think we cannot refuse to apply the maxim *omnia praesumuntur rite esse acta* and to presume that the clerk of assize had done his duty and had signed the bill before he came into court and before this document was received, taking, perhaps, the same view that SELLERS, J., did, that, as the magistrate had indicated that it was a case to go for trial, H
that was a sufficient compliance with the Act of 1925.

It follows from what I have said that the signing of the bill was the critical moment by reason of the provisions of the Act to which I have just referred. The bill becomes an indictment as soon as it is signed. I do not think it is necessary to deal with the rules, because those deal with the supplying of copies of the bill to the proper officers of the court and provide that "except with the leave of the judge or chairman no bill of indictment shall be preferred at any assizes after the first working day of those assizes or sessions." That is only the preferring, not the signing, and that rule has been held to apply only to cases where there has not been a proceeding before the justices.

We put our decision on this ground. We must hold that in the particular circumstances it is right to assume that this order was not made by the magistrate before the bill was signed. That being so, when the bill was signed, and, therefore, the indictment became effective, there had not been a compliance with the Criminal Justice Act, 1925, s. 33 (1). There had been a committal for trial, but it was nugatory, and the position was the same as if the magistrate had refused to commit for trial.

For the reasons which I have expressed the court is of opinion that effect must be given to the preliminary point taken by counsel for the company, and we hold that this bill of indictment is bad against the company. It follows from what I have said—and I wish to emphasise it—that it is the duty of a clerk of assize in any case in which it is proposed to indict a company to be satisfied before he signs the bill that the necessary order has been made.

Conviction quashed.

Solicitors: *Stuart Hallinan, Hill & Mackintosh Thomas*, Cardiff (for the appellant company); *S. Tapper Jones*, town clerk, Cardiff (for the Crown).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

JOSEPH SMITH (CLECKHEATON), LTD. AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS. INLAND REVENUE COMMISSIONERS *v.* JOSEPH SMITH (CLECKHEATON), LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Croom-Johnson, J.), May 17, 1949.]

Excess Profits Tax—Avoidance—Transactions designed to avoid liability—Transfer or acquisition of shares—Change in persons carrying on trade or business—Principal shareholder in company allotted majority of shares in new company—Finance Act, 1941 (c. 30), *s.* 35 (1) (*as amended by Finance Act,* 1944 (c. 23), *s.* 33 (2))—*Finance Act,* 1944 (c. 23), *s.* 33 (3).

The Finance Act, 1941, s. 35 (1), (as amended by the Finance Act, 1944, s. 33 (2)), provides: "Where the commissioners are of opinion that the main purpose or one of the main purposes for which any transaction or transactions was or were effected . . . was the avoidance or reduction of liability to excess profits tax, they may, if they think fit, direct that such adjustments shall be made as respects liability to excess profits tax as they consider appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions."

The Finance Act, 1944, s. 33 (3), provides: "If it appears in the case of any transaction or transactions being a transaction which involves, or transactions one or more of which involve: (*a*) the transfer or acquisition of shares in a company; or (*b*) a change or changes in the person or persons carrying on a trade or business or part of a trade or business, that, having regard to the provisions of the law relating to excess profits tax, other than the said s. 35 and this section, which were in force at the time when the transaction or transactions was or were effected, the main benefit which might have been expected to accrue from the transaction or transactions during the currency of excess profits tax was avoidance or reduction of liability to the tax, the avoidance or reduction of liability to excess profits tax shall be deemed for the purposes of the said s. 35

to have been the main purpose or one of the main purposes of the transaction or transactions."

In 1930 C., Ltd. was incorporated, and it carried on business as spinners of fine yarn and worsted at Cleckheaton. In 1937 C., Ltd., in which S. owned 9,900 out of the 10,000 shares issued, acquired the lease of some mills at Bradford and there carried on a separate business of spinning yarn of coarser quality. In February, 1941, the Bradford mill was closed, C., Ltd. intending to transfer the Bradford business to other premises (not then obtained) at Cleckheaton, where it was proposed to continue the spinning of coarser yarn by means of a new company to be incorporated. Before new premises were obtained, however, C., Ltd. received an offer to purchase about half the machinery in the Bradford mill, and sold it. The remaining machinery was stored in Cleckheaton. In those circumstances, on June 28, 1941, the new company, R., was incorporated, but it was decided that it should for the time being carry on the business of warehousemen. S. was allotted 51 of the 52 shares issued in the R. Co., which leased premises in Cleckheaton from an independent company, and, as from April, 1941, carried on business as warehousemen there. The R. Co. stored the surplus machinery from the Bradford mill on its premises and also stored some wool for C., Ltd., for which services C., Ltd. paid storage charges to the R. Co., and wool for the Wool Control, the charges for which comprised the major part of the R. Co.'s income. There was no evidence that the R. Co. was incorporated by or on behalf of C., Ltd., or that C., Ltd. provided any capital for the R. Co. There was no suggestion that C., Ltd. was transferring trade or business to the R. Co. In a direction under s. 35 (1) the Commissioners of Inland Revenue specified two transactions for the purposes of s. 33 (3) : (i) the formation of the R. Co. and (ii) the allotment to S. of 51 shares in the R. Co. out of the total issued capital of 52 shares. The direction directed (*a*) that C., Ltd. should be treated as carrying on the business of the R. Co. in addition to its own business, and (*b*) that the consequent liability to tax should be a joint and several liability of C., Ltd. and the R. Co. The Special Commissioners found that avoidance or diminution of the liability of C., Ltd., to excess profits tax was the main benefit to be expected from the transactions during the currency of excess profits tax, and upheld the direction (*a*) above. With regard to (*b*) they held that there was no power to direct joint and several liability. On appeal by the taxpayers,

HELD : as regards s. 33 (3) (*a*) the allotment of shares in the R. Co. to S. could not be a transfer or an acquisition of shares by C., Ltd., which had no part in the transaction, for there was no suggestion that the incorporation of the R. Co. or the allotment of shares to S. were illusory or colourable, or that S. held the shares on behalf of C., Ltd., and s. 33 (3) (*b*) had no application because there was no evidence that C., Ltd. carried on business as warehousemen and there had been a change in the trade or business carried on by them. It was irrelevant that S. was the main corporator in both companies, and the appeal should be allowed.

[FOR THE FINANCE ACT, 1941, s. 35, see HALSBURY'S STATUTES, Vol. 34, p. 131 ; and FOR THE FINANCE ACT, 1944, s. 33, see *ibid.*, Vol. 37, pp. 329, 330.]

Cases referred to :

(1) *Marshall Castings, Ltd. and Cindal Aluminium, Ltd.* v. *Inland Revenue Comrs.*, [1946] 2 All E.R. 16 ; 2nd Digest Supp.

(2) *British Pacific Trust, Ltd.* v. *Inland Revenue Comrs.*, (1947), Excess Profits Tax Leaflet, No. 55.

CASE STATED by the Special Commissioners of Income Tax on the question whether a direction given by the Inland Revenue Commissioners under the

Finance Act, 1941, s. 35 (1), and the Finance Act, 1944, s. 33 (3), could be supported.

The Special Commissioners took the view that a company in which the main shareholder was one J. Smith must be regarded as carrying on the business of a new company in which J. Smith was also the main shareholder, and that the main benefit to be expected from the setting up of the new company and the allotment of shares therein to J. Smith was the avoidance or diminution of the liability to excess profits tax of the first-mentioned company. CROOM-JOHNSON, J., allowed the taxpayers' appeal and it became unnecessary to argue the cross appeal. The facts, which appear in the judgment, are summarised in the headnote.

Graham-Dixon for the company, C., Ltd.
Cyril King, K.C., and *R. P. Hills* for the Crown.

CROOM-JOHNSON, J.: The point involved is whether a certain direction given by the Commissioners of Inland Revenue under the Finance Act, 1941, s. 35, as amended by the Finance Act, 1944, s. 33, can be supported. It must be pointed out, as was pointed out by WROTTESLEY, J. ([1946] 2 All E.R. 21), in *Marshall Castings, Ltd.* v. *Inland Revenue Comrs.* (1) that these powers of the Commissioners of Inland Revenue are far reaching. They are a delegation " of a discretion ordinarily reserved by Parliament to itself; for they enable the commissioners by adjustment to charge with tax persons who otherwise would not be chargeable," or would be chargeable in a less amount. Therefore, as it seems to me, the court should scrutinise the exercise of those powers with some particularity. The Finance Act, 1941, s. 35 (1), as amended, provides:

> " Where the commissioners are of opinion that the main purpose or one of the main purposes for which any transaction or transactions was or were effected . . . was the avoidance or reduction of liability to excess profits tax, they may, if they think fit, direct that such adjustments shall be made as respects liability to excess profits tax as they consider appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions."

I need not trouble with the conditions laid down in that sub-section because the Special Commissioners, having heard evidence, came to the conclusion (which I think is a conclusion of fact) that the main purpose or one of the main purposes of the transaction or transactions in this case was not the avoidance or reduction of liability to excess profits tax. There was, indeed, evidence on which they could so hold, and that point, accordingly, has not been argued before me. By s. 33 (3) of the Act of 1944, however, another consequence of a transaction or transactions is envisaged. That sub-section provides:

> " If it appears in the case of any transaction or transactions being a transaction which involves, or transactions one or more of which involve: (*a*) the transfer or acquisition of shares in a company; or (*b*) a change or changes in the person or persons carrying on a trade or business or part of a trade or business, that, having regard to the provisions of the law relating to excess profits tax, other than the said s. 35 and this section, which were in force at the time when the transaction or transactions was or were effected, the main benefit which might have been expected to accrue from the transaction or transactions during the currency of excess profits tax was avoidance or reduction of liability to the tax, the avoidance or reduction of liability to excess profits tax shall be deemed for the purposes of the said s. 35 to have been the main purpose or one of the main purposes of the transaction or transactions."

I have to be satisfied, not that one of the main benefits which might have been expected to accrue was involved, but that the main benefit which might have been expected to accrue was the avoidance or reduction of tax. When that stage is reached the sub-section says that for the purposes of s. 35 such avoidance or reduction to be deemed to have been the main purpose or one of the main purposes of the transaction or transactions. To which I will add from *Marshall Castings, Ltd.* v. *Inland Revenue Comrs.* (1), some further observations from the judgment of Wrottesley, J. ([1946] 2 All E.R. 22) :

> " The tax avoidance which the Commissioners of Inland Revenue have to counteract by adjustment is clearly tax avoidance by the company. For in the case of a company, the tax if not avoided would be assessed on and raised from the company. On this side of the scales, therefore, is to be placed the benefit which might be expected by a reasonable man to accrue to the company in the form of tax avoidance flowing from the transaction. Then in order to see whether this benefit was the main benefit to the company, it seems to me that the commissioners must next look at the other benefits which might be expected, by a reasonable man, to accrue to the company during the currency of the tax from the transaction . . ."

and then the learned judge goes on to give some instances. I am in some doubt about what is the jurisdiction of this court on a Case Stated like the present. The test of the reasonable man suggests to me that this is a question of fact. We all know that the hypothetical " reasonable man " exists chiefly in the minds of lawyers attempting to find answers to *conundra* in the courts. If so, it must be based on evidence. One must not, however, lose sight of the fact that the whole thing is based on s. 35—" the opinion of the commissioners." I prefer to regard this altogether as a legal problem based on facts which are found. I hope that by so doing I shall not be attempting to substitute my own opinion on fact for the opinion which has been formed by the commissioners.

With those introductory observations it is, perhaps, as well that I should remember the observations of Lord Greene, M.R., in *British Pacific Trust, Ltd.* v. *Inland Revenue Comrs.* (2) where, in dealing, not with the second branch, but with the first branch, of this legislation, the Master of the Rolls considers what the word " transaction " means, and says (E.P.T. Leaflet, No. 55, p. 3) :

> " The word ' transaction,' it appears to me, means what it says. A sale is a transaction. A purchase is a transaction, and it is in a sense the same transaction, but it depends on the side from which you are looking at it."

It seems to me that I have to look at this matter from the point of view of the company, and, if anybody else is a party to the transaction, what they thought, or did, or intended, is not in point. I look, first of all, to see whether s. 33 (3) has been satisfied here. The direction was made on Feb. 21, 1945. What it purports to describe as the transactions involved are :—(i) The formation of Rawfolds Spinning Co., Ltd., on June 28, 1941. It seems to me that in cases of this sort the subject is entitled to know completely what the transactions are which are going to be relied on following on the direction by the tax officials when they come to make the necessary calculations to lead to an assessment of excess profits tax. The formation of a limited liability company is not one of the things set out in s. 33 (3). I think, however, that I must take that transaction with the one that follows, which is (ii) " The allotment of 51 shares in Rawfolds Spinning Co., Ltd., out of the total issued capital of 52 shares to Mr. J. Smith who holds 9,900 out of 10,000 shares in Joseph Smith (Cleckheaton), Ltd.", the subject on whom this present direction is now attempted to be supported. I may say that the direction was addressed to the directors of each company, naming it. It is now admitted by the Crown, having regard to authority, that the direction to the Rawfolds Spinning Co., Ltd., cannot be supported, and, indeed, the commissioners have declined to follow it.

I look to see whether these two transactions as set out in the direction bring the case within s. 33 (3). The words "the transfer or acquisition of shares
A in a company" must refer to transfer or acquisition by the company involved in the direction which is now only Joseph Smith (Cleckheaton), Ltd. The second case in the sub-section is: "a change or changes in the person or persons carrying on a trade or business or part of a trade or business." I cannot see that the allotting of shares in Rawfolds to Mr. J. Smith can be either a transfer or an acquisition of shares by Joseph Smith (Cleckheaton), Ltd.,
B unless there were a finding that the beneficial interest in those shares belonged to that company—in other words, that Mr. Joseph Smith held them on behalf of the company. The circumstance that he is an overwhelming corporator in Joseph Smith (Cleckheaton), Ltd., will not do by itself. Who allotted the shares? I can only assume that the shares were allotted by the directors of the Rawfolds Spinning Co., Ltd. The whole thing may be only a device by
C the directors of Joseph Smith (Cleckheaton), Ltd., and, if the Case had so found, there might not have been any difficulty, but in a carefully framed Case there is not a suggestion that any one of these transactions was illusory or colourable or otherwise than what it purported to be. Indeed, the commissioners, in stating the Case, have affirmatively said that there was no intention of any excess profits tax evasion, and they have set out other reasons which
D they have accepted as being the truth. There is no evidence that the Cleckheaton company carried on business even in part as warehousemen and, therefore, there could be no change in the person or persons carrying on their trade or business. It looks to me, therefore, as if this case is not within sub-s. (3) at all. Nothing more is said in the direction than the two things which I have indicated. There is not a word about any transaction between the two
E companies. So far as the direction is concerned, there is no statement that the Rawfolds Spinning Co., Ltd., ever started business or did anything, and it is only by looking at the Case Stated to see what the Crown attempted to prove in trying to get this case on its legs under sub-s. (3) that the Special Commissioners have given me enlightenment by stating a number of other facts which were proved before them.

F There is a history attaching to all this matter, and some of the facts are, I think, of considerable importance. The Cleckheaton company was registered as long ago as 1930. It carried on business at Cleckheaton as spinners of fine yarn and worsted. The memorandum of association does not expressly mention that they are authorised to carry on business as warehousemen. I express no concluded opinion about it, but I have doubts whether cl. C of the memorandum
G is wide enough in its terms to authorise them to do so. In fact, they did not. The Cleckheaton company carried on business at premises which they held on lease, and the Case finds that the whole of the premises were in use—I take that to mean in the spinning business—and no expansion of business was possible. In 1937 the Cleckheaton company acquired the lease of some mills at Bradford and there they carried on a separate business of spinning yarn of a coarser
H quality than that worked at Cleckheaton. For business reasons, which are not relevant to this particular inquiry, the branch at Bradford was closed in February, 1941, and a decision was reached to concentrate all the business at Cleckheaton. The mill at Bradford was, apparently, properly equipped with machinery. Before new premises for the Bradford business had been obtained at Cleckheaton, the Cleckheaton company received an offer for about half of the machinery in the Bradford mill, and sold it. Having necessity to store somewhere the remainder of the machinery, they did it by taking on short

term certain premises at Cleckheaton which are not, so far as I have been able to discover, of any relevance in the present matter. They meant to form a new company to operate the rest of their machinery from Bradford at fresh premises, and it was decided—the Case does not state by whom, but as Mr. Joseph Smith was the moving spirit and almost the only shareholder in the Cleckheaton company I assume that the decision was his—that the Rawfolds Co. should ultimately carry on the business of spinning, but that in the meantime—and, after all, this was during the war when the equipping of new factories would not be easy—it should carry on the business of warehousemen. In those circumstances Rawfolds was incorporated on June 28, 1941. There is no evidence that Rawfolds was incorporated by the Cleckheaton company or on behalf of that company. There is no evidence that the capital required to enable Rawfolds to commence business within the meaning of the Companies Act, 1929, was provided by the Cleckheaton company. The only thing that I do know is—and to my astonishment it has been very much emphasised at the Bar—that the language used in the " objects " clause of the memorandum was in exactly similar terms in the case of each company. I express my astonishment for two reasons. Those who are acquainted with the way in which these documents are prepared would not attach much importance to the circumstance that the same book of precedents was used for both companies or that one was copied from the other. What is more astonishing to me is that, there being the intention to carry on a warehousing business through Rawfolds, no express power is taken in Rawfolds' memorandum of association to do so.

The next thing that happened was that Rawfolds obtained a lease of certain old dye works known as Rawfolds Dye Works at Cleckheaton, not from the Cleckheaton company, but from a wholly independent limited liability company, John Rigby & Son, Ltd. Having obtained those premises in that way at a yearly rent of £200 a year as from Apr. 1, 1941, Rawfolds proceeded to carry on business in those premises as warehousemen. Paragraph 6 of the Case describes how they got their business :

> " In these premises a part of the unsold portion of the Cleckheaton company's machinery was stored until it was finally disposed of by August, 1942 [two and a half years before the direction] and some wool was also warehoused for the Cleckheaton company, for both of which services that company paid storage to Rawfolds, and, in addition, wool was stored for the Wool Control, a ' ration ' of such storage having been sought and obtained . . . The rent or storage charges received from the Wool Control formed, however, the main part of Rawfolds' income."

In addition, at some unspecified time, to some unspecified extent, and with what result I do not know, the Cleckheaton company bought some uncontrolled material, sold it to Rawfolds, and Rawfolds re-sold it unprocessed.

There was no transaction which I have been able to find in the Case—certainly no transaction is indicated in the direction—which suggests that the Cleckheaton company had transferred any branch of their business or any part of their trade or business. There is no suggestion that the Cleckheaton company (which is occupying the whole of their spinning mill, and is, apparently, unable to find any more room for business in it) were transferring to Rawfolds either a trade or a business or a part of a trade or a business which theretofore they had carried on. There is nothing to indicate that the acquisition of shares in Rawfolds was other than an acquisition by Mr. Smith in his own right. Further, it is plain that for the direction of the commissioners to be right the benefit which is to be expected from these transactions is a benefit, not to Mr. Smith, but to the Cleckheaton company.

The commissioners were under the impression that the result of this was that the business of Rawfolds should be regarded as being carried on by the

Cleckheaton company in addition to the latter's own business. That seems to me a hopeless view. It was said that the liability so computed should be a joint and several liability of the two companies, but that has been negatived and has disappeared from the case. Paragraph 8 of the Case states evidence of Mr. Smith which was accepted, and, therefore, constitutes facts which were found by the Special Commissioners. He said that Rawfolds

> " . . . was intended eventually to carry on the spinning business previously carried on by the Cleckheaton company [at Bradford] and that as the two types of business were different it was desirable to have separate companies. There were many spinning firms in Bradford using similar bobbins, and to keep the bobbins separate it was necessary to have a different name thereon, and the easiest way of doing this was to have a separate company. He also had personal reasons for forming a new company as he had two nephews who would, he hoped, eventually succeed to his business; and he desired for family reasons that the portions to which they should succeed should be separate."

It is said that the answer to this lies in the contention that Mr. Smith was not an old man and could be expected to continue in control of the two businesses for a considerable time, but how that prevents the object of the formation of the company being the one indicated by his accepted evidence, I do not follow.

The commissioners found that it had not been established to their satisfaction "that reduction or avoidance of excess profits tax was in fact one of the main purposes with which Rawfolds was formed." They added:

> "We found, however, that avoidance or diminution of liability to excess profits tax was the main benefit to be expected from the transaction during the currency of excess profits tax."

That follows the language of s. 33 (3), but there is no examination of the conditions which bring that sub-section into play. The finding goes on:

> "There was an obvious benefit in the way of possible reduction of excess profits tax because, if the profits made at the new premises were so made by the Cleckeaton company, they might be absorbed in excess profits tax, whereas the new Rawfolds Co. would obtain an additional standard."

That may be the result, but it is largely fancy. If I am to apply the test of the reasonable man, I do not understand how any reasonable man could come to the conclusion that the obvious benefit of some other business being carried on by a separate limited company, although in the same town, is a benefit in the way of a possible reduction of excess profits tax.

The fact of the matter is that there has been a confusion of thought between the two companies and the gentleman who happens to be the main corporator in each of them, and who, I presume, has provided the capital represented by the number of shares that he holds. I find it impossible to say that the result which has been arrived at is justified on the evidence. There was no transaction that I can discover to which Joseph Smith (Cleckheaton), Ltd., was a party. If the word "transaction", contrary to the views expressed by LORD GREENE, M.R., in *British Pacific Trust, Ltd.* v. *Inland Revenue Comrs.* (2), means merely some trade dealing (which is a possible view of it), there was no trade dealing, unilateral or bilateral, by the Cleckheaton company. The right order to make is that the appeal be allowed, with the result that the direction must be set aside. The Crown must pay the costs.

Appeal allowed with costs. The Crown also to pay the costs of the cross appeal.

Solicitors: *Speechly, Mumford & Craig*, agents for *Mumford, Thompson & Bird*, Bradford (for the company); *Solicitor of Inland Revenue.*

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

LAND *v.* LAND.

[Probate, Divorce and Admiralty Division (Lord Merriman, P., and Barnard, J.), June 14, 15, 16, 1949.]

Desertion—Summary jurisdiction—Complaint—Withdrawal of previous summons based on same facts—Right to make subsequent complaint within statutory time limit—Estoppel—Res judicata.

In April, 1946, a wife left her husband on the ground, as she alleged, of his conduct towards her. On June 3, 1948, a summons by the wife under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, for maintenance on the ground of the husband's desertion came before a court of summary jurisdiction, but was withdrawn by the wife after she had given her evidence. On Mar. 29, 1949, a second summons by the wife charging the husband with desertion was heard by justices, who found the charge proved and made an order against the husband. The evidence given at the hearing of the two summonses was substantially the same. On an appeal by the husband to the Divisional Court from the order of the justices, he contended that the withdrawal of the first summons precluded the wife from bringing a second summons on the same grounds.

Held : the matter of the complaint not having been adjudicated on in June, 1948, the wife was not estopped in March, 1949, from proceeding with a second complaint based on the same matter, provided it was made within the limit of six months prescribed by the Summary Jurisdiction Act, 1848, s. 11 ; the matter of complaint being a continuous desertion, her second complaint was made within the statutory time limit ; and, therefore, the justices had jurisdiction to hear her second summons.

Pickavance v. *Pickavance* ([1901] P. 60), *explained and distinguished.*

Hopkins v. *Hopkins* ([1914] P. 282), *not followed.*

Per Lord Merriman, P. : To hold that for some reason peculiar to matrimonial cases a withdrawal, not leading to an adverse adjudication, but a mere withdrawal, whether on a preliminary point or during the hearing of the case, operates in any sense as an estoppel *per rem judicatam* would be to place the matrimonial jurisdiction in a state of unwarranted isolation in the general system of law. In my opinion, there is no warranty for that, and I do not think that we ought to feel ourselves bound by the decision in *Hopkins* v. *Hopkins* ([1914] P. 282), based, as I think it is, on a misapprehension of what was really said by the court in *Pickavance* v. *Pickavance* ([1901] P. 60), to come to any such conclusion.

(As to Withdrawal of Summons, see HALSBURY, Hailsham Edn., Vol. 10, p. 845, para. 1348, Vol. 21, p. 606, para. 1052, and 1948 Supplement ; and for Cases, see DIGEST, Vol. 33, pp. 331, 332, Nos. *438-442*.]

Cases referred to :

(1) *Pickavance* v. *Pickavance*, [1901] P. 60 ; 70 L.J.P. 14 ; 84 L.T. 62 ; 33 Digest 331, *438*.

(2) *R.* (*McDonnell*) v. *Tyrone JJ.*, [1912] 2 I.R. 44 ; 33 Digest 331, *440i*.

(3) *Hopkins* v. *Hopkins*, [1914] P. 282 ; 84 L.J.P. 26 ; 112 L.T. 174 ; 27 Digest 561, *6171*.

(4) *Davis* v. *Morton*, [1913] 2 K.B. 479 ; 82 L.J.K.B. 665 ; 108 L.T. 677 ; 77 J.P. 223 ; 33 Digest 331, *441*.

(5) *Molesworth* v. *Molesworth*, [1947] 2 All E.R. 842 ; 2nd Digest Supp.

(6) *Owens* v. *Minoprio*, [1942] 1 All E.R. 30 ; [1942] 1 K.B. 193 ; 111 L.J.K.B. 179 ; 166 L.T. 134 ; 106 J.P. 53 ; 2nd Digest Supp.

(7) *R.* v. *Seddon, Ex p. Hall*, (1916), 85 L.J.K.B. 806 ; 80 J.P. 208 ; 3 Digest 390, *286*.

(8) *Hall* v. *Hall and Richardson*, (1879), 48 L.J.P. 57 ; 40 L.T. 525 ; 27 Digest 325, *3038*.

(9) *Goldblum* v. *Goldblum*, [1938] 4 All E.R. 477 ; [1939] P. 107 ; 108 L.J.P. 19 ; 160 L.T. 56 ; Digest Supp.

APPEAL by the husband from a decision of the Manchester city justices, dated Mar. 29, 1949, whereby they found the husband guilty of desertion and awarded the wife 30*s*. a week maintenance.

The husband contended (*inter alia*) that the justices had no jurisdiction to deal with the wife's application because a previous summons charging him with desertion on the same facts had been heard by the same court on June 3, 1948, and had been withdrawn by the wife after she had given her evidence. The Divisional Court now held that the justices had jurisdiction to deal with the second summons as there had been no adjudication on the matter of complaint, but, having regard to the fact that on the hearing of the second summons the wife had not disclosed the earlier proceedings and, in particular, certain evidence given by her on that occasion, they allowed the husband's appeal, set aside the order, and remitted the wife's summons for re-hearing. The facts appear in the judgment of LORD MERRIMAN, P.

Henry Gore and *H. V. Brandon* for the husband.
Simon for the wife.

LORD MERRIMAN, P. : This is a husband's appeal against a decision of the Manchester city justices, who, on Mar. 29, 1949, made an order against him on the ground of desertion and awarded the wife 30*s*. a week maintenance. The case is by no means an easy one, either on the facts or on the law. I will deal first with the facts because it is submitted that on any view of the matter it will be necessary to have a re-hearing.

When the wife appeared before the justices on Mar. 29, she was represented by a solicitor and the husband did not appear. No satisfactory reason for his non-attendance has been given and it is assumed that he did not appear owing to his own neglect or default. The wife gave her evidence and in substance stated that, having been married in August, 1944, and a child of the marriage having been born in January, 1945, she had left her husband in April, 1946, on account of his association with other women. She spoke of having found compromising letters and of his staying out all night, and also of his having refused to speak to her for ten months before the parting. She added that she had been asked to leave the matrimonial home (which was at the house of the husband's mother) for a short period to enable the mother to have a holiday ; that at the conclusion of that period she asked the husband to join her, but he refused, whereupon she went back to live at his mother's house where he made it clear, particularly by refusing to speak to her, that he wished to have nothing more to do with her ; and that things drifted on thus for the next ten months or thereabouts until she decided to leave him for the reasons stated. That evidence being uncontradicted, it is not surprising that the justices were satisfied that the husband's association with other women, coupled with his behaviour towards the wife, fully justified her in leaving him, and that he by his conduct was guilty of desertion.

Unfortunately, that is not the whole story. If it were, it would not have been necessary to spend very much time on this case, but the fact is that the wife had brought an earlier charge of desertion before the same court, and that charge was heard on June 3, 1948. Some of the evidence, particularly as regards dates, was the same. According to the notes with which we have been provided, she did not, on that occasion, mention anything about the husband's association with other women, but she did mention that he had refused to speak to her for ten months before she left, that she had gone away, and that he had refused to join her when his mother had gone on holiday in the year before the parting.

She also mentioned something else, which is manifestly of considerable importance. The husband had been serving in the Royal Air Force until July or August, 1947, and she said that she, having continued to draw the Royal Air Force allowance, met the husband in Manchester in August, 1947, when he asked her to return to him, and she consented to do so if he would find a home of their own. She added that a few weeks later he wrote to say that he could not even find rooms, much less a house, but that they had met several times since and had been quite friendly. She was cross-examined, and repeated on oath her story that he had never spoken to her for ten months before the parting, though she agreed that they were quite happy until June, 1945, when this sulking is said to have begun. She agreed that it was she who had left the husband, and she added that she did not want any money for herself but only for the child. Thereupon the summons for desertion was withdrawn by her. Precisely why that happened it is probably impossible, after this lapse of time, to determine. It may be that she realised that the case was not going well for her and that she had better not proceed with it, or it may be that, having said that she did not want money for herself, as she was earning money by her own work, she may have been advised, or, at any rate, had it suggested to her by the clerk or the justices, that, if all she was claiming was custody of and maintenance for the child, she would be better advised to proceed under the Guardianship of Infants Act, 1925. I think it is very likely that something of that sort happened, because within a very short time after the withdrawal of the summons a guardianship summons was taken out, was dealt with by consent, and the wife obtained guardianship of the child and an order for an agreed sum of 12*s*. 6*d*. a week—2*s*. 6*d*. a week more than she could have obtained had she proceeded with her summons under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, as amended by the Married Women (Maintenance) Act, 1920, s. 1 (1). Speaking for myself, I do not think that it is possible to ascertain exactly what happened with regard to this matter without exhaustive inquiries, which would not be worth while. I prefer to leave it exactly as it stands, for I do not think that in the result, as I shall try to show, it makes any real difference. It is, at least, certain that there was no adjudication in the ordinary sense of the word. The notes of the evidence show that the summons was marked "Withdrawn," and within a week the order was made under the Guardianship of Infants Act, 1925.

It is a most unfortunate circumstance that none of that was mentioned at the hearing on Mar. 29, 1949, save only that the wife did refer to the birth of the child and the fact that she had an order under the Guardianship of Infants Act, 1925. I wish to make it plain that it is expressly disclaimed that any blame attaches to the solicitor who conducted her case. He knew nothing whatever about these previous proceedings, but, after all, it is the wife's case, and, however irrelevant or unimportant she may have thought what had been said at the earlier hearing, it is most unfortunate that it was not mentioned on the later occasion. She did not, apparently, even mention it to her solicitor. To put it at the lowest, though the reasons for her leaving her husband perhaps become somewhat stronger by adding together the stories recorded in the two notes (for there is no substantial inconsistency, and, as I have already indicated, some facts are mentioned in one note which are not in the other), there remains this attempted reconciliation which may or may not suggest that from that time desertion was brought to an end, either because the wife refused to return to her husband unreasonably or because it became a consensual separation. I am not expressing any opinion about the conclusion one way or the other, but the possibility of that inference is obvious and clearly a matter which should have been put to the court which in March, 1949, was asked to determine that there was then a continuing state of desertion.

The second and much more formidable point which has been taken and argued with great force is that on the authorities the withdrawal of the first summons on June 3, 1948, precluded the wife from saying thereafter that she had been deserted by her husband when she left him in April, 1946. That argument originates with *Pickavance* v. *Pickavance* (1). In a series of cases attention has been drawn to the distinction between what was actually decided in *Pickavance* v. *Pickavance* (1) and what was supposed to have been laid down *obiter* in that case, and, as the decision of the case before us turns one way or the other on what I will call the gloss which has been put on *Pickavance* v. *Pickavance* (1) in relation to this jurisdiction, I think it is necessary to examine a little closely what was the real point of that case. It may seem elementary, but I think that the proper method of approach here is to begin with the Summary Jurisdiction Act, 1848, s. 11, which lays down a time-limit in respect of the jurisdiction of justices to deal with any complaint. That includes a complaint by a married woman under the matrimonial code which begins with the Summary Jurisdiction (Married Women) Act, 1895. The Act of 1848 makes it clear that, as a matter of procedure, the process begins by what is called " the making of a complaint." The complaint is made in respect of something which is called " the matter of the complaint " [see s. 10], and by s. 11 :

> " . . . such complaint shall be made . . . within six calendar months from the time when the matter of such complaint . . . arose."

The section, therefore, draws the plainest distinction between what is called " the matter of the complaint " and " the making of the complaint " which is the physical process initiating the jurisdiction of the court on which the court may issue a summons, thereby bringing the defendant before the court. It is obvious that the matter of the complaint must necessarily precede in point of time the making of the complaint, and, in relation to the matrimonial jurisdiction with which we are concerned, it is very necessary (speaking generally), to draw the next important distinction, which is between matters of complaint which in their nature are continuing and matters of complaint which in their nature must have come to an end at some definite point of time. The simplest illustration (and one which is directly in point in connection with *Pickavance* v. *Pickavance* (1)) is the distinction between a case of persistent cruelty, on the one hand, and a case of desertion, on the other hand. Desertion—I am again speaking generally—is a continuing offence, and, once it is shown to have begun and not to have been interrupted, the question of a time-limit preventing the making of a complaint otherwise than within six calendar months from the time when the matter of the complaint arose does not come into the question, because it is always possible, so long as the desertion continues, to say that the matter of complaint arises within six months. It is, however, quite otherwise in practically every case of a course of persistent cruelty. Speaking generally, a course of persistent cruelty must have an ingredient which is the last of the series—which must be, in other words, the end of the " matter of the complaint " —and, when six months from that point of time has elapsed, it is too late to make a complaint before a court of summary jurisdiction and too late for the court, if such a complaint is made, to issue a summons and so to found its jurisdiction.

With these elementary considerations in mind, I come back to *Pickavance* v. *Pickavance* (1), which was a case of persistent cruelty. The headnote reads :

> " The withdrawal of a summons under the Summary Jurisdiction (Married Women) Act, 1895, has the effect of putting an end to the complaint in respect of which it is issued, and, after the withdrawal, no fresh summons can be issued upon the same cause of complaint."

I emphasise the word " complaint " and pause there to make another general observation. I have already pointed out that in the case of a continuing offence the time-limit, in the nature of things, cannot apply, but there is the intermediate case where, though the offence is one which must come to an end on a particular date, the complaint may be made well within the six months and the summons issued thereon be heard well within the six months and be withdrawn in time for another complaint to be made, also within the six months. At the moment I am concerned to show that, in my opinion, the court which decided *Pickavance* v. *Pickavance* (1) never even considered that possible case, and that the headnote, in so far as it says that after the withdrawal no further summons can be issued on the same "cause of complaint," goes too far. In that case (without going into detail) the first complaint in respect of the persistent cruelty was within time. The summons issued thereupon was withdrawn and a fresh complaint was made, on which the later summons was issued, outside the six months time-limit. It was not suggested in the argument that there was any question of estoppel *per rem judicatam* or, in particular, that the doctrine of *autrefois acquit* applied. On the contrary, the whole argument was that, as the parties had not been living together for fourteen months before the second complaint was dealt with, and that complaint had not been made within six months, the justices had no jurisdiction, and, in my opinion, but for one sentence in the judgment, that, and nothing else than that, was what was in the minds of the learned judges who decided that case. Both in his observations before adjourning for consideration, and in the opening sentence of his judgment ([1901] P. 63), Sir Francis Jeune, P., referred to the question whether the withdrawal of the summons amounted to a complete withdrawal of the complaint so that it could not be proceeded on, and not to the question whether it amounted to an estoppel *per rem judicatam* or a previous acquittal on the cause of complaint. In my opinion, he was dealing purely with the machinery point—that, on the withdrawal of the summons, the complaint made, on which the summons was issued, ceased to exist, and some fresh complaint was necessary, and, as the fresh complaint could only be made out of time, the justices had no jurisdiction. The only ground on which the more serious implication which has been directed to this decision is based is one sentence in his judgment (*ibid.*, 64). After calling attention to the important fact

> ". . . that the withdrawal of a summons can only take place by leave of the justices or magistrate : a complainant cannot put an end to a criminal proceeding except by leave of the court, and if that leave is given and the summons is withdrawn that amounts to consent by the court . . ."

he added :

> ". . . and that involves the obvious effect that the complaint upon which the summons was founded necessarily falls to the ground."

There the learned President clearly meant to refer to the physical fact of making the complaint, not to the matter of the complaint, but he then added (*ibid*):

> "The court, having once given its consent to the withdrawal, cannot be competent to revive it again by issuing a fresh summons on the same ground."

That is the sentence which has given rise, in my opinion, to the whole of the confusion. Applied to the facts of that particular case, it need mean nothing more than that the justices could not entertain a fresh complaint on the same ground out of time. I do not believe that the court were thinking of *autrefois acquit* or estoppel *per rem judicatam* at all. It is clear, as has been pointed out over and over again, that the decision was simply on the question that the second complaint was out of time, and the summons issued on it, therefore, gave the justices no jurisdiction. There is not the slightest doubt that a gloss has been put on that judgment, it being suggested that Sir Francis Jeune, P., and Gorell Barnes, J., were saying that in all the circumstances, even though a fresh complaint could be made and a fresh summons issued within time, the withdrawal of the first summons gave rise to the plea of *autrefois acquit* and to an estoppel *per rem judicatam*.

That gloss on the decision in *Pickavance* v. *Pickavance* (1) was referred to in *R.* (*McDonnell*) v. *Tyrone JJ.* (2), an Irish case, in which a summons for poaching had not been proceeded with and another one was issued, and it was held that the court could proceed to conviction notwithstanding the withdrawal of the previous summons. But the point is this. In his judgment PALLES, C.B., drew the distinction between the real decision in *Pickavance* v. *Pickavance* (1) A (*viz.*, that the complaint on which the summons was issued was out of time) and what I call the gloss on the judgment in that case, and said ([1912] 2 I.R. 49) :

> " If, however, we apply the principle laid down in that decision to the withdrawal of any summons for a criminal offence, we would impose a fetter upon the administration by justices of the criminal law, which derives no B support either from statute or from analogy in the common law ; and to do so would, in my opinion, be opposed to the long line of authorities which define and limit the application of the common law pleas of ' *autrefois convict* ' and ' *autrefois acquit.*' "

He made it quite plain that he was not prepared to follow what he supposed was the reasoning on which the decision in *Pickavance* v. *Pickavance* (1) was based.

C That brings me to the decision of this court in *Hopkins* v. *Hopkins* (3), the other case with which we must deal. It is only necessary to add that, by the time *Hopkins* v. *Hopkins* (3) came to be decided, a Divisional Court of the King's Bench Division in *Davis* v. *Morton* (4) had held that the withdrawal of a summons in the course of proceedings which had become irregular because the defendant had not been informed of his right to be tried by a jury, as required by the D Summary Jurisdiction Act, 1879, s. 17 (2), did not prevent further proceedings, regularly instituted, on the same subject-matter. The point is sufficiently summarised in the last paragraph of the headnote in *Davis* v. *Morton* (4) :

> " The *dictum* in *Pickavance* v. *Pickavance* ([1901] P. 64), that the withdrawal of a summons by leave of the court puts an end to the complaint E upon which the summons is founded, does not apply where the withdrawal is owing to a technical informality in the proceedings on the hearing of the complaint."

That, as I have already pointed out in another form, omits to notice the distinction between the withdrawal of a complaint which is in time and substituting for it the making of a complaint which is out of time, and the case where, though F the first complaint is withdrawn, another one within time is substituted. *Hopkins* v. *Hopkins* (3) was a case, again, of persistent cruelty. There had been altogether three summonses. We may treat the first as irrelevant, because it is reasonably clear from the judgment that there had been a resumption of cohabitation and, presumably, some fresh acts of alleged cruelty after the issue of that summons. The two that mattered were two summonses issued respectively on Apr. 11 and G July 4, 1914. The April summons was withdrawn, and the question was whether the order based on the July summons could stand, as both the summonses related to what was admitted to be identically the same course of persistent cruelty. After stating the history of the summonses, SIR SAMUEL EVANS, P., said ([1914] P. 283) :

> H " The facts in this case are very similar to those in *Pickavance* v. *Pickavance* (1)."

If the view I have expressed is right, they were essentially different in that there is nothing to show that, in respect of the alleged course of persistent cruelty, the July summons and the complaint on which it was based were not as much in time as had been the April summons and the complaint on which that was based. The learned President read at length the passage in *R.* (*McDonnell*) v. *Tyrone JJ.* (2) to which I have already alluded, and said ([1914] P. 285) that he agreed with it, and he referred also to *Davis* v. *Morton* (4), in which the *Tyrone* case (2) had been approved. Then he said (*ibid*) :

> " Upon the whole I think we ought in cases between husband and wife not to depart from the opinion solemnly expressed by our two eminent predecessors. But it is not every withdrawal of a summons that necessarily disposes of the right of a wife on similar facts to take further proceedings. The withdrawal might be on conditions. In this case the justices seem to have been under a complete misapprehension when they say the first summons was adjourned. It was withdrawn and it is so marked. It was withdrawn absolutely, and without conditions. In these circumstances we are of opinion that the last summons should have been dismissed."

There is an illustration of a summons withdrawn on conditions in *Molesworth* v. *Molesworth* (5), a decision of this court, where we held that, whatever be the rights or wrongs of the decision in *Pickavance* v. *Pickavance* (1), it did not cover the case with which we were then dealing, where the withdrawal had clearly been on conditions.

To return to the judgment in *Hopkins* v. *Hopkins* (3), Bargrave Deane, J., made it plain that, in his view of the matter, *Pickavance* v. *Pickavance* (1) established estoppel *per rem judicatam*, as he said ([1914] P. 285) :

> " So far as causes of complaint between husband and wife under this particular Act are withdrawn unconditionally, husbands ought to be for ever relieved from the same cause of complaint under this Act."

Observe that he spoke of the same " cause of complaint," and not the same " complaint." He proceeded (*ibid.*) :

> " I do not say that a wife should not be able to bring up here, to obtain relief, coupled with adultery, charges which may have been withdrawn in a court of summary jurisdiction ; but such withdrawal should, in my opinion, be an estoppel from bringing up again the same cause of complaint before the justices."

There is the problem in its naked simplicity, and the problem is whether or not there is some different code of law applicable to matrimonial matters, though dealt with under a summary jurisdiction code of general application. The position as I see it is this. If *Pickavance* v. *Pickavance* (1) has, as I think, been misunderstood and a false gloss has been put on it, then we are plainly absolved from following *Hopkins* v. *Hopkins* (3). If, on the other hand, *Hopkins* v. *Hopkins* (3) rightly interpreted the decision in *Pickavance* v. *Pickavance* (1) and so is a decision of this court, based on *dicta* not necessary to the decision of *Pickavance* v. *Pickavance* (1), ought we to follow it although it is plainly shown to be out of line with the law regarding estoppel *per rem judicatam* in relation to both civil and criminal cases ? I say " plainly shown ", because the decision in *R.* (*McDonnell*) v. *Tyrone JJ.* (2) has been followed not only in *Davis* v. *Morton* (4), but even more recently in *Owens* v. *Minoprio* (6), and has received very marked approval from a Divisional Court of the King's Bench Division in *R.* v. *Seddon* (7). The only thing, in my opinion, that gives one any ground for hesitation is that every case in which *Pickavance* v. *Pickavance* (1) has been commented on has been dealt with on the ground, as in *Davis* v. *Morton* (4), that there was a technical defect in the procedure which had developed at the moment when the summons was withdrawn, or, as in *Owens* v. *Minoprio* (6), that the information had been laid by the wrong prosecutor. In *Owens* v. *Minoprio* (6), after referring to *R.* (*McDonnell*) v. *Tyrone JJ.* (2) and *Davies* v. *Morton* (4), Viscount Caldecote, C.J., said ([1942] 1 All E.R. 32) :

> " Those two cases are actually decisions to the effect that, when a withdrawal of a summons is permitted by magistrates, not on the merits of the case, but on a preliminary point, the withdrawal is not equivalent to a

dismissal or an acquittal. That last statement was made by PICKFORD, J., in his judgment in *Davis* v. *Morton* (4). The basic principle of the plea *autrefois acquit* is that the person charged has already been put in peril, and no man is to be put in peril twice in respect of the one charge. In this present case, there was no withdrawal of the summons upon the merits. There was a withdrawal, with the consent of the magistrates, in consequence of an informality in the proceedings."

VISCOUNT CALDECOTE, C.J., added that he thought it was highly desirable that *Pickavance* v. *Pickavance* (1) should no longer appear in the textbooks as an authority to the effect stated by the justices in their first decision, and that it should be appreciated that the only decision in that case was that the information was out of time.

It is argued, first, that it is impossible to discover from the very full report of *R.* (*McDonnell*) v. *Tyrone JJ.* (2) what was the preliminary point on which it was suggested that the first summons had been withdrawn. I admit that it is impossible to answer that question from the report, and VISCOUNT CALDECOTE, C.J., seems to have been in error in that respect. Secondly, it is suggested that from the sentence in which VISCOUNT CALDECOTE, C.J., says that, when a withdrawal of a summons is permitted by justices, not on the merits of the case but on a preliminary point, the withdrawal is not equivalent to a dismissal or an acquittal, it follows that, if the withdrawal was not on a preliminary point, but was on the merits of the case, it is the equivalent of a dismissal or an acquittal. I do not think that that is the right inference to be drawn from that expression of VISCOUNT CALDECOTE, C.J. In my opinion, to hold that for some reason peculiar to matrimonial cases a withdrawal, not leading to an adverse adjudication, but a mere withdrawal, whether on a preliminary point or during the hearing of the case, operates in any sense as an estoppel *per rem judicatam* would be to place the matrimonial jurisdiction in a state of unwarranted isolation in the general system of law. In my opinion, there is no warranty for that, and I do not think that we ought to feel ourselves bound by the decision in *Hopkins* v. *Hopkins* (3), based, as I think it is, on a misapprehension of what was really said by the court in *Pickavance* v. *Pickavance* (1), to come to any such conclusion.

In my opinion, therefore, the justices had jurisdiction to deal with the summons which was before them on Mar. 29, because, as I have already indicated, the matter of complaint being a continuing desertion, no question of time-limit in respect of the making of the complaint arose. I feel bound to say, however, that, having regard to the non-disclosure of the earlier proceedings, and, in particular, of that element in the evidence in the previous proceedings which related to the suggested reconciliation, I do not think that this order can stand. In my opinion, the proper order is that the appeal should be allowed, and the wife's summons remitted for re-hearing by a fresh panel of the Manchester justices, it being plainly understood that, in determining the matter, we are not expressing any opinion whatever on the merits and that the justices are com- justices, it being plainly understood that we are not expressing any opinion whatever on the merits and that the justices are completely unfettered in coming to a just decision on the facts as a whole.

BARNARD, J.: I entirely agree with what my Lord has said as to the true interpretation to be put on the judgment of this court in *Pickavance* v. *Pickavance* (1). My Lord has dealt with the misconception of that judgment in later cases, and I do not think that it is necessary for me to add anything to what he has said. This court has, however, stated from time to time that the principles which are applicable to the Divorce Division should be applied by justices when exercising their matrimonial jurisdiction. It is, therefore, not unimportant to consider how the Divorce Division has dealt with the dismissal of a petition other than when the subject-matter of the petition was adjudicated on. I shall refer only to *Hall* v. *Hall and Richardson* (8). There the husband petitioner filed a petition for dissolution of marriage in May, 1873. In July, 1874, on the petitioner's application and with the consent of the respondent and the co-respondent, the petition was dismissed before hearing. In October, 1878, the petitioner filed a fresh petition, which included the charges of adultery against the respondent and the co-respondent contained in the first petition, and it was held that he was not precluded by the dismissal of the first petition from repeating those charges. At the commencement of his judgment, Sir James Hannen, P., said (48 L.J.P. 59):

> "I am of opinion that the answer which has been proposed to be set up to this petition is bad in law. It amounts to a plea of *res judicata*, that is to say, the respondent alleges that the question of her guilt has been determined by a judgment of this court in her favour. I am of opinion that neither in fact nor in form has there been any such adjudication."

That case was referred to with approval by the Court of Appeal in *Goldblum* v. *Goldblum* (9). In the present case there was clearly no adjudication. The summons was withdrawn. There is no evidence to suggest that the matter of the complaint, which in this case was desertion, was ever withdrawn, and, there being no adjudication on that, I agree that in March the justices had jurisdiction to deal with the matter. For other reasons, however, which my Lord has given, this appeal must be allowed, and the case must go back to the justices for a re-hearing.

Appeal allowed, order set aside and wife's summons remitted to justices for re-hearing. Wife to have costs not exceeding £20, *no taxation by consent.*

Solicitors: *Jaques & Co.*, agents for *Samuel Bieber & Bieber*, Manchester (for the husband); *Field, Roscoe & Co.*, agents for *Frank Leigh & Johnson*, Manchester (for the wife).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

R. B. POLICIES AT LLOYD'S *v.* BUTLER.

[King's Bench Division (Streatfeild, J.), June 23, 24, 1949.]

Limitation of Action—Detinue—Date of accrual of action—Car stolen by unknown person—Discovery in hands of innocent purchaser for value—Action for recovery brought seven years after theft—Limitation Act, 1939 (c. 21), *ss.* 2 (1), 3 (1).

On June 27, 1940, a car, the property of the plaintiffs, was stolen by an unknown person. Subsequently it passed through a line of intermediate purchasers to the defendant, an innocent purchaser for good consideration in whose hands it was identified in January, 1947. On July 16, 1947, the plaintiffs commenced an action in which they claimed the return of the car and, alternatively, damages for its detention. The defendant pleaded that the action was barred by the Limitation Act, 1939, s. 2 (1), having been "brought after the expiration of six years from the date on which the cause of action accrued," and by s. 3 (1) under which: "Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of six years from the accrual of the cause of action in respect of the original conversion or detention."

HELD : although the original owners had not known who had stolen the car in 1940 and so had been unable to bring an action for detention, their cause of action had accrued when the car was stolen, and the present action was statute-barred.

[AS TO WHEN TIME BEGINS TO RUN IN AN ACTION OF TROVER OR DETINUE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 614-615, para. 772 ; and FOR A CASES, see DIGEST, Vol. 32, pp. 343-344, Nos. *259-268.*

FOR THE LIMITATION ACT, 1939, ss. 2 (1) and 3 (1), see HALSBURY'S STATUTES, Vol. 32, pp. 225, 226.]

Cases referred to :

(1) *Gibbs* v. *Guild,* (1882), 9 Q.B.D. 59 ; 51 L.J.Q.B. 313 ; 46 L.T. 248 ; 32 Digest 526, *1819.*

B (2) *Gregory* v. *Hurrill,* (1823), 1 Bing. 324 ; 8 Moore, C.P. 189 ; 1 L.J.O.S.C.P. 115 ; 4 Digest 114, *1036.*

(3) *A'Court* v. *Cross,* (1825), 3 Bing. 329 ; 11 Moore C.P. 198 ; 4 L.J.O.S.C.P. 79 ; 32 Digest 374, *578.*

TRIAL of a preliminary issue in an action for the return of a motor car alleged C to be wrongfully detained by the defendant, and, alternatively, for the value of the car or for damages for its wrongful detention.

The car had been stolen from the plaintiffs on June 27, 1940, and the action was commenced on July 16, 1947, more than six years after its loss. The defendant pleaded the Limitation Act, 1939, ss. 2 (1) and 3 (1), but the plaintiffs contended that their cause of action had not accrued in June, 1940, because they had not known who had stolen they car and so had been unable D to bring an action in respect of it. STREATFEILD, J., found for the defendant.

Fenton Atkinson for the plaintiffs.

L. S. Hart Jackson for the defendant.

STREATFEILD, J. : This is an action brought by R. B. Policies at Lloyd's against Mr. Alfred Butler by a writ issued on July 16, 1947, claiming E the return of a motor-car which, they allege, has been wrongfully detained by the defendant. When the motor-car was first in the plaintiffs' possession it had the registration number, JD 6412, and it was stolen from them by some person or persons unknown on June 27, 1940. In January, 1947, the car, then bearing the registration number ALN 765, was found in the possession of the defendant, having passed to him through a line of intermediate F purchasers during the previous seven years. It is pleaded in the defence that the plaintiffs' cause of action is barred under the Limitation Act, 1939, by s. 2 (1) of which no action shall be brought " after the expiration of six years from the date on which the cause of action accrued " in cases, among others, of actions founded on tort, which this was. That issue has been set down for trial as a preliminary issue under R.S.C., Ord. 25, r. 2.

G The plaintiffs were the owners of this car and the defendant was an innocent purchaser who acquired it for good consideration and in good faith many years after it was stolen. That, of course, can only weigh with me to the extent that one of the matters to be taken into account where there is any doubt or ambiguity in an Act of Parliament is that natural justice shall be done, another principle being that, where there is any doubt about the wording of H an Act of Parliament, the words are to be understood in a way which harmonises with the policy of the Act.

In deciding this issue, it becomes necessary to determine the date on which the cause of action accrued. If it accrued to the plaintiffs as soon as the motor-car was stolen so that they then had a cause of action against the thief for conversion or detention, it is contended that under s. 3 (1) of the Limitation Act, 1939, any subsequent detention cannot be the subject of any action. That sub-section provides :

> "Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of six years from the accrual of the cause of action in respect of the original conversion or detention."

Therefore, if a cause of action did accrue at the date of the theft and, before the plaintiffs recovered possession, there were further conversions by a line of persons of whom the defendant was the last, no cause of action will lie against any of them after six years from the date of the original cause of action. Sub-section (2) goes on to introduce what is new law : A

> "Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished." B

When does a cause of action accrue ? In the present case when the thief stole this car in 1940, clearly he converted it to his own use, and, apart from his prosecution for the felony, if he had been known, undoubtedly an action could have been brought against him for conversion of the car then. I have to determine whether it is necessary that there should be an actual, known, and available defendant to such an action before it can be said that the cause of action has accrued so as to fulfil the phrase used in s. 2 (1) of the Act of 1939. Some persons, such as ambassadors enjoying diplomatic privilege, may commit torts such as negligence or conversion without being liable to an action although the act, if done by an ordinary individual, would have amounted to a cause of action. No cause of action against them would accrue until after they had ceased to be ambassadors, when, if they could be sued by writ, they might be liable. But those are special circumstances. C D

Various definitions have been made of an accrual of a cause of action, and I start with the proposition, which has been submitted by counsel for the plaintiffs, in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 20, at p. 618, para. 777 : E

> "A cause of action cannot accrue unless there be a person in existence capable of suing and another person in existence who can be sued."

Is it to be said, because a person is not traceable or is not known, that he is not in existence, and cannot be sued ? If the thief in the present case had been traceable, he could have been sued, so I doubt whether on that definition it can be said that there was no person in existence who could have been sued. It was, no doubt, a misfortune to the plaintiffs that they could not find a defendant whose name they could insert in a writ, but the fact remains that every other ingredient of the cause of action was present. Their car had been converted and a statement of claim could have been drawn without difficulty if the name of the defendant had been known. F G

Did the cause of action not accrue merely because there was an absent and unknown defendant whose name could not be inserted on the writ ? It is of assistance to examine the position arising under s. 26 of the Act of 1939, which provides : H

> "Where, in the case of any action for which a period of limitation is prescribed by this Act . . . (*b*) the right of action is concealed by the fraud of any such person as aforesaid . . . the period of limitation shall not begin to run until the plaintiff has discovered the fraud . . . or could with reasonable diligence have discovered it . . ."

A proviso protects third parties who take for valuable consideration and without notice. From the wording of s. 26 it seems to me that time runs in an ordinary case even though the plaintiff is ignorant that he has a right of action, and that the section was inserted solely to prevent time running against a plaintiff who was not aware of the fact that he had a right of action because it was concealed from him by the fraud of the defendant. The section does not say the cause of action shall accrue for the first time on the discovery of the fraud ; but only that time "shall not begin to run" until that event, and its language is somewhat different from that of COLERIDGE, C.J., in *Gibbs* v. *Guild* (1), an illustration of a right of action accruing to a plaintiff although he is unaware of the fact that that right of action has accrued. Section 26 is the only provision in the Act of 1939 where a special exception of this nature is made. Nowhere is an exception to be found in favour of a person who cannot give effect to an otherwise perfect cause of action because of an unknown defendant. *Prima facie*, therefore, if there is a cause of action (as there clearly was here the moment this motor-car was stolen), time begins to run as from that moment, notwithstanding the fact that the plaintiff is ignorant of the identity of the thief.

Another illustration of time running against a plaintiff who is unaware of his rights is to be found under the statute, 4 and 5 Anne, c. 3, s. 19. Under that Act, which has now been repealed, if at the time of the accrual of a cause of action the defendant was overseas, time did not begin to run against him until he returned to this country, but that did not apply when he disappeared overseas after the cause of action had accrued and remained there, in which case time ran against the plaintiff continuously although he could sue the defendant. Taking the case visualised by s. 19, if a defendant returned to this country, even though only for a few hours and though his return was unknown to the plaintiff, time began to run in his favour. That was held in *Gregory* v. *Hurrill* (2), where the defendant was in a sailing vessel returning from overseas to Scandinavia, and, while the ship was waiting for more favourable winds, he put ashore at the port of Deal to leave some message for the Scandinavian consul. It was held that that visit of a few hours at Deal constituted a return by the defendant to this country so that the time began to run in his favour against the plaintiff, although the latter was unaware of it.

Can it be said, therefore, that, the cause of action being otherwise complete, the ignorance of the plaintiff regarding the person who committed the conversion is sufficient to prevent the accrual of that cause of action ? I think not, and I agree with the argument of counsel for the defendant. It would lead to appalling results if someone, having lost a watch and discovered it fifty or sixty years later in the possession of a wholly innocent person who had bought it many years previously, was able to bring an action for its recovery merely because he did not know who the thief was fifty or sixty years before. I cannot think that that is the policy of the Limitation Act, 1939, or that to construe its words in favour of the plaintiffs would be to construe them in a way which harmonises with the intention of the legislature. I agree that one of the principles of the Act is that those who go to sleep on their claims should not be assisted by the courts in recovering their property. But another equally important principle is that there shall be an end of these matters, and that there shall be protection against stale demands. In *A'Court* v. *Cross* (3), BEST, C.J., referred to the policy of the Limitation Act, 1623, in this way (3 Bing. 332) :

> "It has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the Act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have heard it often called by great judges, an act of

peace. Long dormant claims have often more of cruelty than of justice in them."

I am not suggesting that the plaintiffs here are guilty of heartless or cruel conduct, but a claim made seven or eight years after the loss of the car against a perfectly innocent holder who has given good consideration for it without any knowledge that it was stolen does not seem just. I think that one object of this Act is to prevent injustices of that kind and to protect innocent people against demands which are made many years afterwards. In my view, the proper construction of the words " the action accrued " involves the finding that the cause of action here accrued in 1940 when the car was stolen from the plaintiffs. This preliminary point must, therefore, be decided in favour of the defendant.

Judgment for the defendant with costs, excluding any costs for which the defendant might be liable to third parties and subsequent parties.

Solicitors : *Gibson & Weldon*, agents for *John Whittle, Robinson & Bailey*, Manchester (for the plaintiffs) ; *Peacock & Goddard*, agents for *Barlow, Parkin & Co.*, Stockport (for the defendant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Affirmed. C.A. Post, p. 581.

JOHN LEE & SON (GRANTHAM), LTD. AND OTHERS *v.* RAILWAY EXECUTIVE.

[King's Bench Division (Streatfeild, J.), June 23, 1949.]

Indemnity—Tenancy agreement—Indemnity by tenant—Loss " which but for the tenancy . . . would not have arisen "—Premises adjacent to railway—Fire caused by locomotive—Damage to goods—Applicability of indemnity clause.

Goods stored in a railway warehouse let to a tenant were damaged by fire and the tenant brought an action against the Railway Executive alleging that the accident was due to their negligence because a spark or other combustible material ejected from their railway engine had caused the fire. The Railway Executive set up a clause in the tenancy agreement providing that : " The tenant shall be responsible for and shall release and indemnify the company and their servants and agents from and against all liability for personal injury (whether fatal or otherwise) loss of or damage to property and any other loss damage costs and expenses however caused or incurred (whether by the act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created or anything done pursuant to the provisions hereof would not have arisen."

Held : the words " but for the tenancy hereby created " limited the purview of the indemnity to damage arising out of or in connection with the occupation under the tenancy or anything done in pursuance of the tenancy, and did not relieve the Railway Executive from liability for negligence of the kind alleged, if established.

Great Western Ry. Co. v. *Durnford (James) & Sons, Ltd.*, (1928) (139 L.T. 145), *applied.*

[AS TO EXTENT OF LIABILITY UNDER INDEMNITY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 17-19, para. 14, and pp. 61-65, paras. 53-57 ; and FOR CASES, see DIGEST, Vol. 26, pp. 233-241, Nos. *1821-1885.*]

Cases referred to :

(1) *Furness Shipbuilding Co.* v. *London and North Eastern Ry.*, (1934), 103 L.J.K.B. 180 ; *sub nom., London and North Eastern Ry. Co.* v. *Furness Shipbuilding Co., Ltd.*, 150 L.T. 382 ; Digest Supp.

(2) *Great Western Ry. Co.* v. *Port Talbot Dry Dock Co., Ltd.*, [1944] 2 All E.R. 328 ; 2nd Digest Supp.

(3) *Great Western Ry. Co.* v. *Durnford (James) & Sons, Ltd.*, (1928), 139 L.T. 145 ; Digest Supp.

TRIAL of a preliminary issue in an action for damages for negligence, or, alternatively, for damages on the ground that the defendants, the Railway Executive, had brought fire on to their property and allowed it to escape on to the plaintiffs' adjoining property and their goods.

The plaintiffs alleged that their goods, which were stored in a warehouse adjacent to the railway, had been damaged by fire through the negligence of the defendants. The defendants contended that, even if this were proved, they were entitled to be released and indemnified from and against all liability by one of the plaintiffs, who were tenants of the warehouse, by virtue of a clause in the tenancy agreement. STREATFEILD, J., held that the clause did not relieve the defendants from liability.

Beney, K.C., and *Felix Denny* for the plaintiffs.
Gardiner, K.C., and *Douglas Lowe* for the defendants.

STREATFEILD, J. : This matter arises out of an action brought by John Lee & Son (Grantham), Ltd., and Arthur Richardson & Son, Ltd., against the Railway Executive. The statement of claim alleges that the two plaintiffs have suffered damage to their goods as the result of the negligence of the Railway Executive in the operation of a shunting engine on Aug. 21, 1947, when a spark or sparks or other combustible material was or were ejected from the engine and set fire to the goods in the first plaintiffs' warehouse in which the goods of both plaintiffs were stored. The defence is a denial of negligence and a denial that any act of the defendants' servants caused this accident. It also raises a point as to the construction of a clause in a tenancy agreement between the predecessors of the defendants and the first plaintiffs under which, it is contended, the first plaintiffs are bound to indemnify the defendants and release them from liability in respect of both their own claim and also that of the second plaintiffs. That matter has been referred to the court, under R.S.C., Ord. 25, r. 2, for determination as a preliminary issue.

The clause in the agreement (which is dated June 13, 1939), is one of a number of clauses governing the occupation by the first plaintiffs of warehouse premises immediately adjoining the defendants' railway at Grantham. It is part and parcel of a tenancy agreement, though that mere fact does not necessarily prevent its operation outside the tenancy agreement. The clause reads as follows :

> "The tenant shall be responsible for and shall release and indemnify the company and their servants and agents from and against all liability for personal injury (whether fatal or otherwise) loss of or damage to property and any other loss damage costs and expenses however caused or incurred (whether by the act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created or anything done pursuant to the provisions hereof would not have arisen."

It is conceded that if the words had stopped at the end of the second parenthesis —that is after the words " the company or their servants or agents or not "— that would have exactly covered the situation which has arisen here. They would have been quite unqualified and would have covered a negligent act caused by the defendants themselves setting fire to the plaintiffs' goods on these premises, but it is contended by counsel for the plaintiffs that the last words form the key to the construction of this clause and are words of qualification or limitation of the sort of liability or damage which is intended to be covered. It is not damage in general which is referred to, but it must be damage " which but for the tenancy hereby created or anything done pursuant to the provisions hereof would not have arisen."

To construe those words, I think it right to say, as was said by LORD ATKIN in *Furness Shipbuilding Co.* v. *London and North Eastern Ry.* (1) and also by TUCKER, J., in *Great Western Ry. Co.* v. *Port Talbot Dry Dock Co.* (2), that not very much assistance is to be derived from the study of other cases of construction where somewhat similar words, but not necessarily exactly similar words, in different situations have fallen to be construed. In the end it always comes back to the proper construction of the words themselves in the agreement in which they occur. Under this agreement the predecessors of the defendants let the premises to the first plaintiffs for a rent of £83 a year. In cl. 4 the tenants agree to pay the company for any services rendered in transferring goods to or from the premises. In cl. 5 there are restrictions on the use of the premises and on what goods shall be manufactured or stored there. In cl. 8 there is a kind of "tie" agreement, whereby the tenants are only to store in those premises goods which are intended to be carried over the railway company's lines. In cl. 9 the railway company reserve the right to carry pipes, cables, or wires under, through, or over the premises and to enter upon the premises for the purpose of executing such works.

I have come to the conclusion that counsel for the plaintiffs is right in contending that the words " which but for " down to the end of cl. 10 are words of limitation. I think the clause means that the tenants shall be responsible for, and shall release and indemnify the company against, liability for damage to property, however caused, even by the neglect of the company, but limited by these words " which but for the tenancy hereby created or anything done pursuant to the provisions hereof would not have arisen." Without doubt the latter part of that phrase, " anything done pursuant to the provisions hereof " certainly would cover operations such as are visualised in cl. 9. Under cl. 9 the company might enter on the premises and lay pipes or cables or wires through or over or under them. That would be something which was done pursuant to a provision of the tenancy, and it would clearly be covered by those words, " anything done pursuant to the provisions hereof " if the company were to cause any damage in the process of installing pipes or cables. I think that the preceding words, " but for the tenancy hereby created," must be construed in relation to the whole phrase. According to the rule of *ejusdem generis*, that whole phrase must be read together, and some light is thrown on the meaning of the words " but for the tenancy hereby created " by the following words. Those words " but for the tenancy hereby created " are, in fact, the equivalent of words such as " arising out of or in connection with the plaintiffs' occupation under the tenancy." One must not, of course, insert words which are not there, but I think that the whole phrase means that the damage which is visualised is the sort of damage which arises out of the occupation under the tenancy, or anything, for instance, under cl. 9, which is done in pursuance of the provisions of it.

That brings me to the consideration of the case which I think throws most light on the present matter—an authority on which counsel for the plaintiff relies : *Great Western Ry. Co.* v. *Durnford (James) & Sons, Ltd.* (3). There the defendants took a lease of premises from the railway company who for the purpose of the agreement gave the defendants permission to use a portable gangway which was, in effect, part of the premises, though having nothing to do with the work done there. The words which fell to be construed were :

> "In consideration of the within-named company . . . permitting the within-named lessees . . . to use the portable gangway with brackets recently erected by the said lessees upon the premises within described and projecting over the company's premises for the purpose of loading traffic into trucks on the sidings adjacent to the within described premises, the said lessees hereby agree and undertake to indemnify the said company against all claims and demands or liability whatsoever, whether in respect of damage to person or property, arising out of or in connection with the existence or user of the said gangway and brackets."

LORD SUMNER said (139 L.T. 147) :

> "Again, the liability may arise out of or it may arise in connection with—but it must still arise, and for legal purposes that must mean arise causally, and, since the matter dealt with is a legal liability, that must mean in such causal connection as is required to make somebody liable, who has to be answerable for the apparatus. It is contemplated that the railway company is liable and that its liability has been caused by the presence or the use of the gangway. In the present case the action of the engine-driver was what caused the railway company to be liable. It is said that if the lorry had not been there—*a fortiori* if it had not existed—it would not have been knocked off the gangway, but for legal purposes the lorry was not a contributing cause of the injury to it, but only a *causa sine qua non*. Moreover, it was there pursuant to the terms of the licence for use in a joint operation with the railway company and, as the clause in question is not a clause of defeasance or of exception but only a foundation for an independent cross-claim, I think that there was an implied contractual obligation on the railway company to be reasonably careful not to injure it. Hence the negligence in itself formed a cause of action, and the damage to the lorry was merely the measure of the amount recoverable. The liability was, as a matter of causation, wholly due to the acts and defaults of the railway company and did not arise at all out of or in connection with the presence or the user of the gangway."

LORD WARRINGTON (*ibid.*, 148), said :

> "Did, then, the damage arise out of or in connection with the user of the gangway or brackets ? Inasmuch as the respondents alone and persons authorised by them can lawfully use the gangway, the words seem to me to assume that it is an act of the respondents themselves in the course of or in connection with the user of the gangway from which the damage arises. In the present case the damage arose not from any act of the respondents in the course of or in connection with the user, but from that of the appellants' servants in driving the box truck against the overhanging lorry. It is true that if the lorry had not been there the damage would not have arisen, but on the other hand but for the act of the appellants' servants the lorry, though in its actual position, would not have been injured, and it seems to me that in determining the present question it is the *causa causans* alone which has to be regarded."

In my view, although the words are not the same (and I do not rely on that or any other case as a guide for the construction of this phrase), these words must refer, as I have said, to something which arises out of the occupation under the tenancy or is done pursuant to the provisions of that tenancy agreement. Although, no doubt, it can be said that no damage would have been caused to the plaintiffs' goods unless they had taken this tenancy and had had the goods on the premises, the matter falls, on the construction of this phrase, to be determined in view of those passages to which I have referred in *Great Western Ry. Co.* v. *Durnford (James) & Sons, Ltd.* (3), and what was the *causa causans.* I do not think it can be said that this agreement can be construed so widely that the plaintiffs took these premises at their peril. The words in question, as I have indicated, have limited the purview of the indemnity to those cases where the damage is the result of the actual occupation of the tenancy or something done in pursuance of it. As, for this purpose, I must assume that the plaintiffs are in a position to establish that their damage was done, not as the result of their occupation or something done in pursuance of their occupation, but as the result of negligent operations of the defendants, it follows that this preliminary point must be determined in their favour. The preliminary point fails.

Order accordingly. Costs reserved to the trial judge.

Solicitors: *Kenneth Brown, Baker, Baker* (for the plaintiffs); *E. Coleby* (for the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

FINKIELKRAUT *v.* MONOHAN.

[Chancery Division (Danckwerts, J.), June 20, 21, 1949.]

Sale of Land—Specific performance—Rescission of contract—Notice to complete served by vendor—Purchaser willing and able to complete on date fixed—Vendor unable to do so—Return of deposit money—Law of Property Act, 1925 (*c.* 20), *s.* 49 (2).

On Dec. 10, 1947, a contract was concluded for the sale of certain property. On Mar. 31, 1948, the vendor sent to the purchaser a notice to complete within 14 days. On Apr. 14, the date fixed by the notice as the final date for completion, the purchaser was ready and able to complete, but the vendor was unable to do so. On the same day, the purchaser sent to the vendor a three days' notice to complete, but the vendor was unable to comply with it, though she was in a position to complete on Apr. 30. In an action by the purchaser claiming a declaration that he was entitled to rescind the contract and a counter-action by the vendor claiming an order for specific performance:

Held: (i) by her notice of Mar. 31, the vendor made completion by Apr. 14 an essential term of the contract so that the rule of equity that the time fixed for completion was not of the essence of the contract no longer applied; as the purchaser was bound by the notice, the vendor, having given the notice, was also bound thereby; and, as she was unable to complete on the day fixed, she was not entitled to an order for specific performance of the contract.

Re Sandwell Park Colliery Co. ([1929] 1 Ch. 277), *distinguished.*

(ii) as an order for specific performance was refused to the vendor, the purchaser was entitled to an order under the Law of Property Act, 1925, s. 49 (2), for the return of his deposit.

[AS TO SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LAND, see HALSBURY, Hailsham Edn., Vol. 29, pp. 388, 389, paras. 533, 534 ; and FOR CASES, see DIGEST, Vol. 42, pp. 516, 517, Nos. *805-811.*]

Cases referred to :

(1) *Stickney* v. *Keeble*, [1915] A.C. 386 ; 84 L.J.Ch. 259 ; 112 L.T. 664 ; 42 Digest 511, *768.*

(2) *Green* v. *Sevin*, (1879), 13 Ch.D. 589 ; 41 L.T. 724 ; 42 Digest 586, *1538.*

(3) *Re Sandwell Park Colliery Co.*, [1929] 1 Ch. 277 ; 98 L.J.Ch. 229 ; 140 L.T. 612 ; Digest Supp.

(4) *Smith* v. *Butler*, [1900] 1 Q.B. 694 ; 69 L.J.Q.B. 521 ; 82 L.T. 281 ; 40 Digest 247, *2153.*

CONSOLIDATED ACTION.

The plaintiff (the purchaser) entered into a contract to purchase certain property from the defendant (the vendor) and was ready and able to complete on the date for completion which had been fixed by the vendor by a notice to complete. The vendor, however, was unable to complete on the date fixed, and the purchaser brought an action claiming (*a*) a declaration that he was entitled to rescind, and (*b*) the return of his deposit money. The vendor brought a cross-action claiming an order for specific performance. DANCKWERTS, J., held that the vendor was not entitled to an order for specific performance and that the purchaser was entitled to an order for the return of his deposit money. The facts appear in the judgment.

Richmount for the purchaser.

F. E. Skone James for the vendor.

DANCKWERTS, J. : On Sept. 29, 1947, Miss Monohan, who is the defendant in the first, and plaintiff in the second, of these two actions, which have been consolidated, entered into a contract to purchase certain property known as No. 20, Wykeham Road, Hendon, from Mr. Algernon Nairne Gray. On Oct. 5, 1947, Mr. Gray died, having appointed Barclays Bank, Ltd. and Horace Edgar Gray to be the executors of his will. On Dec. 10, 1947, Miss Monohan concluded a contract with Mr. Finkielkraut, who is the plaintiff in the first action and the defendant in the second, to sell to him all except a small portion of the property. The purchase price in the original contract was £4,250 and the purchase price to the purchaser was £5,350. It was obvious that some delay would occur before probate of Mr. Gray's will could be obtained and the sale to the purchaser could be completed, but for the present purpose the material part of the history starts on Mar. 18, 1948, when Mr. Fishman, the solicitor acting for the purchaser, wrote informing Mr. Landy, the solicitor acting for the vendor, that the mortgagee who had been expected to provide part of the purchase price was not prepared to go on. Thereupon Mr. Landy sent a letter threatening to serve a notice which, he said, might result in the forfeiture of the deposit, and on Mar. 31 he sent a notice to complete within fourteen days from the date of the receipt of the notice, *i.e.*, by Apr. 14, 1948. On Apr. 2, 1948, an engrossment of the conveyance to the purchaser was sent by his solicitor, Mr. Fishman, to Mr. Landy, and on Apr. 5, 1948, that engrossment was sent by Mr. Landy to the vendor for execution, with a letter so that it could be sent on for execution by the executors of Mr. Gray's will. It appears that it was, in fact, sent on to the solicitor acting for the executors. At this stage a very unfortunate thing occurred. The engrossment, as submitted, contained errors, which are quite obvious when they are pointed out, but which, apparently, were not perceived by whoever completed the engrossment, nor by Mr. Fishman, nor by Mr. Landy, nor by the executors' solicitors, as all these persons approved the engrossment in the form in which it was sent. On Apr. 5 Mr. Landy also sent a completion statement to Mr. Fishman, providing for the situation which would arise on Apr. 14, 1948, and on Apr. 7, 1948, the executors' solicitors in their turn sent a completion statement to Mr. Landy. On Apr. 8 Mr. Fishman discovered the errors in the engrossment and telephoned to Mr. Landy. There is a dispute between Mr. Fishman and Mr. Landy whether Mr. Fishman explained what the errors, in fact, were. Mr. Fishman said definitely that he did explain what they were and said that, although purely A matters of drafting, they were substantial, but Mr. Landy said that Mr. Fishman merely said that there were minor errors and did not inform him of their exact nature. On the following day, Apr. 9, 1948, the executors' solicitors telephoned to Mr. Landy and raised a question as to the form in which the consideration should be stated in the two deeds, *i.e.*, the deed which conveyed the greater part of the land to the purchaser, and the other B deed which conveyed a small portion to the vendor. It was quite obvious that the way in which the consideration was expressed was not satisfactory and some alteration would be required. On Apr. 13, Mr. Landy wrote to the executors' solicitors sending an amended conveyance of the small portion of the land to the vendor and on the same day he received a letter from the executors' solicitors, refusing to accept the transaction in the form in C which it had been put forward and requiring one conveyance of the property to the vendor.

On Apr. 14, which was the final date for completion according to the notice sent to the purchaser by Mr. Landy, Mr. Landy told Mr. Fishman over the telephone that it was clear that they could not complete on that date. He was then asked whether he would withdraw the notice which he had given, D and he said that he could not do so, but would not require the purchaser to complete, and that he would give three days' notice to complete within an early period. On the same day, Apr. 14, 1948, at about 5 p.m., Mr. Fishman's clerk came to Mr. Landy's office with three banker's drafts which made up the total amount due for the balance of the purchase price, having regard to the deposit which had already been paid and was in the hands of E the stakeholders. Mr. Fishman said that he produced the letter to the stakeholders to pay over the deposit. Whether or not he did produce it was disputed, but I have no doubt that he had the letter and that, therefore, the purchaser was in a position to complete the purchase on Apr. 14, 1948. His solicitor, however, had already been told by the vendor's solicitor that the completion could not take place owing to the difficulties which had F arisen, and, therefore, it was useless to tender the drafts, although Mr. Landy inspected the drafts and noted down the amounts. At this stage there was a willing vendor (the vendor) and a willing purchaser (the purchaser), and I cannot understand why the two solicitors could not have got together in a reasonable manner and settled the matter without further controversy and so saved the expense of these actions. The difficulties which existed were G not in regard to the title which was perfectly in order. They were merely difficulties in drafting, for which both solicitors must bear responsibility, as they were both parties to the mistakes. One put them forward and the other did not notice them. On the same day, Apr. 14, a three days' notice was given by Mr. Fishman to the vendor to complete the sale. On Apr. 15, Mr. Landy wrote to Mr. Fishman putting forward other and different grounds H for the fact that the vendor was not ready to complete, but stating that she hoped to complete in a day or two. On the same day a letter was written by the executors' solicitors which had the effect of straightening out the difficulties which they had previously raised. They were ready to assist in completing the matter in the way which was necessary. On Apr. 18, 1948, there was another telephone conversation between Mr. Landy and Mr. Fishman, and Mr. Landy's account is that he then understood for the first time the amendments which were required on account of the errors in the original engrossment. On Apr. 19, Mr. Landy wrote to Mr. Fishman pointing out that a further delay would be necessary because of difficulties which might require re-engrossment of the conveyances, and on the same day he wrote to the executors' solicitors, in answer to their letter of Apr. 15, saying what was now necessary. On the next day, Apr. 20, the executors' solicitors wrote to Mr. Landy returning the approved amended engrossment. On Apr. 22, 1948, the purchaser issued the writ in his action, in which he claimed a declaration that he was entitled to rescind and asked for the return of the deposit of £535. On Apr. 30, Mr. Landy wrote to Mr. Fishman, saying that the vendor was now in a position to complete, but on May 4, Mr. Fishman replied that he did not understand Mr. Landy's letter, because his own three days' notice had expired. On May 5 the vendor issued her writ claiming an order for specific performance so as not to be accused of delay in case the statement of claim in the purchaser's action was not delivered promptly.

The question to be decided is whether, owing to the circumstances and history of the case, the vendor in her cross-action is entitled to ask for specific performance. In my opinion, she is not. It is true that this was a contract in which originally the time for completion would not have been regarded by equity as of the essence, but by her notice of Mar. 31, 1948, sent by her solicitor, the vendor made completion by Apr. 14, 1948, an essential term, at any rate on the purchaser's part. Notwithstanding the fact that he or his solicitor was told that completion would not take place, the purchaser was, I think, within his rights in appearing on Apr. 14 to complete the purchase by paying the balance of the purchase money, and it is claimed that he was in a position to do so. In my view, the vendor cannot be heard to say that time was not essential on Apr. 14, 1948. A number of cases were cited, but none of them really touches the point, though they do indicate that, where a party gives a notice requiring completion by a certain date and the date is a reasonable one, the rule of equity that the time fixed for completion is not of the essence of the contract no longer operates: see *per* LORD PARKER OF WADDINGTON ([1915] A.C. 416) in *Stickney* v. *Keeble* (1); and the notice does, at any rate, bind the person to whom it was given. If it binds the person to whom it was given, I cannot see why the person who has elected to give such a notice is not also bound. The cases cited: see *Stickney* v. *Keeble* (1), *Green* v. *Sevin* (2), *Smith* v. *Butler* (4), and *Re Sandwell Park Colliery Co.* (3). *Re Sandwell Park Colliery Co.* (3) is in certain respects quite a different kind of case. The sale in that case was subject to the approval of the court, and the vendor, the receiver in a debenture holders' action, did not obtain the consent of the court by the date fixed for completion. The consent of the court was treated as an essential condition which had to be fulfilled before the date for completion if the contract was to be enforced. To some extent, therefore, it is rather a special case, but I think it is clear from the judgment of MAUGHAM, J., that, if time is essential, a vendor who is claiming that he is entitled to obtain an order for specific performance must show that he himself was in a position to complete on the date fixed. On the date of completion in the present case the vendor, who is now seeking an order for specific performance, was not in a position to complete. For that reason, in my opinion, the vendor in her cross-action is not entitled to a decree for specific performance, and her action must be dismissed.

The next matter is whether the purchaser is entitled to rescission, or, at any rate, whether I should make an order for the return of the deposit. This seems to me a case in which, as an order for specific performance is refused to the vendor, an order for the return of the deposit should be made under the Law of Property Act, 1925, s. 49 (2), which is in these terms:

> "Where the court refuses to grant specific performance of a contract, or

> in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit."

In my opinion, justice in this case requires that an order should be made for the return of the deposit to the purchaser, and I make an order accordingly.

There remains the matter of the costs, and I think that it would be an advantage if I were to say what I think about that before I hear what learned counsel have to say. I consider that this was a case in which, if the solicitors had behaved in a more reasonable manner, the expenses of both these actions could have been saved entirely. I think that the solicitors were to blame. It was their error in making, or reading, the drafts, and they were too hasty to stand on strict rights. They made too little attempt to co-operate and settle the matter on a friendly basis, when it was quite obvious that little was required to put the matter right and it could be settled within a few days. It is, of course, unfortunate that these actions will cost their respective clients considerable sums of money in costs. I do not think that it is a case in which it would be right for me to order that either of the parties should pay the other's costs, so the order that I propose to make is that there shall be no order as to costs and that each party should bear his own costs of these actions.

Order for return of deposit to purchaser. Cross-action dismissed. No order as to costs.

Solicitors : *Asher Fishman* (for the purchaser) ; *M. Landy* (for the vendor).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

EGERTON *v.* EGERTON.

[Court of Appeal (Bucknill, Asquith and Denning, L.JJ.), June 28, 1949.]

Variation of Settlement—Proper provision for injured spouse of the marriage—Income of trust fund to be paid to wife if marriage undissolved—Appointment by husband by will in favour of second wife—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 192.

In 1928 the husband and wife were married, and there were no children of the marriage. By cl. 3 of an ante-nuptial settlement, to which the wife was a party, it was provided that after the husband's death, if the intended marriage should be subsisting and undissolved at the date of his death and if the wife should survive him, the trustees were to pay the annual income of the trust fund to the wife during her lifetime. The settlement further provided that, subject to cl. 3, the husband might by deed or will appoint, in favour of any other wife who might survive him, all or any part of the annual income of the fund. On June 27, 1947, the wife was granted a decree *nisi* on the ground of the husband's adultery, and that decree was made absolute on Aug. 15, 1947. On Aug. 19, 1947, the husband re-married and on Nov. 17 he died. By his will, dated Sept. 14, 1947, he exercised the power of appointment conferred on him by the settlement, partly in favour of the second wife and partly in favour of his sister, and, after the death of the second wife, in favour of his sister's children living at the date of his death. The wife had an annual income of £1,100 and had supported herself since 1931. The husband's only income had been £650 derived from the settlement. The second wife was without income apart from the provision made for her under the will, and the sister had an income of £1,089. Barnard, J., refused the first wife's application for a variation of the settlement in her favour.

Held : the main object of the variation of a settlement was to make proper provision for an injured spouse and the children of the marriage (if any), and *prima facie* settlements ought not to be interfered with further than was necessary for that purpose ; the first wife had failed to prove that it was necessary to vary the settlement in order to make proper provision for her ; in exercising his discretion BARNARD, J., had not taken into account any irrelevant factor or failed to take into account any material one, nor had he applied any erroneous principle of law ; and, therefore, his decision was right.

Dicta of HILL, J., *in Prinsep* v. *Prinsep* ([1929] P. 236), *applied.*

Decision of BARNARD, J. ([1949] 1 All E.R. 670), *affirmed.*

[AS TO VARIATION OF SETTLEMENTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800-809, paras. 1274-1292 ; and FOR CASES, see DIGEST, Vol. 27, pp. 517-533, Nos. *5576-5778.*]

Cases referred to :

(1) *March* v. *March and Palumbo*, (1867), L.R. 1 P. & D. 440 ; 36 L.J.P. & M. 64 ; 16 L.T. 366 ; 27 Digest 517, *5576.*

(2) *Hartopp* v. *Hartopp and Akhurst*, [1899] P. 65 ; 68 L.J.P. 33 ; 80 L.T. 297 ; 27 Digest 523, *5650.*

(3) *Prinsep* v. *Prinsep*, [1929] P. 225 ; 98 L.J.P. 105 ; 141 L.T. 220 ; *revsd.*, [1930] P. 35 ; 99 L.J.P. 35 ; 142 L.T. 172 ; Digest Supp.

(4) *Alston* v. *Alston*, [1929] P. 311 ; 98 L.J.P. 155 ; 141 L.T. 542 ; Digest Supp.

(5) *Colclough* v. *Colclough and Fisher*, [1933] P. 143 ; 102 L.J.P. 87 ; 149 L.T. 287 ; Digest Supp.

(6) *Burghley* v. *Burghley*, (1947), unreported.

(7) *Blunt* v. *Blunt*, [1943] 2 All E.R. 76 ; [1943] A.C. 517 ; 112 L.J.P. 58 ; 169 L.T. 33 ; 2nd Digest Supp.

APPEAL by the wife against an order of BARNARD, J., dated Mar. 9, 1949, and reported [1949] 1 All E.R. 670, refusing to vary a settlement.

The applicant, the first wife of the deceased settlor, having obtained a decree absolute for the dissolution of her marriage, sought to vary an ante-nuptial settlement by an order directing the trustees to pay to her during her lifetime the income of the trust fund. The settlor, who had re-married, had exercised a power of appointment conferred on him by the settlement by directing in his will that the income should be paid in varying parts to his second wife and his sister and after the second wife's death to his sister's children. BARNARD, J., refused to accept a report of the registrar recommending a variation and his decision was now upheld by the Court of Appeal.

Karminski, K.C., and *R. J. A. Temple* for the wife (appellant).

Beyfus, K.C., and *Adams, K.C.*, for the trustees of the settlement and the beneficiaries under the will of the husband (respondents).

BUCKNILL, L.J. : This is an appeal from an order of BARNARD, J., refusing to vary a pre-nuptial settlement made before the marriage of the late Mr. George Egerton and his wife, Sarah Egerton. The parties were married in April, 1928. The wife had divorced her first husband from whom she received a sum of £2,000 a year, but on marrying Mr. Egerton she had to give up about £1,000 a year of that and she was left with an income of approximately £1,100 a year. She is a Belgian by birth. There were no children of the marriage. The wife was 34 at the time of the marriage and the husband was also about that age. They lived together for under a year—in London, Kenya, Brussels, and then in London again, and in 1929 the wife left the husband and returned to Belgium. In Sept., 1931, the husband committed adultery with a woman in London over a period of some weeks, and then she passed out of his life. Notwithstanding the discretion statement signed by the husband which asserted that he had " informed my wife through her solicitors of my adultery soon after it took place, but she took no action in respect to it," Mr. Egerton, in his evidence, said that he had not informed his wife about the adultery. I do not know whether he had forgotten or was ill at the time when he gave his evidence, but the letters which the wife's solicitor wrote in Aug., 1946, when Mrs. Egerton offered to return to her husband, seem to me to indicate that he had not told her about the adultery because no reference is there made to it. It does not matter very much whether she knew about it or not.

From 1931 onwards the wife remained in Belgium and the husband remained in England. In 1947 the husband filed a petition for a divorce on the ground of desertion, asking the court, in view of his adultery in 1931, to exercise its discretion in his favour. The wife filed an answer denying desertion and not asking for any relief save that the petition should be dismissed. At the trial a copy of the discretion statement was furnished to the wife's solicitors, and the wife then asked to be allowed to amend her answer and allege the husband's adultery as stated in the discretion statement. The husband did not pursue his allegation of desertion and the wife was given a decree on the ground of the husband's adultery. In her evidence the wife said that when they went to Mombasa she paid her own expenses, that she had trouble with her husband because she did not want to give him any money, and that she paid the hotel bills. The husband would seem to have been more of a financial liability than an asset to his wife while they lived together. He had the income from a sum of approximately £18,000, acquired from his father, which he had brought into an ante-nuptial settlement dated Apr. 13, 1928, to which the wife was a party. Cl. 3 of that settlement provided :

> " After the death of the settlor if the said intended marriage shall at the date of his death be then subsisting and undissolved and if the wife shall be living at the expiration of seven days after the death of the settlor the trustees shall as and from the date of the death of the settlor subject as hereinafter mentioned pay the income of the trust fund (including the accruing interest aforesaid) to the wife during her life without power of anticipation during any coverture."

Clause 8 provided :

> " Subject to the provisions of cl. 3 hereof the settlor may from time to time by deed revocable or irrevocable or by will or codicil appoint to or in favour of any other wife who may survive him during the residue of her life or any less period all or any part of the annual income of the trust fund."

The marriage having been dissolved, the interest of the wife under cl. 3 disappears, if the clause stands.

The wife's decree was made absolute on Aug. 15, 1947, and four days later the husband married his second wife, who is a young woman. On Sept. 14, 1947, he made a will in which he directed that the trustees were to hold the settled fund :

> " . . . upon trust as to one equal one fourth share both capital and income for [his second wife] absolutely and as to one other equal one fourth share thereof upon trust both capital and income for my sister absolutely and as to the remaining moiety of the said fund upon trust to pay the income arising therefrom to [his second wife] during her life with power for the trustees in their uncontrolled discretion to raise and pay out of the capital thereof any sum or sums not exceeding in the whole £5,000 to or for the benefit of [the said second wife] and subject thereto from and after her death upon trust for such of the children [of the said sister] as shall be living at the date of my death."

He also bequeathed the residue of his estate to his second wife absolutely.

On Oct. 15, the period for an application by the wife for a variation of the settlement expired because, by the rules, such an application must be made within two months from the decree absolute although the court has power to extend the time. On Nov. 17, the husband died, and on Jan. 27, 1948, the wife applied for leave to apply to vary the settlement. Leave was given by Pilcher, J., and the matter came before Mr. Registrar Pereira. He recommended a variation of the settlement in respect that during the lifetime of the first wife the trustees should pay to her instead of the sister one fourth of the income arising from the settled fund ; that, should the first wife survive the second wife, they should pay the income of a moiety of the said fund to the first wife for the remainder of her life instead of to the children of the sister ; and that the discretion of the trustees arising under the said appointment to raise and pay out of the capital of the said moiety sums not exceeding £5,000 to or for the benefit of the second wife should not be interfered with. In February, 1949, that report came before Barnard, J. Counsel for the wife asked that she should receive the income of the whole of the husband's fund during her life. Counsel for the other parties, including the sister and the children of the sister and the second wife, asked that the first wife should receive nothing. Barnard, J., decided that the settlement should not be varied. He gave as his reasons, first, the precise terms of the settlement, which it was sought to vary. As I understand his judgment, he meant that the wife, as a party to the settlement, was fully aware of the terms of cl. 3, which made it clear that, if her marriage had been dissolved at the instance of either party before the death of the husband, she had no interest whatsoever in the settlement. The wife, knowing the terms of cl. 3 and that she would lose her interest under the settlement if she took steps to dissolve the marriage, deliberately took those steps and the marriage was dissolved, and, therefore, it was argued, she could not complain if she were excluded from any interest in the fund. Barnard, J., referred to the fact that the wife did not apply to vary the settlement until after the two months had expired. I think there is substance in that point because the husband did not die until a month after the time had expired. If the wife within the two months had applied to vary, it may very well be that the husband would have made a different will from the will which he did make. He might have taken more effective steps to protect the interest of his second wife. In giving the reasons for his decision Barnard, J., said ([1949] 1 All E.R. 673) :

> " Giving due consideration to the terms of cl. 3 of the settlement, the lawfully acquired interests of the second wife, Lady Mary Cecilia Boyd [the husband's sister], and her children, the pecuniary means of the various parties, and the relative financial position of the husband and the wife during the subsistence of their marriage, I have come to the conclusion that I ought not to vary this settlement."

Counsel for the wife has argued that Barnard, J., disregarded some of the material facts in this case and did not properly apply the law. He has cited several cases and I must refer shortly to the material passages in them. In *March* v. *March and Palumbo* (1), Sir J. P. Wilde, J.O., said (L.R. 1 P. & D. 443) :

> " The relative sums contributed by each party, the conduct of each, the total amounts of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income, are all elements to be considered. These elements are not capable of exact expression in figures, and the result must be a general one, varying according to the details of each case."

I cannot see that Barnard, J., misapplied the law, as stated in that case, so far as it is a statement of the law. I need not refer to *Hartopp* v. *Hartopp and Akhurst* (2), because Barnard, J., cited the judgment of Gorell Barnes, J., in that case ([1949] 1 All E.R. 672).

In *Prinsep* v. *Prinsep* (3), Hill, J., made a statement which appears to have met with very considerable favour in later judgments of other judges. He said ([1929] P. 236) :

> " The main object of variation is to make proper provision for the injured spouse and the children of the marriage. And *prima facie*, settlements ought not to be interfered with further than is necessary for that purpose. But the court which has annulled the marriage must not only protect the injured party, but also be fair to the wrongdoing party."

That passage was cited with approval by Bateson, J., in *Alston* v. *Alston* (4), by Langton, J., in *Colclough* v. *Colclough* (5), and, I think, by Finnemore, J., in *Burghley* v. *Burghley* (6).

The main object of a variation is to make proper provision for the injured spouse and the children of the marriage. There are no children of this marriage. As to proper provision for the injured spouse, the first wife has been living on her own money ever since she married the husband. She never received anything from him financially while they lived together and she never got anything from him after they parted, and for eighteen years, apparently, she has been satisfied to live on the not inadequate income of some £1,100 a year. I cannot see that it is necessary to alter the terms of the settlement in order to make proper provision for her. The statement of Hill, J., that settlements ought not to be interfered with further than is necessary for that purpose raises the question : Is it necessary for the purpose of making proper provision to vary the settlement ?, and that question must be a matter for the discretion of the judge who hears the case. I agree that the discretion exercised by a judge in a case of this kind is not quite the same sort of discretion as that exercised in *Blunt* v. *Blunt* (7), but it is a matter for the discretion of the judge, and, unless one is satisfied that he went wrong in the law or misapprehended the facts, it is not right that this court should interfere with his decision. Taking the test which Hill, J., has laid down, I cannot see that the wife has made out that it is necessary to vary this settlement to make proper provision for her, and, that being so, in my judgment this appeal should be dismissed.

ASQUITH, L.J. : I agree. In exercising his discretion in this case I cannot see that Barnard, J., took into account any irrelevant factor, or failed to take into account any material one, or that he has applied any erroneous principle of law. If the right factors are taken into account, the computation of their relative weight is a matter in which the judge can show great latitude. I do not see how we can disturb his assessment or its result in the present case, and I agree that the appeal should be dismissed.

DENNING, L.J. : I agree. It is not lawful for an engaged couple to agree on what financial provisions should apply between them in the event of their separating after the marriage because it is against public policy that they should anticipate that they may separate, but, apparently, they are entitled to anticipate that they may be divorced, and a settlement which contains provisions as to what should happen in the case of divorce is not contrary to public policy. This seems to me to be anomalous and only to be tolerated because there is a safeguard against its abuse, namely, that after pronouncing a decree of divorce the court has an overriding power to vary any such settlement so as to do what is just. In the present case I see no abuse which needs to be corrected. The husband provided the fund for this settlement. If the wife had been the guilty party, there would have been nothing unjust in the deed, but she was the innocent party and had it in her option either to petition for judicial separation or for divorce. If she had proceeded for judicial separation, her rights under the deed would have remained intact. She chose to proceed for divorce. That enabled the husband to re-marry and he then became liable to maintain a second wife. The first wife has adequate means of her own, whereas the second wife has none. The first wife has lived on her own means for eighteen years and there is no reason why she should now get more at the expense of the second wife. The appeal should be dismissed.

Appeal dismissed. No order as to costs except that trustees' costs out of the estate as between solicitor and client.

Solicitors : *Peacock & Goddard* (for the wife, appellant) ; *Grover, Humphreys & Boyes* (for the trustees of the settlement and beneficiaries under the husband's will, respondents).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

JAMES *v.* HUTTON AND ANOTHER.

[COURT OF APPEAL (Lord Goddard, C.J., Tucker and Singleton, L.JJ.), June 16, 17, 29, 1949.]

Landlord and Tenant—Covenant—Breach—Damages—Measure—Covenant to reinstate premises at end of term—No actual damage suffered by landlord—Landlord and Tenant Act, 1927 (*c.* 36), *s.* 19 (2).

By a lease dated Dec. 12, 1934, a landlord demised certain business premises to a tenant who covenanted, *inter alia,* not to make alterations to the premises without the consent and approval of the landlord and superior landlords. On Aug. 14, 1936, the tenant assigned the lease to a company who obtained a licence from the landlord to construct a new shop front in place of the existing one. In that licence the assignees covenanted that they would, if so required, at the expiration or sooner determination of the lease, reinstate the premises in their original condition. The assignees completed the alterations in February, 1940. In June, 1940, the premises were requisitioned by a government department which had remained in occupation ever since. In 1945 the lease was determined by agreement and in June, 1946, the landlord gave notice to the assignees requiring them to reinstate the premises. The assignees having failed to comply with the notice, the landlord brought proceedings against the tenant and the assignees claiming damages for breach of covenant to reinstate. There was no evidence that the landlord had any reason for desiring an alteration of the new shop front, or that the restoration of the old one was required for any particular purpose, or that the premises were in any way less valuable by reason of the alteration. On a question as to the measure of damages :

HELD by the Court of Appeal : (i) the rule as laid down in *Joyner* v. *Weeks* ([1891] 2 Q.B 31) as to the measure of damages for breach of a covenant to deliver up a house in repair was not appropriate to the present case ; the general rule as to damages for breach of contract ought to be applied ; and, as the landlord had suffered no damage by the failure to reinstate, he was entitled only to nominal damages.

Applicability of the Landlord and Tenant Act, 1927, s. 19 (2), *discussed.*

[AS TO DAMAGES FOR BREACH OF COVENANT TO YIELD UP PREMISES IN REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 220, 221, para. 241 ; and FOR CASES, see DIGEST, Vol. 31, pp. 340, 341, Nos. *4835-4844.*]

Cases referred to :

(1) *Matthey* v. *Curling,* [1922] 2 A.C. 180 ; 91 L.J.K.B. 593 ; 127 L.T. 247 ; 31 Digest 342, *4857.*

(2) *Joyner* v. *Weeks,* [1891] 2 Q.B. 31 ; 60 L.J.Q.B. 510 ; 65 L.T. 16 ; 55 J.P. 725 ; 31 Digest 341, *4841.*

Appeal by the tenant under and assignees of a lease against an order of an official referee, His Honour J. G. Trapnell, K.C., dated Jan. 26, 1949, whereby he awarded the landlord substantial damages for breach of a covenant to reinstate the demised premises at the expiration or sooner determination of the lease. The appeal was also concerned with two questions of breach of covenant to repair, with which this report does not deal. The Court of Appeal, in allowing the appeal, held that the landlord was only entitled to nominal damages. The facts appear in the judgment of the court delivered by Lord Goddard, C.J.

Mitchison, K.C., and *Morgan Blake* for the landlord.

Ward, K.C., and *Ryder Richardson* for the tenant and assignees.

Cur. adv. vult.

June 29. **LORD GODDARD, C.J.**, read the following judgment of the court. By a lease dated Dec. 12, 1934, the landlord demised to the tenant certain premises known as the James Store in Carrington St., Nottingham, for a term of 21 years at a rent of £1,250 for the first seven years and £1,500 thereafter. The lease contained a full repairing covenant and also a covenant that the tenant would not during the said term make or permit to be made any substantial addition, deviation, or alteration, to or in the demised premises without the consent and approval of the landlord and her superior landlords, and would submit plans, elevations, and so forth, of any proposed addition or alteration for approval by her and the superior landlords. On Dec. 13, 1934, the landlord granted to the tenant a licence for the alteration of the existing shop front and the erection of one which differed very materially from that which was in existence at the time of the demise. That licence contained a provision that at the expiration or sooner determination of the lease the tenant would reimburse to the landlord the cost of the reinstatement and making good by the landlord of the demised permises, including the cost of removing the additions and alterations made by virtue of the licence, as if the several works and alterations authorised had not been made, provided that the liability of the tenant should not be greater than the cost of the reinstatement actually carried out by the landlord. The tenant, in fact, did not carry out any work under the licence, and on May 29, 1936, the lease was assigned by him to the assignees. On Aug. 14, 1936, by a deed which was said to be supplemental to the licence to which we have just referred ("the principal licence"), the landlord granted a licence to the assignees to execute certain alterations and works which were of the same description as those contemplated by the tenant, namely, the erection of a new shop front, and the licence contained a covenant by the assignees at the expiration or sooner determination of the lease, if so required, to restore the said premises to the same state as they were in before the said alterations and works had been executed by the assignees, or, at the option of the landlord, to the same state as they were in before the principal licence was granted and as if the several works and alterations thereby or by the principal licence authorised had not been made. It was also provided that the second licence should be in addition to, but not in substitution for, the principal licence, the covenants and conditions of which should remain in full force and effect. It is, however, only necessary to consider the provision for restoration contained in the second licence.

It is apparent that the obligations on the assignees imposed by the second licence are different from those contained in the first licence, and it was not argued that for this purpose the two licences would have to be read together. The works were carried out by the assignees at a cost of something like £3,300, they being finished in February, 1940. On May 27, 1940, notice was given by the assignees to determine the lease on Mar. 25, 1941, but on June 20, 1940, the premises were requisitioned by the War Department and have ever since remained in the occupation of one government department or another. In March, 1941, the landlord started proceedings, claiming damages for breach of the repairing covenant in the lease and for a declaration that the lease could not be determined by the assignees because they had not put the said premises into a proper state of repair. That action was settled on terms, one of which was that the lease should continue in existence until Sept, 29, 1945. At that date, as we have already said, a government department was still in occupation and paying compensation at the rate of £1,100 a year. While we were informed that negotiations had for some time been in progress with regard to a lease being granted to the ministry, so far no agreement has been concluded. On June 12, 1946, notice was given on behalf of the landlord to the assignees that she required them, in exercise of the option contained in the second licence, to restore the premises to the same state as they were in before the principal licence was granted and as if the works and alterations authorised by both licences had not been made. There was no suggestion that she had been required by her superior landlords to reinstate the premises.

On Oct. 15, 1947, the writ in this action was issued claiming damages for breach of the repairing covenants and for breach of the covenant to restore the premises to their former condition. The action was referred to an official referee and was heard by His Honour J. G. TRAPNELL, K.C. The principal matter in dispute, at any rate so far as this appeal is concerned, is as to the true measure of damages which the landlord can recover for the failure of the tenants and assignees to restore the premises to their original condition. The learned referee, apparently applying the rule which prevails, or did prevail before the Landlord and Tenant Act, 1927, as to the measure of damages recoverable for breach of a repairing covenant, has awarded the landlord a sum of money, some £4,300, which he estimates is the probable cost of doing the work of restoration. It is quite obvious from his judgment, and, indeed, it could not seriously be disputed considering that the government department is still in occupation of the premises, that, in his opinion, the landlord will not herself restore these premises and there is not the slightest likelihood of the shop front ever being replaced. In other words, it will simply enable the landlord to put this sum of money in her pocket, but he came to the conclusion that there were no provisions in the Landlord and Tenant Act, 1927, applying to this case, and that, therefore, the landlord was entitled to recover the damages at common law. If she is, no doubt it is no concern of the court what she will do with the money when she gets it, and the first question we have to consider is whether the measure of damages is the cost of doing the work, assuming it can be done.

Counsel for the tenant and assignees did not argue that the fact that a government department were in occupation at the present time would afford any defence, considering, no doubt rightly, that he was precluded from setting up that contention by the decision of the House of Lords in *Matthey* v. *Curling* (1). Although the matter is not quite clear, we think the learned referee has fixed the sum as the price at which the work could be done today with some deduction because of the fact that the work cannot in any case be carried out for a very considerable time.

Now, we think the case has to be considered without regard to the fact that a Ministry is at present in possession of the premises. If we eliminate that fact the position would be, so far as the shop front is concerned, that the landlord would receive back her premises from the tenant and assignees with a new and modern shop front. Although evidence was, no doubt, given that some persons might prefer the old shop front as it was, no evidence was given either by or on behalf of the landlord that she had any reason whatever for desiring an alteration of the present shop front or that restoration of the old one would make the premises more suitable for any particular purpose or business which she might wish to carry on there or that the premises were in any way adversely affected or made less valuable by reason of the alteration to the shop front. True there was some evidence that there had been a reduction in the rateable value, but it cannot be taken that this was due to the alterations which had been carried out. What, then, is the measure of damages applicable to the breach of a covenant to restore on request when the only evidence is that there has been no compliance with that request ? In our opinion, the general rule as to damages for breach of contract ought to be applied, namely, to ascertain what the damage actually suffered amounts to. A covenant is only a special form of contract and the same rules apply to a breach of covenant as apply to a breach of a simple contract so far as damages are concerned.

To apply to this case the rule as to the measure of damages for a breach of contract to deliver up a house in repair is, in our opinion, wrong, for there is no true analogy between the two cases. If a tenant fails to deliver up a house in repair, the landlord must suffer some damage at least so long as the house remains in existence. Instead of getting a house in a perfect state of repair he gets one which is dilapidated. It is true that he may be able to let the dilapidated house for the same or even a higher rent than he was hitherto getting, but that may be due to market conditions and more especially to the demand for a certain class of premises. A dilapidated house must be worth less than a house in a proper state of repair. Presumably, if the house is sold in good repair, it would fetch more than a house which is out of repair. If a house can be let in good repair, it would ordinarily fetch a higher rent than one that is out of repair. Damage is, therefore, suffered. The measure of damages to be applied was laid down in *Joyner* v. *Weeks* (2). In that case the Divisional Court had applied the same rule as is applicable to a case where the lessee has failed to keep the house in repair during the term and ordered the damages to be assessed according to the injury done to the reversion. The Court of Appeal held that in these cases there was a well-defined rule which had become a rule of law that, on a failure to deliver up a house in good repair, the damage was the cost of the work necessary to put it into repair. LORD ESHER, M.R., in giving the judgment referred ([1891] 2 Q.B. 43) to the large number of cases in which this rule had been adopted, and said that such an inveterate practice amounted to a rule of law. He said it was a highly convenient rule, avoiding all the subtle refinements with which the court had been indulged and the extensive and costly inquiries which they would involve. It was a simple and business-like rule, and he was very much inclined to think it was an absolute rule. But, as we have already said, that case must be regarded as proceeding on the footing that the landlord must have suffered damage by the tenant yielding up the house out of repair. We see no ground here for assuming that the landlord in the present case has suffered any damage at all. She has got back a shop, or would have done so if the premises had not been requisitioned, provided with a modern and convenient front, and there was no suggestion that the work had not been carried out properly. We do not for one moment suggest that it might not be possible for a landlord, in circumstances such as these to give evidence that she or her superior landlords at the end of the term desired to carry on or to let the premises for the purpose of carrying on a business for which the altered shop front would be inappropriate and the old one suitable. In that case she might well say that it is of value to her to have her shop back in its former condition and she would suffer damage if the tenant's or assignees' covenant to restore was not carried out, but if it is a mere matter of getting back a shop which has been altered and there is no suggestion that any damage whatever has been caused to the landlord thereby, it appears to us she has suffered no damage by reason of the tenant's or assignees' failure to comply with her requirements to reinstate. The official referee evidently thought that not only did the landlord not intend to do this work, but it would be a sheer waste of money if the work were done, and, as no evidence was given that the landlord has suffered any damage in fact, the court is not entitled, in our opinion, to come to the conclusion that she must have suffered damage by reason of the tenant or assignees not complying with her requirements. In our opinion, therefore, she cannot be entitled to any more than nominal damages, which we should assess at twenty shillings, by reason of the alleged breach of covenant.

The learned official referee thought that there was no provision in the Landlord and Tenant Act, 1927, applicable to this case. On the view that we take of the common law rights of the parties, it is really unnecessary to consider the provisions of that Act, though we confess we have some difficulty in seeing why the provisions of s. 19 (2) do not apply to this case. By that section a covenant against making the alteration, for we think the word " improvement " in the section means an improvement from the tenant's point of view, is to be subject to a proviso that consent is not to be unreasonably withheld, and, in fact, it was given. The section enacts that the proviso to this effect does not preclude the right of the landlord to require, as a condition of his consent in the case of an improvement which does not add to the letting value of the holding, a reasonable requirement that the tenant should reinstate the premises into the condition they were before the improvement was executed. It is true there was no evidence here whether the improvement did or did not add to the letting value of the holding. If it did, the section would prevent the landlord requiring the tenant to reinstate and, in any case, such a requirement would have to be reasonable. For our part, we cannot see that in this case it would be a reasonable requirement. At any rate, there was no evidence to show that it was reasonable. The most that was said was that some people might prefer the old front to the new, but it is, perhaps, unnecessary to give a final decision on the application of s. 19 (2) for the reasons which we have already stated.

The appeal, in our opinion, succeeds and the tenant and assignees should have the costs.

Appeal allowed with costs.

Solicitors : *Freke Palmer, Romain & Romain* (for the landlord) ; *Tudor & Rowe* (for the tenant and assignees).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

JOHNSON *v.* JOHNSON.

[COURT OF APPEAL (Bucknill, Asquith and Denning, L.JJ.), June 30, 1949.]

Variation of Settlement—Application to vary made out of time—Consideration of facts as known at date of hearing of application—Separation deed—Covenant by husband to pay wife weekly sum during her life—Marriage dissolved—Re-marriage of both parties—Insertion in deed of dum sola clause—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 192.

The parties were married on Apr. 20, 1935. On May 14, 1943, they entered into a separation deed under which the husband covenanted to pay his wife for her support and maintenance the sum of £1 10*s.* a week during her life. In 1946 the wife obtained a decree absolute of divorce on the ground of her husband's adultery, and subsequently both she and the husband re-married, there being a child by each of these second marriages. In 1949 the husband obtained leave to apply for variation of the deed under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, notwithstanding the expiry of more than two months after decree absolute, the time limited for such an application by the Matrimonial Causes Rules, 1947, r. 44. ORMEROD, J., varied the deed by inserting in it a *dum sola* clause so as to disentitle the wife to the payments while she was married. On appeal,

HELD : the court was bound to consider the application in the light of the facts as they were known at the date when it was heard ; the fact that both parties had re-married must, therefore, be taken into account; and in those circumstances there was no reason to interfere with the judge's exercise of his discretion.

[AS TO VARIATION OF SETTLEMENTS AFTER DISSOLUTION OF MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800-809, paras. 1274-1292; and FOR CASES, see DIGEST, Vol. 27, pp. 517-533, Nos. *5576-5778*.]

Case referred to:

(1) *Tomkins* v. *Tomkins*, [1948] 1 All E.R. 237; [1948] P. 170; [1948] L.J.R. 1028.

APPEAL by the wife from an order of ORMEROD, J., dated Mar. 28, 1949, whereby he varied a deed of separation providing for weekly payments by the husband to the wife during her life by inserting a *dum sola* clause.

The wife, having obtained a decree of divorce from the husband, had re-married. Three years later the husband obtained leave to apply out of time to vary the deed. The wife contended that the application should be dealt with as if the husband had applied within two months of the decree absolute, the time prescribed for such an application by the Matrimonial Causes Rules, 1947, r. 44, and that regard should not be had to what had happened subsequently. The Court of Appeal overruled this contention and dismissed the appeal.

W. Phillips for the wife.

P. A. Harmsworth for the husband.

BUCKNILL, L.J.: I will ask **DENNING, L.J.**, to give the first judgment.

DENNING, L.J.: The parties were married on Apr. 20, 1935. On May 14, 1943, a separation deed was made between them which recited that against the wishes of the wife the husband had ceased to live with her and that he had agreed to make provision for her maintenance. The provision was that the husband would pay to the wife for her support and maintenance during her life £1 10*s.* 0*d.* per week. Later, the husband served in the army and the wife received her allowance from the military authorities. In due course she obtained a divorce on the ground of her husband's adultery, the decree being made absolute on Feb. 25, 1946. Thereafter the husband did not make any payments under the separation deed, and he did not apply to vary the deed within the two months after decree absolute as prescribed by the rules. In June, 1946, the wife re-married and had a child. Later, the husband also re-married and he had a child by this second marriage. So both the parties have now set up new establishments. In 1948 the wife brought an action in the King's Bench Division claiming arrears of maintenance under the deed from the time of the divorce in February, 1946, down to the time when she sued. The master gave judgment for the arrears up to the time of the wife's re-marriage in June, 1946, but stood over the claim for maintenance from that date onwards pending an application in the Divorce Division for variation of the separation deed. The husband then applied in the Divorce Division for leave to apply out of time to vary the deed. He was given leave and then made his substantive application. It has been heard by the registrar and the judge. Both have held that the wife's maintenance should cease as from the date of her re-marriage. She now appeals to this court, claiming that the deed should not be varied and that she should still be paid the maintenance due under it.

It is plain that this separation deed was a post-nuptial settlement which the court has power to vary under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. Settlements of this kind are always subject to variation by order of the court in the event of the marriage being dissolved: see *Tomkins* v. *Tomkins* (1). When this separation deed was made in 1943 the parties probably never applied their minds to what should happen in the case of a divorce. All they had in mind was that the £1 10*s.* 0*d.* a week should be paid during the separation, but the deed says that the maintenance is to be paid to the wife " during her life." As a matter of literal construction, therefore, it applies even after the parties are divorced. This is where the remedial powers of the Divorce Court come into play. The divorce alters the position fundamentally and the court is enabled to vary the deed so as to do what is just between the parties. Counsel argued, on behalf of the wife, that she ought to have the £1 10*s.* 0*d.* maintenance notwithstanding her re-marriage and the husband's re-marriage. The first point he made was that this ought to be dealt with as if the husband had applied within two months of the decree absolute, at which time neither the wife nor the husband had re-married, and that the court ought to shut their eyes to what happened subsequently. In my opinion, that argument will not bear examination for one moment. When the court gives leave for an application to be made after the two months, the application must be considered on its merits in the circumstances which exist when it comes on for hearing. The powers of the court under s. 192 of the Act of 1925 are unrestricted by any procedural rules about time. To take a parallel, when a court assesses damages long after an accident, it has regard to the facts that have happened between the date of the writ and the date of the assessment. The contingencies which have become actualities are to be taken into account as actualities. So, here, whenever a court comes to deal with an application under s. 192, it deals with it on the facts as known at the time when the application is heard, and not on hypothetical contingencies as they existed within two months of the decree absolute. Approaching the matter in that way, the facts here are that the husband has re-married, he has a wife and a child, and he has given full details of his income in an affidavit. The wife has re-married and has a child, but she has not put before the court any details of her income, and it is a reasonable inference that she is supported by her second husband.

Counsel for the wife says that she is the innocent party and, as such, has a special claim for consideration. I agree that the innocence of a party is certainly a matter for consideration, but so are many other matters. The most material factor in this case is that the wife has re-married and has a husband to support her. As LORD GREENE, M.R., pointed out in *Tomkins* v. *Tomkins* (1) ([1948] 1 All E.R. 241), it is a relevant consideration that, if the settlement is allowed to stand as it is, the money paid under it will or may go into the ordinary household expenses of the new establishment. So in this case the money might well go to help the new husband in the new establishment. It was for this reason that the registrar thought that the deed should be varied by striking out the provision for the payment of the £1 10*s.* 0*d.* a week. The judge varied it by inserting a *dum sola* clause, which means that the £1 10*s.* 0*d.* is to be paid to the wife while she is unmarried, but not to be paid to her when she has re-married and has a new husband to support her. It seems to me that there is ample ground for the judge exercising his discretion in the way he did, and there is no ground for saying that he has erred in point of principle, or taken into account matters which he ought not to have taken into account, or omitted matters which he ought to have considered. For these reasons, I am of opinion that the appeal should be dismissed.

BUCKNILL, L.J.: I agree.

ASQUITH, L.J.: I also agree.

Appeal dismissed; no order as to costs.

Solicitors: *Vivash Robinson & Co.* (for the wife); *W. B. Blackwell & Co.* (for the husband).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Re VERE-WARDALE (*deceased*), VERE-WARDALE *v.* JOHNSON AND OTHERS.

[Probate, Divorce and Admiralty Division (Willmer, J.), June 29, 1949.]

Will—Attestation—Evidence—Adverse evidence of attesting witnesses—Admissibility of further evidence—Wills Act, 1837 (*c.* 26), *s.* 9.

In a probate action the two attesting witnesses gave evidence that they had subscribed their names to the will before the testator appended her signature, in which case the will would not be validly attested. The propounders of the will tendered evidence to show that the evidence given by the attesting witnesses was erroneous, but the plaintiff contended that the evidence of the attesting witnesses was conclusive.

Held : the object of the legislature in imposing the strict formalities required by the Wills Act, 1837, s. 9, was the prevention of fraud, and the duty of the court was to see that no fraud was perpetrated ; the exclusion of further evidence could only increase the possibility of the perpetration of fraud ; and, therefore, it was competent for the propounders of the will to call further evidence.

Dicta of Lord Penzance in *Wright* v. *Rogers* (1869) (L.R. 1 P. & D. 682), *applied.*

[As to Presumption and Proof of Due Execution of Will, see HALSBURY, Hailsham Edn., Vol. 34, pp. 65, 66, paras. 83, 84 ; and for Cases, see DIGEST, Vol. 44, pp. 280-285, Nos. *1122-1171.*]

Cases referred to :

(1) *Young* v. *Richards,* (1839), 2 Curt. 371.

(2) *Burgoyne* v. *Showler,* (1844), 1 Rob. Eccl. 5 ; 3 Notes of Cases, 201 ; 44 Digest 280, *1124.*

(3) *Wright* v. *Rogers,* (1869), L.R. 1 P. & D. 678 ; 38 L.J.P. & M. 67 ; 21 L.T. 156 ; 33 J.P. 711 ; 44 Digest 284, *1170.*

Probate Action.

Evidence adverse to the due execution of the will having been given by the attesting witnesses, the question was whether it was competent for the court to receive evidence to rebut that of the attesting witnesses. Willmer, J., ruled that it was. The case is only reported on this point.

Fairweather for the plaintiff.

Winn for the defendants (propounders of the will).

WILLMER, J. : I am asked to rule that, having heard the evidence of the two attesting witnesses to this will, it is not competent for me to receive the evidence of any other witnesses with regard to the attestation of the will. The two attesting witnesses have both said that they subscribed their names to the will before the testator appended her signature. If that was the true state of facts, it is clear that this will was not attested in accordance with the provisions of the Wills Act, 1837, s. 9, and it is not competent for me to admit it to probate. Counsel for the propounders of the will, however, has indicated to me that other evidence is available to show that the attesting witnesses are in error in saying what they have said in their evidence. The question is whether it is competent for me to receive that evidence. It is submitted by counsel for the plaintiff that the evidence given by the attesting witnesses is conclusive. He bases his submission largely on the fact that no presumption arises in this case because of the peculiar wording of the attestation clause, which is :

> " Signed by the said Nellie May Vere-Wardale in our joint presence and by us in her presence and the presence of each other."

There is not a wealth of authority on the subject. I have been referred to Mortimer on Probate Law and Practice, 2nd ed., p. 127, and have had the opportunity of considering *Young* v. *Richards* (1) and *Burgoyne* v. *Showler* (2), the two cases there cited, but I think it is clear that neither of those cases goes quite so far as the proposition stated in MORTIMER, which is as follows :

> "Even if the witnesses profess to remember the transaction and state that the will was not duly executed (that the testator did not make or acknowledge his signature in their joint presence, or so forth), this negative evidence may not only be rebutted by the evidence of other witnesses, but the court may in this case also, from a consideration of all the circumstances of the case, and of the facts and circumstances which the attesting witnesses themselves state, come to the conclusion either that they are not to be credited or that their recollection fails them ; and so the will may be admitted to probate in spite of their testimony."

On the other hand, I am bound to regard MORTIMER ON PROBATE LAW AND PRACTICE as a very authoritative contribution to the law of England. I was also referred to the judgment of LORD PENZANCE (L.R. 1 P. & D. 682) in *Wright* v. *Rogers* (3), where he seemed to make it clear, first, that the presumption of law in favour of due execution exists, notwithstanding the wording of the attestation clause. LORD PENZANCE then said (as I understand his words) that the presumption was enormously strengthened if there was a perfect attestation clause, and he continued (*ibid.*) :

> "Where both the witnesses, however, swear that the will was not duly executed, and there is no evidence the other way, there is no footing for the court to affirm that the will was duly executed."

The important words, to my mind, in that context are "and there is no evidence the other way." If it were not competent to call other evidence in addition to that of the attesting witnesses, those words would have been otiose, and I cannot imagine LORD PENZANCE including them in his judgment unless his view was that it was competent on this question to call witnesses to contradict the attesting witnesses. It seems to me that, although *Wright* v. *Rogers* (3) is not cited in support of the proposition in MORTIMER ON PROBATE LAW AND PRACTICE, 2nd ed., p. 127, which I have read, it certainly lends some support to the broad proposition there stated.

A word about the attestation clause. I have always understood that no particular form of words is required for the attestation clause—indeed, the Wills Act, 1837, s. 9, says so. Counsel for the plaintiff has attacked the attestation clause in this case which, he claims, is in an unusual form. It appears, however, to be similar to that which is used in some of the cases to which I have been referred and in accordance with the common precedent in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 14th ed., vol. 2, p. 953. I do not think that I can draw any inference from the peculiar wording of the attestation clause.

It appears to me that the object of the legislature in imposing the strict formalities required by the Wills Act, 1837, s. 9, was the prevention of fraud, and, therefore, that my duty here is to do all that I can to see that no fraud is perpetrated, and, if I am to exclude further evidence, it seems to me that such a ruling can only increase the possibility of the perpetration of fraud. In all the circumstances it appears to me that it would be wrong and not in accordance with authority to exclude such further evidence with regard to the attestation of this will as may be available. I, therefore, decline to rule that it is not competent for the propounders of this will to adduce further evidence, and they are at liberty to do so.

Ruling accordingly.

Solicitors : *Daybell & Lynde* (for the plaintiff) ; *Rawlinson & Son* (for the defendants).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

DUDLEY AND DISTRICT BENEFIT BUILDING SOCIETY *v.* EMERSON AND ANOTHER.

[Court of Appeal (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ.), June 28, 29, 1949.]

Rent Restriction—Tenant—Dwelling-house subject to mortgage—Lease by mortgagor—Mortgagor's statutory power of leasing excluded—Default in payment of instalments due under mortgage—Position of tenant—" Landlord "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), *s.* 12 (1) (*g*)—*Law of Property Act,* 1925 (*c.* 20), *s.* 99 (1)—*Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (*c.* 32), *s.* 3 (1), *sched. I.*

Mortgage—Remedies of mortgagee—Possession—House subject to Rent Restrictions Acts—Unauthorised lease of mortgaged property—Default in payment of instalments due under mortgage—Position of tenant—Increase of Rent and Mortgage Interest (*Restrictions*) *Act,* 1920 (c. 17), *s.* 12 (1) (*g*)—*Law of Property Act,* 1925 (c. 20), *s.* 99 (1)—*Rent and Mortgage Interest Restrictions* (*Amendment*) *Act,* 1933 (*c.* 32), *s.* 3 (1), *sched. I.*

By a mortgage, dated Dec. 5, 1946, the mortgagor charged a dwelling-house, the rateable value of which fell within the monetary limits prescribed by the Rent Restrictions Acts, with the payment by weekly instalments of the sum secured and interest thereon. The mortgage contained *inter alia* a clause expressly excluding the mortgagor's power of leasing under the Law of Property Act, 1925, s. 99 (1), and the mortagees were empowered to enter into possession of the property on default of payment of a certain number of weekly instalments. In January, 1947, F.G. occupied the house under a tenancy agreement with the mortgagor. The weekly instalments due under the mortgage having fallen into arrears, the mortgagees claimed possession of the property, but the claim was resisted by F.G. on the ground that he was the lawful tenant of the house and entitled to the protection of the Rent Restrictions Acts.

Held : (i) the protection against eviction conferred on a tenant by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), read with sched. I to the Act, applied only against a landlord or a person who could be described as in the position of a landlord, and the definition of " landlord " in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*g*), was not in itself sufficient to enable a mortgagee to be described as a " landlord " for the purpose of the Rent Restrictions Acts.

(ii) as the mortgagor's power of leasing under the Law of Property Act, 1925, s. 99 (1), was expressly excluded by the terms of the mortgage deed of Dec. 5, 1946, and the mortgagees had never accepted F.G.'s tenancy as binding on them, there was no contractual relationship between F.G. and the mortgagees, either imported by the Rent Restrictions Acts or otherwise, and, therefore, notwithstanding that the tenancy was lawful, and binding as between F.G. and the mortgagor, F.G. could not claim the protection of s. 3 (1) of the Act of 1933 against the mortgagees, who were asserting their paramount title, and the mortgagees were entitled to possession of the property.

Dictum of the Earl of Selborne, L.C., in *Corbett* v. *Plowden,* (1884) (25 Ch.D. 681), *applied.*

Dictum of Farwell, J., in *Iron Trades Employers Insurance Assocn., Ltd.* v. *Union Land and House Investors, Ltd.* ([1937] 1 All E.R. 484), *approved.*

Decision of Vaisey, J., ([1949] 1 All E.R. 691), *reversed.*

[As to the Leasing Powers of Mortgagors, see HALSBURY, Hailsham

Edn., Vol. 23, pp. 330-333, paras. 494-496; and FOR CASES, see DIGEST, Vol. 35, pp. 334-337, Nos. 768-793.]

Cases referred to :

(1) *Alliance Building Society* v. *Varma*, [1949] 2 All E.R. 261.

(2) *Iron Trades Employers Insurance Assocn., Ltd.* v. *Union Land & House Investors, Ltd.*, [1937] 1 All E.R. 481; [1937] Ch. 313 ; 106 L.J.Ch.
A 206 ; 156 L.T. 322 ; Digest Supp.

(3) *Corbett* v. *Plowden*, (1884), 25 Ch.D. 678 ; 54 L.J.Ch. 109 ; 50 L.T. 740 ; 35 Digest 337, *790*.

(4) *Martin* v. *Watson & Egan*, [1919] 2 I.R. 332 ; 35 Digest 697 *q*.

APPEAL by the mortgagees from a decision of VAISEY, J., dated Mar. 8, 1949, and reported [1949] 1 All E.R. 691, dismissing a summons taken out by the
B mortgagees, under R.S.C., Ord. 55, r. 5A, asking for delivery of possession of the property, a dwelling-house, subject to the mortgage.

The mortgagor, the first defendant, in the action, did not enter an appearance, but the second defendant, who was in occupation of the house under a tenancy agreement granted to him by the mortgagor, claimed the protection of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1).
C VAISEY, J., held that, although the lease granted by the mortgagor to the second defendant was not, on the facts of the case, binding on the mortgagees, the second defendant's tenancy was lawful and he was entitled to the protection of the Rent Restrictions Acts. The Court of Appeal now held that the protection against eviction given by s. 3 (1) of the Act of 1933 applied only where possession was claimed by the landlord or a person in the position of a landlord and, as the
D lease granted to the second defendant was not binding on the mortgagees, the second defendant could not assert his rights under s. 3 (1) against the mortgagees claiming by paramount title, and they allowed the appeal. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

Milner Holland, K.C., Stephen Murray, J. W. Mills and *L. A. Blundell* for
E the mortgagees.

Heathcote-Williams, K.C., and *E. Dennis Smith* for the second defendant.

SIR RAYMOND EVERSHED, M.R. : Although the case now before us does not involve the same point as *Alliance Building Society* v. *Varma* (1), it also is an action started by originating summons under R.S.C., Ord. 55, r. 5A, by mortgagees against two persons, the mortgagor and an individual
F in possession. There is this difference between the present case and the *Alliance* case (1)—that the man in possession, Fred Goodlad, does derive title from the mortgagor in the sense that his interest, which he claims to be that of a tenant, was created later than the mortgage, and he is, therefore, a person who could, as is conceded, exercise the right in the mortgagor to redeem the mortgage.

The matter is by no means free from serious difficulty, and it is surprising
G that there has been no similar case before the court since the rent restriction legislation first operated. The point, put in its briefest form, is this : Can a person in occupation of premises within the monetary limits prescribed by the Rent Restrictions Acts by virtue of a contract of tenancy between himself and a mortgagor claim the protection of those Acts against a mortgagee claiming to assert his rights as mortgagee, where, by the terms of the mortgage, the Law
H of Property Act, 1925, s. 99 (1), has been expressly excluded ? The learned judge, VAISEY, J., came to the conclusion that such a tenant could claim protection, and it is with natural diffidence that I find I have reached a different conclusion. I will try to state the reasons for my differing from the learned judge, but it may be that this is a case in which there is a *lacuna* in the legislation. Whether Parliament did or did not intend to protect the tenants of mortgagors against eviction by title paramount is a matter on which I can express no opinion, but, if the view which I am about to express is right, Parlia-

ment, if it intended to protect such a tenant, has not been successful in achieving its intention.

The property is at Walsall, and the mortgage was made in December, 1946. The mortgagor does not seem to have been very satisfactory, for when the proceedings were started in November, 1948, no less than 91 weekly instalments were in arrear. The amount of each of those weekly instalments was £1 14*s.*, and it may be some reason for their being in arrear that in January, 1947, the mortgagor had granted a tenancy to Fred Goodlad, the second defendant, at a rent of only 16*s.* 6*d.* per week. The mortgage is a building society mortgage in the usual form providing for repayment by instalments. It is provided, and this is a matter on which counsel for the second defendant relied, that the mortgagees may do a number of things, as *e.g.*, entering into possession or receipt of the rents and profits, but subject to a proviso. The proviso (to cl. 4) is :

> " . . . that the society shall not exercise the powers of entering into possession letting or selling hereinbefore contained unless and until the mortgagor shall have made default for three lunar months in payment of some such instalment . . ."

There is no question whatever that the three lunar months' period had elapsed, but the purpose for which counsel for the second defendant relies on the proviso will appear later. Clause 7 of the deed provides that the Law of Property Act, 1925, s. 99 (1), shall not apply. It is, first, necessary to state the effect of excluding that sub-section, the terms of which are familiar. They are :

> " A mortgagor of land while in possession shall, as against every incumbrancer, have power to make from time to time any such lease of the mortgaged land, or any part thereof, as is by this section authorised."

Various conditions, to which I need not refer, are imposed on the mortgagor's right to grant leases which will be effective and binding on persons entitled as mortgagees or through the mortgagees. Section 99 (13) provides that the mortgage deed may by express terms exclude the privilege which s. 99 (1) otherwise confers on the mortgagor, and, as I have stated, that privilege was excluded in this case.

What, therefore, is the effect, first, in general, and, secondly—and this is the main point—for the purposes of the Rent Restrictions Acts, of a demise of the mortgaged property made by a mortgagor who, according to the terms of the mortgage, has no power to make a lease which will bind the mortgagee ? One of the cases cited before us, and referred to in the judgment of VAISEY, J., is *Iron Trades Employers Insurance Assocn., Ltd.* v. *Union Land and House Investors, Ltd.* (2), a decision of FARWELL, J. That was a different case from the present in that the statutory power to grant leases was not excluded, but there was a covenant by the mortgagor that it would not be exercised save on a condition. In effect, as the learned judge held, the parties had added to the statutory conditions of s. 99 of the Act of 1925 a fresh contractual condition In considering the case before him, FARWELL, J., used, among others, the following phrase in a part of his judgment devoted to a somewhat similar point to that which I am now considering, *viz.*, the effect of demises by mortgagors who are restricted in their powers to grant leases. The learned judge said ([1937] 1 All E.R. 484):

> " Any lease he might attempt to grant to some third party would be in no way binding on the mortgagee, and as between the lessee and the mortgagee would create no estate or interest other than that which I will mention in a moment."

The interest which was mentioned later was the right which the lessee had as a person interested in the equity of redemption to redeem the mortgage.

Counsel for the second defendant was disposed to criticise somewhat the broad language I have cited, and he referred us to a number of other cases designed to show that, apart from the statutory power under s. 99 of the Act of 1925, a mortgagor has the power to create a lawful right to possession on the part of the tenant or to create in the tenant some title or interest which (as counsel for the second defendant put it) will be effective until, or unless, it is destroyed by the mortgagee. In other words, it is said that the mortgagor can create a defeasible interest by demise. Without disrespect to the argument of counsel for the second defendant I shall not refer to all the cases which were cited. I am content to take the language of the EARL OF SELBORNE, L.C., in *Corbett* v. *Plowden* (3), where he said (25 Ch.D. 681):

> "If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by an agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them."

I am content, for the purpose of the question which we have to consider, to take as the correct relevant statement the passage from LORD SELBORNE'S judgment which I have just read, and to assume, therefore, to borrow his language, that the second defendant, the tenant in this case, has a precarious title, good as between himself and the mortgagor, but liable to be defeated on the assertion by the mortgagees of their paramount title. Until that happens, the second defendant can remain lawfully in possession. It is plain that in the present proceedings the mortgagees are asserting their paramount title. Their argument is that there is here no contract which affects them in any way, they are not parties to the tenancy, and the power which the Law of Property Act, 1925, s. 99 (1), would have given to the mortgagor to make a contract binding on them has been expressly and properly excluded. Put in another way, say the mortgagees, the mortgagor here had not such an estate in himself that he could confer on the second defendant, his tenant, an interest or estate in the land which is effective against our paramount title. Therefore, we are wholly unaffected by this transaction of demise, and *prima facie*, therefore, we are entitled, asserting our title paramount, to evict the second defendant and claim possession.

Apart from the Rent Restrictions Acts, there could be no defence to that argument. It is said, however, that the Rent Restrictions Acts are designed to protect from eviction occupants of premises within the ambit of those Acts, and that the effect of the Acts is to compel the court to hold that, although the Law of Property Act, 1925, s. 99 (1), has been expressly excluded, this lease binds the mortgagees. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), provides:

> "This Act shall apply to a house . . . let as a separate dwelling . . ."

It is said that this house was let by the mortgagor to the second defendant as a separate dwelling. There was nothing unlawful in the letting, nor was it entirely nugatory, because, on the basis of the language in *Corbett* v. *Plowden* (3), it did operate to confer on the second defendant such a right as LORD SELBORNE describes. But that is not the end of the matter. In considering to what class of cases the Rent Restrictions Acts are intended to apply, for what purposes, and between what persons, it is, I think, useful next to look at the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), for, if the second defendant is entitled to succeed, it must be by virtue of reliance on that sub-section. Section 3 (1) provides:

> "No order or judgment for the recovery of possession of any dwelling-

> house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless . . ."

Then reference is made to the various circumstances in which the court can make an order. Counsel for the second defendant points out that there is no reference in that sub-section, or in the main body of the Act, to the landlord, or to any particular person as the person claiming the order. It is, he says, quite general in its terms. But when the terms of sched. I to the Act of 1933 A are examined, I think it is plain that what s. 3 (1) and sched. I, which is read into it, must be taken to contemplate is a proceeding for possession against the tenant by someone who may be fairly described—and I deliberately use that phrase for the moment—as a landlord. In other words, it appears to me that the general conception—which I, of course, entirely accept—that the Acts are designed to protect occupants of dwelling-houses within the Acts against B eviction must be qualified to the extent that the protection afforded is against eviction at the suit of persons who may fairly and properly be described as landlords of the occupants. I will not go in detail through the terms of sched. I to the Act of 1933, but they contain several references to the "landlord" and the "tenant." To take one example, they include (in para. (*a*)), breach by the tenant of obligations due under a contract of tenancy, or its C equivalent, and failure to pay any rent due. It seems to me, therefore, that, looking at s. 3 (1) and sched. I to the Act of 1933, and reading them with s. 12 (2) of the Act of 1920, s. 3 (1) of the Act of 1933 contemplates that the person against whom the occupant is to be protected is someone who can be described as his landlord. Pausing for a moment at that stage, and turning to the facts of this case, it will at once be seen that the description cannot be fairly, as I D think, applied to the mortgagees in their claim against the second defendant. The mortgagees are not his landlords, and never have been. The evidence makes it, I think, tolerably clear that the mortgagees have never accepted the second defendant's tenancy as one which binds them, and it is clear that there is no contractual relationship between the second defendant and the mortgagees, either imported by the Rent Restrictions Acts or otherwise. E

Counsel for the second defendant, however, very properly draws attention to the definition of "landlord" in the definition section, s. 12 (1) of the Act of 1920. In s. 12 (1) (*f*) it is stated :

> "The expression 'landlord' . . . include[s] any person from time to time deriving title under the original landlord . . ."

F

Section 12 (1) (*g*) states :

> "The expression 'landlord' also includes in relation to any dwelling-house any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house . . ."

Counsel for the second defendant says that those are wide terms, and the mortgagees should be regarded as being within the ambit of the definition, since G they are, in truth, persons "who are or would but for this Act be entitled to possession of the dwelling-house." It seems to me, however, that some limitation must be put on the scope of those words. To take the most extreme case, they could not be applied where the occupant was a squatter having no right or title, or alleging that he was the tenant of someone else who equally had no right or title. The argument is, indeed, a circular one, for, if the claimant H to possession of property is to be regarded as a "landlord" for the purposes of the Rent Restrictions Acts, then it must first have been decided that the occupant is protected by the Acts. When the definition in s. 12 (1) (*g*) of the Act of 1920 is read together with s. 3 (1) of the Act of 1933, and sched. I to that Act, it is obvious that the gravest difficulties are going to be encountered if so wide a meaning is to be given to this phrase as counsel for the second defendant suggests. Without attempting any precise statement or definition of what is itself a definition I think that the explanation may be found in this. Section 12 (1) (*g*) extends the definition of "landlord" to persons deriving title under a landlord. In certain circumstances, to which I must presently refer, a sub-tenant is entitled to the protection of the Acts. Where a head lessor is suing for possession against a tenant, the Act of 1920 makes provision, by s. 5 (5) [as amended by the Rent and Mortgage Interest Restrictions Act, 1923, s. 4], and s. 15 (3), for preserving the sub-tenant's right to possession as against the landlord, and the sub-tenant becomes, or may become, the statutory tenant of the head landlord. In such a case as that, in construing the various provisions of the Acts, the landlord, *quoad* the sub-tenant, is a person not deriving title under that sub-tenant's landlord, but is a person whose title is superior to that sub-tenant's landlord. Furthermore, in certain circumstances (when, for example, an effective notice to quit has been given) the contractual tenancy between A and B may come to an end, and there then is created what is known as a statutory tenancy, B remaining in possession as a "statutory tenant" of A. It has been said in these courts that a statutory tenancy, as the phrase is commonly used, is a somewhat inapposite expression, for it confers on the so-called statutory tenant no estate or interest in the land. He cannot part with it or dispose of it, and in certain circumstances the right to possession, which is its principal feature, may pass to persons who would be quite different from the persons who would get the benefit of a contractual tenancy when a tenant dies. It would appear, therefore, more than possible that this addition by s. 12 (1) (*g*) to the definition of "landlord" was put in (and, I think, something would have had to be put in) to make the word "landlord," where a statutory tenancy has been created, apply in the relationship being then dealt with by the Acts between the person who would be entitled to possession apart from the Acts and the statutory tenant. I, therefore, have come to the conclusion that this definition is not sufficient to give to the mortgagees in this case the right to describe themselves as the "landlords" for the purposes of these Acts.

I am, therefore, thrown back on the result which I derive from my consideration of s. 12 (2) of the Act of 1920, and s. 3 (1) and sched. I to the Act of 1933. That result is to the effect that the mortgagees, asserting their title paramount, can properly resist the claim of the tenant to protection under s. 3 (1) of the Act of 1933 by denying, as they can deny, any contractual right which binds them, or any estate or interest in the land on the part of the tenant which affects the mortgagees' title. The question has been debated whether the result would be the same if the mortgagor had determined the contractual tenancy, which he, undoubtedly, created between himself and the second defendant, so that, at any rate as between himself and the second defendant, a statutory tenancy had arisen. I prefer for my part to express no view whether the result would be different if the second defendant could say: "My right to remain here is not by virtue of any contract or any estate which I derive from the mortgagor, but is by virtue of the statutory right to possession which, as between me and the mortgagor, the Rent Acts have conferred." Counsel for the second defendant suggested that in that event the mortgagees could not succeed in ousting the second defendant, but I must not be taken to assent to that. As I have said, I find it unnecessary to decide it. It may be that there is an anomaly, but I am certainly not satisfied that, if there had been a statutory tenancy created in the way I have indicated, that would have been necessarily sufficient to defeat the mortgagees' rights.

I have, I hope, covered the main part of the argument, but there is one other matter which I think is instructive, to which I have made some reference, and it is this. In s. 5 (5), as amended, and s. 15 (3) of the Act of 1920 special provision is made to protect a sub-tenant. I think that fact supports the view pressed on us by the mortgagees, for, if it were true to say that the existence of a tenancy lawfully created or of a tenancy created in fact, binds, so to speak, the whole world, then, though, no doubt, some provision might have to be inserted, I do not think that the provisions of s. 5 (5) and s. 15 (3) would have taken the form they have. It seems to me that those sub-sections are directed to providing in clear terms that, although, were it not for their provisions, the title paramount of the superior landlord would prevail, yet Parliament is intending that that title should not prevail, and that the sub-tenant's right to possession should be preserved, and, therefore, the legislation goes on expressly to provide that thereafter there shall be deemed to come into existence a contractual relationship, or the equivalent of a contractual relationship, which is carefully defined, between the sub-tenant and the head landlord. That last matter seems important to me, because, if the second defendant is right, he would have to show that the Acts have the effect of creating a contractual relationship of some kind between the mortgagees, on the one hand, and the second defendant, on the other. Unless it were somehow or other implied, it is clear that no such contractual relationship exists. I think that, if a person having title paramount, as the mortgagees have, was to be treated as a head landlord is to be treated, it would have been necessary to insert a provision creating and defining the relationship. I add, further, that it seems to me that if these Acts had intended so to affect the statutory power to exclude the Law of Property Act, 1925, s. 99 (1), which is given by s. 99 (13), I should have expected to find (in Acts dealing with a subject-matter to some extent of the same kind, *viz.*, the relationship of mortgagors and mortgagees and landlords and tenants), some reference and provision accordingly.

Referring to *Martin* v. *Watson and Egan* (4), an Irish case, the Law Notes book on these Acts, Rent and Mortgage Interest Restrictions, 21st ed., p. 94, states :

> "It has been held in Ireland that the lessee of a mortgagor claims under him and gets the benefit of the Act as against the mortgagee, though the lease be void as against the mortgagee."

Like Vaisey, J., I take the view that *Martin* v. *Watson* (4) does not establish that proposition, or, at least, it does not establish that the protection given to the lessee is a protection against eviction where the mortgagee is entitled to assert, and is asserting, his paramount title. What *Martin* v. *Watson* (4) decided was that (on the facts of that case) the lessee of the mortgagor was protected against having the mortgage called in.

Counsel for the second defendant made this further point, based on the specific provisions of this mortgage, that, by the proviso to cl. 4, which I have read, the mortgagees could not, in any event, assert their title paramount until three lunar months had passed from the default of the mortgagor, and that, so to speak, renders far less precarious the title or interest conferred by the mortgagor on the second defendant. It, no doubt, does, but, assuming that the conditions which enable the mortgagees to assert their right do arise, then it seems to me that the position is in no way made different because the mortgagees could not for a period assert them. It does not mean that, because there is a period when the mortgagees cannot claim possession, they are for all time bound by anything which may be done during that period. I, therefore, venture to think that the special terms of this mortgage do not help counsel for the second defendant on the main point.

For the reasons which I have stated, I have ventured to express a view differing from that of the learned judge. It is plain, I think, that Vaisey, J., found the matter one of difficulty, but the real basis of his conclusion rests, I think, on the answer he gave to the question he put to himself ([1949] 1 All E.R. 694) :

> "I have said that this case, in my judgment, depends on whether at the relevant time the possession of the second defendant was lawful."

He came to the conclusion, and I agree with him, that the possession was lawful in the sense that there was nothing unlawful in the grant by the mortgagor to the second defendant of his tenancy. The mortgagees could not have prevented it and had nothing whatever to do with it, but it was still not binding on them. It was a matter effective only between the parties to the particular contract. Therefore, I have come to the conclusion that it is not sufficient to say that the lease was lawful in the sense that it was not an infringement of some covenant between mortgagees and mortgagor or that it was not otherwise unlawful in the sense that it was contrary to some statutory provision. I agree that it is necessary to determine the character of the tenancy at the time when proceedings are started, and one must, therefore, ask what is the nature of the tenancy at that time. I am bound, I feel, to answer that, though it was a tenancy lawful and effective between the parties to it, it was ineffective in law against someone asserting, as the mortgagees were at that time asserting, a title paramount.

The point is a short one, and we have been much assisted by the careful argument on both sides, but, in the end, it is a matter of construing relatively few provisions of the Rent Restrictions Acts. As I have indicated, I have come to the conclusion that the appeal should succeed and that the mortgagees are entitled to possession, and are not prevented from obtaining it by the operation of s. 3 (1) of the Act of 1933.

SOMERVELL, L.J. : I agree. In construing s. 3 (1) of the Act of 1933, which is the primary protecting section, one must read it with sched. I to the Act to which it refers. In every paragraph of sched. I one finds a reference either to the tenant or to the landlord or to both. One must also, in my opinion, construe this section with all the other sections, and another very relevant section to consider is s. 15 of the Act of 1920. Section 15 (1) provides for what is to happen when a tenant has successfully asserted the right conferred on him by the Act. It is unnecessary to read it, but it provides, as is well known, that substantially the terms of what was previously a contract of tenancy shall govern the rights and obligations as between the parties. It, therefore, seems to me that the primary purpose of the Acts is to enable tenants to assert certain rights and to remain in possession as against landlords who are seeking to obtain possession and would, but for the provisions of the Acts, be entitled to possession. The second defendant said : "I am a tenant. That is why I am here." "But," replied the mortgagees, "the transaction under which you became and claim to be a tenant is not one which binds us." So far as the law is concerned, to which we have been referred—counsel for the second defendant referred to a number of cases—I accept the passages already cited by the MASTER OF THE ROLLS from the judgment of FARWELL, J., in *Iron Trades Employers Insurance Assocn., Ltd.* v. *Union Land and House Investors, Ltd.* (2), and from the statement by the EARL OF SELBORNE, L.C., in *Corbett* v. *Plowden* (3) as sufficient for the purposes of this decision.

The question, therefore, as it seems to me, is whether the second defendant can assert the rights which the Acts confer on a tenant as against mortgagees who are not bound by the contract of tenancy under which the second defendant became tenant, the mortgagees claiming by what is usually called a title paramount. *Prima facie*, it seems to me he is not. It is against landlords or persons who can be described as in the position of landlords that the Acts are giving protection. Of course, there may be provisions in the Acts which displace that *prima facie* scope and ambit. Counsel for the second defendant relies on the definition of "landlord" in s. 12 (1) (*g*) of the Act of 1920. I agree with what the MASTER OF THE ROLLS said, that there must be some limitation on the meaning of those words. I agree that some extension of the definition in s. 12 (1) (*f*) is necessary to meet the situation created by the application of ss. 5 (5) and 15 (3) of the Act of 1920, which confer the benefits of the

Act on sub-tenants. I am not quite sure whether these words would be necessary to bring within the scope of the Act what I may call the statutory landlords, because, when we get to the expansion of the word "tenant," it is not thought necessary to use words which cover expressly a statutory tenant. It may be that the position between what are called statutory landlords and statutory tenants was thought to be sufficiently covered without these words. I also think it is clearly necessary that some words should be inserted having regard to the fact that in the latter part of s. 12 (1) (*g*) the word "tenant" is extended so as to include a widow or other members of the family who may be residing with a tenant who has died. For these reasons, therefore, I cannot accept the definition of "landlord" in s. 12 (1) (*g*) as by itself enabling a tenant to claim the protection of the Acts as against a mortgagee who is in the position of the mortgagees in this case. I think an express clause would be necessary to enable such an extension of the provisions of the Acts to be successfully asserted by someone in the position of the second defendant. I am reinforced in that view by the argument which has been already stated by the Master of the Rolls with regard to ss. 5 (5) and 15 (3) of the Act of 1920 dealing with sub-tenants.

The learned judge thought that the issue here was whether the possession was lawful. I do not think that is the real issue. I think one reason why there is a difficulty in approaching the question in that way is to be found in the provisions of s. 15 (3) of the Act of 1920. If all that it was necessary to do was to show that someone was lawfully in the premises as a tenant, but was the tenant of someone other than the plaintiff suing to recover possession and did not claim title under the plaintiff, then, as it seems to me, the provisions to be found in s. 5 (5) and s. 15 (3) would be unnecessary. I, therefore, come to the conclusion that the second defendant cannot claim the protection which he seeks, and I can see arguments for the non-insertion of the special clause which would have been necessary if people in his position were to be protected. It may be that there are arguments either way, but we are not concerned in this court with the weighing of one against the other.

The only other point on which I would like to add a word relates to the last argument of counsel for the second defendant. It was suggested, and I think probably rightly, that, if the mortgagor in a case like this sought to get possession as against someone to whom he had let the mortgaged property in the circumstances which we are considering, that person, if the property was a dwelling-house separately let, could assert as against the mortgagor the benefits conferred by the Rent and Mortgage Interest Restrictions Acts, and, if he did so successfully, he would become a statutory tenant. It is unnecessary to decide what would be the position if a mortgagee, as against someone who had reached that position, sought to assert the right which the mortgagees are asserting in this case. All I want to say is that at the moment I do not feel that there would be any anomaly in coming to the same conclusion in those circumstances, although counsel for the second defendant submitted that there would be. Therefore, that part of the argument did not affect me in the conclusion to which I have come with regard to the other points. For these reasons, I think that this appeal must be allowed.

JENKINS, L.J. : I also agree. In view of the full reasons given by my brethren with which I agree, I hope it will not be thought disrespectful to the learned judge from whom we are differing if I say that for those reasons I agree that the appeal should be allowed without adding any further reasons of my own.

Appeal allowed with costs.

Solicitors : *Marcy, Russell Cook & Co.*, agents for *Hooper & Fairbairn*, Dudley (for the mortgagee) ; *Miller & Smiths*, agents for *C. L. Hodgkinson & Benton*, Walsall, Staffs. (for the second defendant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

ALLIANCE BUILDING SOCIETY *v.* VARMA AND ANOTHER.

[Court of Appeal (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ.), June 28, 29, 1949.]

Mortgage—Possession of mortgaged property—"Person in . . . possession of the property"—Stranger to mortgage—R.S.C., Ord. 55, *r.* 5A.

R.S.C., Ord. 55, r. 5A, provides: "Any mortgagee . . . may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require; that is to say . . . Delivery of possession . . . to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property."

By a conveyance dated Sept. 28, 1945, the mortgagor acquired property which, by a mortgage of the same date, he charged to the plaintiffs with the payment by instalments of the sum secured. Before Sept. 28, 1945, the mortgagor had been permitted by the vendors to enter into possession of the property and he agreed with the second defendant that she should go into possession of the property as a tenant at will. In 1948, the instalments having fallen into arrears, the plaintiffs took out an originating summons under R.S.C., Ord. 55, r. 5A, against the second defendant claiming possession. Romer, J., held that, the second defendant being a stranger in title to the mortgage, the plaintiffs were not competent to bring proceedings for possession under r. 5A, and that the proper proceeding was by action commenced by writ. On appeal,

Held: the words "or by any other person in, or alleged to be in possession of the property" in R.S.C., Ord. 55, r. 5A, gave the court power to make an order for delivery up of possession to the plaintiffs against the second defendant as being a person in possession of the property, even though she was neither the mortgagor nor a person claiming to derive title under him.

[As to Relief Claimable by Originating Summons instead of by Writ, see HALSBURY, Hailsham Edn., 1948 Supplement; and for Cases, see Second DIGEST Supplement.]

Case referred to:

(1) *Temperance Permanent Benefit Building Society* v. *Nevitt*, [1940] 3 All E.R. 237; 163 L.T. 234; 2nd Digest Supp.

Appeal by mortgagees from an order of Romer, J., dated March 9, 1949, dismissing an originating summons under R.S.C., Ord. 55, r. 5A, by which they sought possession of premises subject to the mortgage.

The mortgagor did not appear to the summons and the learned judge held that an order under the rule could not be made against the second defendant who was occupying the premises as a tenant at will by permission of the mortgagor. The Court of Appeal now held that the remedy was available against the second defendant and allowed the appeal. The facts appear in the judgment of Sir Raymond Evershed, M.R.

Denys Buckley for the mortgagees.

The mortgagor and the second defendant were not represented.

SIR RAYMOND EVERSHED, M.R.: In this case a short question is raised regarding the effect of certain words in R.S.C., Ord. 55, r. 5A. The present proceedings are by way of originating summons expressed to be taken out under this Order and rule, and the parties to the action are the plaintiffs, the Alliance Building Society, and the two defendants, Devanchand Varma and Nadine Nicholaena Legat, a widow. The plaintiffs sue as mortgagees of premises known as Warberry House, Bishopsdown Park, Tunbridge Wells, which is a mansion house and other buildings, including cottages, all of which were subject to a mortgage created in 1945 by the first defendant, the mortgagor, in favour of the plaintiffs. The mortgagor acquired these premises by a contract in August, 1945, which was completed on Sept. 28, 1945, the date of the mortgage. In the meantime, however, by arrangement with the vendors, the mortgagor was given authority to go into possession of the premises. He did not go into occupation himself, but he made an agreement—I am not referring to any written document—with the second defendant whereby she should go into possession as his tenant, the evidence indicating that there was then in contemplation the preparation and execution of a lease from the mortgagor to the second defendant. That lease was never executed, and the second defendant remained in occupation, certainly of the mansion house and possibly of parts of the other premises, as a tenant at will. It will, therefore, be observed that the tenancy originated when the mortgagor had not acquired the property and before the date of the mortgage. Not long after these transactions the mortgagor went to his native country, now known as the Dominion of Pakistan, without paying all the instalments under the mortgage, and in Oct., 1948, when these proceedings started, there was some £1,900 arrears owing to the plaintiffs. When this application for an order for possession under R.S.C., Ord. 55, r. 5A, came before Romer, J., the defendants were the mortgagor himself, who has not appeared and has taken no part in the proceedings, and a person who did not derive her title under the mortgagor in his capacity as mortgagor since the tenancy began before the date of the mortgage. She was a person in occupation, and the plaintiffs say that she is a mere trespasser.

The question is whether it is competent for a mortgagee to proceed under this Order to obtain an order for delivery up of possession against some stranger in title to the mortgage who is said to be merely a trespasser. If that is so, it involves an appreciable departure from the older practice and procedure, and it may be said to deprive defendants of the right to plead possession as such. On that ground Romer, J., decided that he could not make an order under R.S.C., Ord. 55, r. 5A, and dismissed the summons. It is from that dismissal that the present appeal comes.

The relevant words of the rule are :

> " Any mortgagee . . . may take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require ; that is to say . . . Delivery of possession . . . to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property."

The words " or by any other person in, or alleged to be in possession of the property " are the vital words which were added in 1940. On the fact of it those words, as a matter of ordinary language, must cover anybody who is in fact in, or is alleged to be in, possession of the property, unless the word " possession " is to be read as being confined in some way to a person deriving title under the mortgagor and entitled to legal possession as distinct from occupation. The amendment of the rule in 1940 has something of a history, which I do not want to deal with at great length, but under Ord. 13, r. 8, and Ord. 27, r. 7, provision is made in the case of an action to recover possession of land for the plaintiff's right, in the one case in default of appearance and in the other case in default of defence, to obtain an order summarily for possession. I only need to refer to one because the only difference is that they relate to the two different classes of case. By Ord. 13, r. 8, it is provided that :

> "In case no appearance shall be entered in an action for the recovery of land, within the time limited by the writ for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply, upon the production of a certificate by the solicitor A for the plaintiff or, in the case of a plaintiff in person, of an affidavit that the action is not one to which r. 17 of this Order applies."

Rule 17 is in these terms:

> "In any action in which the plaintiff is claiming any relief of the nature or kind specified in Ord. 55, r. 5A, no judgment shall be entered in default B of appearance without leave of the court or a judge who may require the application for leave to be supported by such evidence as might be required if relief were being sought on originating summons under Ord. 55, r. 5A, and may require notice of such evidence to be given to the defendant and to such other person (if any) as the court or a judge may think proper."

The last sixteen words were also added in 1940.

C The effect appears to be that where a mortgagee could proceed under Ord. 55, r. 5A, but, in fact, proceeds by writ, and there is no appearance or no defence to that writ, he cannot obtain summary judgment, but is subject to having imposed on him such terms as the court might think proper in the way of evidence, giving notice, and so on, in a proceeding under Ord. 55, r. 5A. If a certificate can be given that the matter could not have been D litigated under Ord. 55, r. 5A, that limitation does not arise. It is plain that the addition to Ord. 55, r. 5A, followed on a case in this court in 1940, in which a full court consisting of five Lords Justices sat—*Temperance Permanent Benefit Building Society* v. *Nevitt* (1). In that case the mortgagee had issued proceedings by writ against the mortgagor's wife who was living on the premises, asserting that the wife was a mere trespasser and claiming possession against E her. It was suggested that the certificate could be given because the wife was not a person covered by the language in Ord. 55, r. 5A, as it then stood. The court regarded that application as an abuse of the process of the court on the ground that it was manifest that the mortgagor's wife could not be regarded as a trespasser and that she was plainly a person who was properly in possession or occupation of the mortgagor's house, but there seems no doubt that it was F to meet the possibility of writs being issued in similar cases where some person other than the mortgagor was in occupation of the property and it might be said that the matter did not fall within Ord 55, r. 5A, that the words to which I have alluded were added to the rule. We are not, of course, entitled to be influenced, in construing these words of the rule, by what may have been the intention when they were added, but, my view being that the words in the G rule do cover such a case as the present, it is some comfort to me to think that the rule as so construed does give effect to the intention at the time. Having considered the matters to which I have referred and the case which I have cited, my view is that this rule, on its fair meaning and notwithstanding the use of the word "possession" in lieu, perhaps, of "occupation," covers such a case as the present, and does entitle the court to make an order for delivery up of H possession to the mortgagee against a person in occupation, even though that person is neither the mortgagor nor a person claiming to derive title under him in the sense of having a right to redemption.

That being so, there only remains the question of the form of the order. The second defendant is in occupation of the mansion house and the right order to make will be an order that she deliver up to the plaintiffs within the proper time possession of the premises described in the schedule to the summons or such part thereof as she now occupies. As the mortgagor is not in occupation of anything, no order is required against him, and, therefore, it appears to be proper not to make any other order on the summons save to give to the plaintiffs the right to add their costs of the summons and of the appeal to this court to their security.

SOMERVELL, L.J.: I agree. We have only a short note of what the learned judge said below, but it would appear that he proceeded on the basis that Ord. 55, r. 5A, should not apply unless the person against whom possession A is sought is claiming through the mortgagor. We have had the advantage in this court of a much fuller argument, and I have come to the clear conclusion that the rule, as it now stands, cannot be so restricted. The only other point is with regard to the meaning of the words "deliver up possession," and I desire to add nothing to what the MASTER OF THE ROLLS said on that point. I would like to add that, if the rule was limited in the way the learned judge B suggested, the result would, I think, be inconvenient. I do not think anyone would get any greater protection, and the result would be that it might not be clear whether the procedure of the rule applied until the matter had been investigated to a considerable extent. It is always inconvenient if after investigation a party finds that he has started on the wrong road. For these reasons, I agree that the appeal should be allowed. C

JENKINS, L.J.: I also agree.

Appeal allowed; declaration that the property be delivered up within 21 *days of service of the notice on the second defendant; costs to be added to the security.*

Solicitors: *Boxall & Boxall* (for the mortgagee.)

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*] D

Affirmed. C.A. [1950] 1 All E.R. 39.

Re KAVANAGH. *Ex parte* THE BANKRUPT *v.* JACKSON (The Trustee). E

[CHANCERY DIVISION (Jenkins, L.J., and Romer, J.), May 23, June 27, 1949.]

Bankruptcy—Property available for distribution—Claim by bankrupt for damage to reputation and property—Settlement of action—Apportionment of agreed damages—Bankruptcy Act, 1914 (c. 59), *s.* 38 (*a*). F

The bankrupt carried on business as a farmer and in 1946 she got into financial difficulties. She consulted B., a solicitor, who acted for her until September, 1947, when he gave her notice that he could no longer act on her behalf. On Sept. 13, 1947, a few days after the notice, B. called a meeting of the bankrupt's creditors, giving the bankrupt notice of the meeting and requesting that she should be present. At the meeting, which G the bankrupt attended, B. explained the bankrupt's position. The creditors refused to accept a composition and were of the opinion that the law of bankruptcy should take its course. A bankruptcy notice was later served on the bankrupt by a creditor, W., Ltd., for whom B. had acted for some time and continued so to act after he had ceased to represent the bankrupt. On Nov. 7, 1947, the bankrupt issued a writ H against B. claiming an injunction to restrain him from disclosing confidential information which he had obtained from her as her solicitor and damages. It was alleged in her statement of claim that B. was guilty of breaches of professional confidence in disclosing her affairs to the meeting of creditors and to certain individual creditors, and that she had as a result suffered irreparable loss of credit and reputation, and had been prevented from managing her financial affairs to the best advantage so as to avoid bankruptcy, and had been denied credit. As special damages she claimed (i) costs of appearing at and defending the bankruptcy proceedings ; (ii) costs of defending an originating summons issued by a bank in respect of a mortgage, and (iii) loss of profit in the manufacture and sale of ice cream. On Nov. 11, 1947, a receiving order was made against the bankrupt, and adjudication followed on Dec. 3, 1947. The bankrupt's action against B. never came to trial, and on Feb. 22, 1949, it was settled by the payment of £1,000 by B. together with the bankrupt's party and party costs. The trustee in bankruptcy made no application in the action, although on Nov. 10, 1948, he wrote to the bankrupt's solicitors saying that in reliance on the Bankruptcy Act, 1914, s. 38, he would claim any sum recovered in the action as assets in the bankruptcy. On Mar. 4, 1949, the trustee notified all persons concerned by letter that he claimed the £1,000. B. paid the £1,000 into the county court to abide the decision of the court (less £50 which had been paid into court during the currency of the action and taken out by the bankrupt). The trustee moved in the county court for a declaration that the whole of the money in court was payable to him. It was agreed at the hearing that the bankrupt would have become bankrupt in a fortnight or so irrespective of B.'s act in calling a meeting of creditors, and the bankrupt argued that, therefore, the acts of B. had not resulted in any damage to her property, but that the whole £1,000 was attributable to damage to her personally in respect of her credit or reputation and was, therefore, payable to her. The trustee argued that there was equally no case to show damage to her credit or reputation in view of her impending bankruptcy and that the £1,000 must vest in him under s. 38.

HELD : the £1,000 was paid to extinguish the claims of the bankrupt in respect of both heads of claim and there was no presumption arising under the Bankruptcy Act, 1914, s. 38 (*a*), that it must be applied for the benefit of the creditors ; in the absence of evidence to show in what shares it should be apportioned, it should be divided equally between the two heads ; and, therefore, the bankrupt was entitled personally to one moiety and the trustee to the other.

[AS TO ENTITLEMENT TO PROPERTY DEVOLVING ON BANKRUPT BEFORE DISCHARGE, see HALSBURY, Hailsham Edn., Vol. 2, pp. 219-225, paras. 290-295 ; and FOR CASES, see DIGEST, Vol. 5, pp. 724-729, Nos. *6286-6323*.]

Case referred to :

(1) *Wilson* v. *United Counties Bank, Ltd.*, [1920] A.C. 102 ; 88 L.J.K.B. 1033 ; 5 Digest 974, *7971*.

APPEAL from an order of His Honour JUDGE KINGSLEY GRIFFITH made at Scarborough County Court on Apr. 6, 1949, whereby he directed the apportionment of £1,000 paid into the county court as to £300 to Mrs. Kavanagh, a bankrupt, personally, and £700 to her trustee in bankruptcy. The Court of Appeal now varied the order, apportioning the money equally between the bankrupt and the trustee. The facts are set out in the headnote.

M. V. S. Hunter for the bankrupt.

Aronson, K.C., for the trustee in bankruptcy.

JENKINS, L.J. [having stated the facts :] At the hearing before the learned county court judge the case was argued on the footing that the bankrupt was on the verge of bankruptcy and would have gone bankrupt in a fortnight irrespective of the act of Mr. Bagshawe (the bankrupt's former solicitor) in calling the meeting of creditors. On those facts it was argued for the bankrupt that the acts of Mr. Bagshawe complained of in the action had not resulted in any damage to the bankrupt's property, and that, therefore, the whole of the £1,000 was attributable to damage to her personally, *i.e.*, damage to her credit or reputation, and, being wholly so attributable, was payable to her notwithstanding her bankruptcy. On the other hand, it was argued for the trustee that, inasmuch as the bankrupt would have gone bankrupt anyhow within a matter of days, there was equally no case to show any damage to her credit or reputation, and that, *prima facie*, the £1,000 was property acquired by her before her discharge which must vest in the trustee under s. 38 of the Bankruptcy Act, 1914, unless brought within one of the recognised exceptions.

As to the law to be applied, there is no difference between the parties. They accept, as they must and as this court must, the statement of the law contained in the well known decision of the House of Lords in *Wilson* v. *United Counties Bank, Ltd.* (1) where their Lordships' House, after reviewing all the authorities, affirmed the principle that damages recovered in respect of injury to credit and reputation, as opposed to damages recovered in respect of injury to property, do not pass to the trustee in the plaintiff's bankruptcy. The questions for the learned county court judge, therefore, were whether this sum of £1,000 should be treated as attributable to the bankrupt's claim for damage to her credit and reputation exclusively or whether it should be treated as attributable to her claim in respect of damage to her property exclusively, or whether it should be treated as attributable partly to one and partly to the other branch of her claim, and, if so, in what proportions. The learned county court judge, in a note of his judgment, says :

> "It is agreed on the authority of *Wilson* v. *United Counties Bank, Ltd.* (1) that the money is payable to the bankrupt in so far as it represents damage to her health, peace of mind, credit or reputation, and to the trustee in so far as it represents damage to her estate. I have no allocation of the sum to these different heads of damage by any judge or jury or in the endorsement on counsel's briefs. Evidence was called before me by the trustee only and on that evidence counsel for the trustee argued that there was no damage to the bankrupt's reputation, and counsel for the bankrupt (in complete contradiction of his own client's affidavit) that there was no damage to her estate. I entirely agree with both of them and so find. It follows that the payment of £1,000 rests upon an entirely artificial basis, and that does not help me much in deciding on the allocation and it seems to me that since the true facts give me no guidance, I must have regard to the fictitious assumptions upon which the payment was made."

The learned judge goes on to describe what he calls the fictitious assumptions which were to the effect that it must have been assumed for the purposes of the settlement that Mr. Bagshawe's action either caused or accelerated the bankrupt's bankruptcy, meaning by " accelerated " that his action had brought it on substantially sooner than it would otherwise have happened, if it would have happened at all. I think also, although the learned judge is not so clear on this, that the parties must have assumed that there was some damage to her estate inasmuch as both kinds of damage, that is to say, damage to her credit and reputation and damage to her estate, were pleaded. He says :

> " But, on the assumption that she would not have gone bankrupt but for the acts of Mr. Bagshawe, there must have been damage both to her estate and to her credit and reputation, and both kinds of damage were pleaded and must be regarded as having been assessed in the settlement. In these circumstances there must be an allocation, and I can only make as intelligent a guess as I can at the proportions. I allot £300 to the bankrupt. It is an absurd sum in view of the uncontradicted evidence that financially she was practically devoid of credit or reputation and that no evidence of stress of mind or body has been given. But it is no more

absurd than the allocation of £700 to the trustee for damage to the estate which is equally baseless. That is the best allocation that I can make, basing myself, not on the facts, which lead nowhere, but on the assumptions necessarily underlying Mr. Bagshawe's payment."

From that judgment the bankrupt has appealed and counsel has argued on her behalf that she should have been allowed the whole of the £1,000 or, at all events, a larger proportion of the £1,000 than the £300 at which the learned county court judge arrived. In my judgment, the bankrupt's claim was, on the face of it, of a very flimsy character if one has regard to the admitted facts about her financial position at the material time. I think the learned county court judge was quite right in taking, as he did, the view that no damage had been shown to be caused in fact either to her property or to her credit and reputation. Counsel for the bankrupt has pressed us to say that, be that as it may, we should, nevertheless, hold that the whole of this £1,000 is attributable to the estimate of the parties of Mr. Bagshawe's hypothetical liability to the bankrupt as damages for a gross breach of his duty to her in the confidential relation in which he stood to her as her solicitor. For my part, I see no justification for that submission. This case was never tried out. One will never know now what the result might or might not have been. In fairness to Mr. Bagshawe, I must say that he did, in his defence, plead facts which, if substantiated at the hearing, would have gone far to absolve him from any breach of confidence at all, or, if there had been technically a breach of confidence, in the circumstances it would have been a most venial one. The position according to him was that he was acting under the instructions of the bankrupt to try and get time for her from the creditors and he made a certain promise to the creditors with her authority which behind his back she broke in a way which, in his view, made it his duty to call the creditors together. I am not going to assume without any evidence that Mr. Bagshawe was in all the circumstances of the case guilty of any such gross breach of confidence towards the bankrupt as would have entitled her to substantial damages. Mr. Bagshawe is a professional man, who had acted, I think, rashly in the course he took of representing William Cornforth (Whitby), Ltd., one of the creditors, having regard to the fact that he had only lately acted for the bankrupt. I think he was imprudent in taking the leading part he did in calling the creditors together and trying to see what terms could be made with them when he was no longer acting for the bankrupt. He, being a professional man, would naturally not wish charges of the kind contained in the statement of claim in this action to be publicly made against him, however ill-founded they might be shown to be. That type of litigation is obviously of the most damaging kind to a professional man, whether it is justified or not, and in those circumstances I think it reasonably plain that Mr. Bagshawe wanted to settle and that it was worth his while to pay for a settlement a sum which the bankrupt would be prepared to accept, and, if she would not be prepared to accept anything less, a sum perhaps much larger than she could be reasonably expected to recover in the action if it was fought out, the advantage to Mr. Bagshawe being simply the avoidance of publicity most undesirable to him as a person engaged in the profession of a solicitor. That accounts for the quantum of the payment, £1,000. The parties did not think it necessary to apportion it in any way between the various heads of claim, and I should be very much surprised to find there had been any attempt to do so. At all events, so far as the evidence before us is concerned, there was no such attempt. It was simply a sum of £1,000 plus taxed party and party costs paid in full satisfaction of all claims.

As to the destination of the payment as between the bankrupt personally and the trustee in bankruptcy, I think a possible view would be the one submitted by counsel for the trustee, namely, that *prima facie* all property accruing to the bankrupt before her discharge would, under the Bankruptcy Act, 1914, s. 38, vest in the trustee in bankruptcy as assets divisible among her creditors, and that, accordingly, the onus must be on the bankrupt to displace the presumption, so to speak, that this acquisition of £1,000 must be for the benefit of the creditors in the bankruptcy. If that view were right, I think it would follow from the learned judge's conclusion, with which I agree, that no damage either way is shown, that the whole sum would have to go A to the trustee in accordance with the general rule. That view is at first sight the logical one, and, as such, perhaps, attractive, but I think it ignores the very important circumstance that, after all, this sum was recovered in settlement of all claims in an action brought by the bankrupt herself in which she claimed not only damages in respect of injury to her property but also damages for injury to her credit and reputation. It was a sum in effect paid to B extinguish those two classes of claims. Therefore, it seems to me, it must *prima facie* be treated as attributable to both classes of claims. I see no justification for treating it as wholly attributable to damage for injury to credit and reputation, and I see no more reason for treating it as wholly attributable to the other matters. It is attributable to both, and the parties did not think it necessary to apportion it between the two. C

I further agree with the learned county court judge that there is nothing to guide the court in arriving at an apportionment, but that an apportionment should be made notwithstanding that no guidance is forthcoming. I part company with him in my ultimate conclusion. It seems to me that, if there is a sum which is apportionable between two heads of claim and if there is no evidence to show in what particular shares it should be apportioned, the D only possible solution is to make the apportionment equally between the two heads of claims. To give more to one than to the other can only be right on the footing that there is some reason for saying that more is attributable to one than to the other. Unless there is some evidence to fix the unequal proportions, I think the proportions should be equal. Therefore, in my judgment, the correct solution in this somewhat unusual and curious case is E to allow the appeal and vary the order of the county court judge by declaring that the total sum of £1,000 should be divided equally between the bankrupt and the estate, £500, including of course the £50 already paid to her, going to the bankrupt for her own personal use, and the balance going to the trustee.

There remains the question of costs incurred by the bankrupt in recovering the sum of £1,000. The bankrupt received in settlement, in addition to the F £1,000, her taxed party and party costs of the action. That would not cover the difference, which may be fairly substantial between the party and party costs and the solicitor and client costs incurred. I think those costs ought to be met out of the sum recovered and borne equally by the parties participating in that sum. It, therefore, seems to me that the proper way of dealing with the costs will be to deduct the amount of the taxed party and party costs and G also that of the solicitor and client costs from the total so as to make the equal division apply to the net sum cleared of all costs incurred in recovering it. As regards the costs of this appeal, as the bankrupt has succeeded I think the proper order would be that the trustee should pay her costs of this appeal which can be taken out of the trustee's share of the fund.

ROMER, J.: I agree. The principal difficulty in this case arises from H its want of reality.

The learned county court judge examined the evidence and came to the conclusion, first, that there was no damage to the bankrupt's reputation, and, secondly, that there was no damage to the bankrupt's estate. In regard to her reputation—the main thing which the bankrupt is relying on here—the only direct evidence, apart from presumed damage, is contained in an affidavit which she swore in the county court, and is of damage to her health through worry, stress and strain, and so on. Although I am far from denying she may have suffered worry, stress and strain, it did not, so far as I can see, flow directly from the breach of confidence by Mr. Bagshawe, of which she was complaining. It flowed exclusively from the fact that she found herself in a state of insolvency. The only conceivable injury that I can imagine she might have sustained as a direct result of the breach of confidence, as distinct from her insolvent position, was a shock to her sensibilities occasioned by the belief that a solicitor had been guilty of some impropriety. The bankrupt did not venture to formulate a claim based on that, but founded her allegations on the claim in the affidavit to which I have referred. In those circumstances I confess to considerable sympathy with the submission of counsel for the trustee which was to the effect that from the learned county court judge's finding of fact there was no damage to reputation, and, having regard to the burden of proof that rests in these cases, arising as it does from the provisions of s. 38, then logically the whole of this sum ought to have gone to the trustee, who had no burden of proof to discharge at all. He had not got to prove that the sum was not within some exception to the general provisions of s. 38 of the Act ; it was for the debtor to prove the contrary. As JENKINS, L.J., has said, however, I think it is true to say that this approach does rather disregard what actually happened. Mr. Bagshawe was defending a case in which both kinds of damage, *i.e.*, to property and reputation, were alleged and being pressed against him. He settled the litigation—principally, I suppose, to purchase peace—for this lump sum. I do not think it would be right to treat that sum as divorced from the claims in the proceedings. It has, I think, to be related to the whole of the claims which were adumbrated in the action, and it is not possible to attribute more importance to one claim than to another. If so, one gets away from the strict logic of the submission of counsel for the trustee and does give effect to what I think was the factual position. It only remains to apportion the sum in regard to the two claims. Inasmuch as it was paid in satisfaction of both sets of claims in the action and we know that there was no real substance so far as damages were concerned in relation to either, I find difficulty in appreciating how one can show a reasoned apportionment other than on an equal basis. I, accordingly, agree that it should be divided on an equal basis subject to the provision for costs to which my Lord has referred.

Appeal allowed. Order of county court varied.

Solicitors : *Gibson & Weldon*, agents for *Tasker Hart & Munby*, Scarborough (for the bankrupt) ; *Field, Roscoe & Co.*, agents for *Cook, Fowler & Outhet*, Scarborough (for the trustee).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

BARTRAM *v.* BARTRAM.

[Court of Appeal (Bucknill, Asquith and Denning, L.JJ.), June 29, 30, 1949.]

Desertion—Termination—No intention by deserting spouse to resume matrimonial home—Wife living as fellow lodger in same house as husband.

A husband, who was living with his wife in a house, P., left that house and went to live at another house in the same village where his mother resided with her adopted daughter. His wife refused to go with him solely because she did not wish to have anything more to do with him and preferred to earn her own living. In consequence, she became a deserting wife. After eighteen months the husband, in an attempt to compel his wife to end her state of desertion and resume married life with him, sold the house, P. Being unable to find other accommodation the wife went to live as a lodger at the other house. She slept in a room apart from her husband, avoided meeting him, and paid no attention to him as a husband, though at times she sat at the same table with him for meals. This mode of existence continued for a further eighteen months. On a question whether on these facts the wife had been guilty of desertion under the Matrimonial Causes Act, 1937, s. 2 (*b*),

Held : desertion, once established, continues until it is proved to have been brought to an end ; the original desertion in the present case was not brought to an end by the parties merely living in the same house in the circumstances in which they did, which showed no intention by the wife to resume a matrimonial home ; and the husband was entitled to a decree on the ground of desertion.

Hopes v. *Hopes* ([1948] 2 All E.R. 920) *discussed and distinguished.*

[As to What Constitutes Desertion, see HALSBURY, Hailsham Edn., Vol. 10, pp. 835-838, para. 1338 ; and for Cases, see DIGEST, Vol. 27, pp. 307-310, Nos. *2840-2880* and p. 322, Nos. *3000-3013.*]

Cases referred to :

(1) *Mummery* v. *Mummery*, [1942] 1 All E.R. 553 ; [1942] P. 107 ; 111 L.J.P. 58 ; 166 L.T. 343 ; 2nd Digest Supp.

(2) *Hopes* v. *Hopes*, [1948] 2 All E.R. 920 ; [1949] P. 227 ; [1949] L.J.R. 104 ; 113 J.P. 10.

(3) *Everitt* v. *Everitt*, [1949] 1 All E.R. 908 ; 113 J.P. 279.

(4) *Mackrell* v. *Mackrell*, [1948] 2 All E.R. 858.

(5) *Pratt* v. *Pratt*, [1939] 3 All E.R. 437 ; [1939] A.C. 417 ; 108 L.J.P. 97 ; 161 L.T. 49 ; Digest Supp.

Appeal by the husband from a judgment of His Honour Judge Carey-Evans, sitting as a commissioner in divorce, dated Feb. 22, 1949, refusing to grant to the husband a decree of divorce on the ground of the wife's desertion. The Court of Appeal reversed the decision of the learned commissioner, and allowed the appeal.

Barry, K.C., and *Alpe* for the husband.

The wife did not appear.

BUCKNILL, L.J. : This is an appeal from a judgment of His Honour Judge Carey-Evans, sitting as a commissioner in divorce, whereby he refused to grant a decree to the husband on the ground of his wife's desertion for three years. The marriage took place on Aug. 5, 1932, and there is no issue. The petition was filed on Nov. 24, 1948. The wife did not enter an appearance, nor did she appear either before the judge or before this court. It is clear that she desires nothing more than a release from this bond of marriage which appears to her to be odious. She says that she is not made like ordinary women and hates sexual intercourse. When she was married she was engaged in teaching, and she went on teaching for five years. In 1937 the husband persuaded her to stop teaching, and she stopped until 1939, when she started teaching again in the village of Wymondham. Until 1943 the parties lived in a house called "Penlan" in Wymondham. The husband complained that his wife was not willing to look after him there, and in 1943 he left the house for business reasons, which seem adequate, and went to live in another house in Fairland Street, Wymondham. His mother was living there, and also the adopted daughter of the mother. The wife refused to leave A "Penlan" and go to Fairland Street, not because she disliked her mother-in-law or the house or because it was less convenient for her work. The only reason why she refused was because she did not want to have anything more to do with her husband. Her husband tried to get her back, but she steadily refused to go to live with him.

I have no doubt that the learned commissioner was right in holding that B as a result of that conduct the wife was a deserting wife. She ought to have gone to live with her husband and she steadily refused to do so without any good reason whatsoever. To try and force the wife to come back and live with him the husband sold "Penlan," and in February, 1947, when eighteen months of the period of three years necessary to establish desertion had expired she went to live at Fairland Street. I think she went there purely as a lodger because C there was no other accommodation in Wymondham available and she wanted to go on teaching at this school. She lived at Fairland Street till September, 1948, when she went to Northampton to teach.

In the house in Fairland Street there were, besides the bedrooms, two large living rooms, a kitchen, and the usual offices. The wife refused to sleep with her husband. She slept with the adopted daughter. She never went into his D room. She paid no attention to him as a husband. She never mended his clothes, or cooked for him, or went out with him, or treated him in any way differently from the way in which she would have treated another lodger in the house whom she cordially disliked. She did everything possible to avoid him, but there were certain times when she had to have meals in the house unless she went to a restaurant, and, consequently, there were times when E she actually sat at the same table with her husband eating the food provided for them. This court has to decide whether living in these circumstances in the same house as the husband terminated the desertion which had started in 1945. On the whole the commissioner accepted the husband's evidence. There is a passage in his judgment where he said that he thought there was some slight exaggeration as to the precise number of times when F they had meals in the same room, but he did not think that was of much importance.

The crucial passage in his judgment is this:

> "Now I quite agree with Mr. *Alpe's* reference to *Mummery* v. *Mummery* (1) which I interpret in this connection in this way. I think some very brief interlude in a desertion may not be sufficient to break a period of desertion, G but I think when they went on living in this manner for practically half the statutory period of desertion—March, 1947, to September, 1948—it is impossible to say that they were, within the principle of *Hopes* v. *Hopes* (2), living in fact separately during these eighteen months or so. That would really conclude the matter but for an additional argument of Mr. *Alpe* which I must mention. He says I ought to find there was desertion in 1943, and H that the case is distinguishable from *Hopes* v. *Hopes* (2) because of this prior desertion. I think that on the evidence I must hold that in 1943 the parties were living separately and the wife had got a deserting mind while the husband wanted her back, and she was guilty of desertion, but it doesn't alter the fact, so it seems to me, that the husband must prove at any rate the fact of separation throughout the statutory period of three years, and I cannot myself see that it makes any difference to the question whether they were living in one household or two that prior to that date, February, 1947,

> she had been guilty of desertion. To my mind it does not make any difference at all. Obviously, it might make a great difference if one was enquiring into a question of intent, but I have already said I am satisfied on that aspect of the case. The difficulty in this case is whether they were living separately and that is all there is to the matter. I quite appreciate the husband has behaved well. He has tried to get her back and she has not stood by him as a wife ought to, but, as DENNING, L.J., pointed out in *Hopes* v. *Hopes* (2) ([1948] 2 All E.R. 925), gross neglect or chronic discord is not a ground for divorce though desertion is. I quite appreciate that both parties want the divorce to go through, but I am not entitled to grant a divorce unless the conditions of the Act of Parliament are complied with."

With great respect to the commissioner I do not think that he gave sufficient weight to the essential difference between this case and *Hopes* v. *Hopes* (2). I will not refer to the judgments in *Hopes* v. *Hopes* (2), because I think that for the purposes of this case it is more convenient to refer to the comments which LORD MERRIMAN, P., made on that case when he was presiding in the Court of Appeal (after *Hopes* v. *Hopes* (2) had been decided) in *Everitt* v. *Everitt* (3), where he said this ([1949] 1 All E.R. 917) :

> " The fundamental point about this part of the case is that it was decided by this court in *Hopes* v. *Hopes* (2) that the necessary element of separation cannot subsist when a husband and wife are living under the same roof unless they have ceased to share one household and have set up two households there."

In conjunction with that passage I may refer to another passage in a judgment, also by the learned PRESIDENT, in *Mummery* v. *Mummery* (1) where he said ([1942] 1 All E.R. 555) :

> " Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so. At least a resumption of cohabitation must mean resuming a state of things —that is to say, setting up a matrimonial home together. That involves, so it seems to me, a bilateral intention on the part of both spouses so to do."

In *Hopes* v. *Hopes* (2) the husband failed to prove his case because he never succeeded in proving desertion. He never proved that there was any actual separation of husband and wife, although he did prove the intention on the part of the wife to desert. Therefore, the case failed on the threshold. In the present case, the husband has established actual desertion by the wife for many months. That being so, it seems to me that the husband is entitled to say that the desertion once established continues until it is proved that it has been brought to an end. The wife does not suggest for one moment that she brought it to an end. The question is : Do the facts proved establish that it was brought to an end ? In my view, it can only be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home with the husband. If the facts do not establish any intention on the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she went to live under the same roof as her husband, because she had nowhere else to go, does not remove the desertion which she had already started and which continued to run. For these reasons, in a case which is not free from difficulty, I think the husband has established desertion for the requisite three years, and that a decree ought to be granted in his favour. Therefore this appeal should be allowed.

ASQUITH, L.J. : This seems to me a borderline case of very great difficulty, but for the reasons given by my Lord I also have come to the conclusion that he has expressed, and I think that the appeal ought to be allowed.

It is clear that the husband, by selling the original matrimonial home, "Penlan," over the wife's head, succeeded in forcing her to leave that house and to go to Fairland Street, which was the only other accommodation available within reach of her work. Having regard to those and other proved circumstances in the case, it seems to me wrong to hold that the three years period was interrupted by any resumption of cohabitation, for such resumption involves, in A the language of LORD MERRIMAN, P., in *Mummery* v. *Mummery* (1), a bilateral intention on the part of both spouses to set up a matrimonial home together. In my view, the facts proved in this case negative any such intention on the part of the wife who was not a free agent but was acting under the spur of combined necessity and convenience. For these reasons, and for the reasons given by my Lord, I agree that this appeal should be allowed.

B **DENNING, L.J.** : I agree. *Hopes* v. *Hopes* (2) does not apply because there the period of desertion never began to run. Here the period of desertion had begun to run before the parties came to live together again under the same roof. Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time. That was laid down by LORD MERRIMAN, P., in C *Mummery* v. *Mummery* (1) and has never been doubted since. Indeed, I would say in such a case the period of desertion does not cease to run unless, and until, a true reconciliation has been effected, as to which see *Mackrell* v. *Mackrell* (4). Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the reconciliation was unsuccessful. D It was held in *Pratt* v. *Pratt* (5) that it was the duty of the husband to respond to a reasonable offer of reconciliation ; and so he should not be penalised for so doing. In *Everitt* v. *Everitt* (3) the period of desertion was held to have ceased to run because the letter left by the wife was strong evidence that there had been a reconciliation. Nothing short of reconciliation, however, will suffice. Applying those principles to the present case, the commissioner found E that in 1945 the wife was guilty of desertion. The only question is whether that period ceased to run in 1947 and 1948 when the parties were living in the same house. The evidence shows that the husband was very willing to effect a reconciliation, but the wife never had any intention to go any part of the way to meet him. She had discovered that she was a woman who should never have been married. She had a complete abhorrence of all questions of sex and F regarded them as purely animal. She went to the house in 1947 merely as a lodger, and that is all she was. I agree that the appeal should be allowed.

Appeal allowed. Decree nisi from the date of judgment.

Solicitors : *Ford, Michelmore, Rose & Binning*, agents for *Greenland, Houchen & Co.*, Norwich (for the husband, appellant).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

KRAJINA *v.* THE TASS AGENCY AND ANOTHER.

[COURT OF APPEAL (Tucker, Cohen and Singleton, L.JJ.), June 22, 23, 24, 27, 1949.]

Action—Who may be sued—Department of foreign sovereign State—Burden of proving separate legal existence—Evidence—Particulars under Registration of Business Names Act, 1916—*Soviet news agency.*

On June 2, 1948, the plaintiff issued a writ claiming damages for an alleged libel in an article in a weekly newspaper published by the first defendants on May 7, 1948. After entering a conditional appearance the first defendants applied to the court to set aside the writ on the ground that they were a department of the Soviet State and as such immune from suit. In those proceedings it was shown that in June, 1938, particulars were filed under the Registration of Business Names Act, 1916, by the second defendant, an English subject. The business was described as a telegraphic news agency, and in the particulars appended to the application it was stated " the business name and address of the foreign firm as agent for whom the business is carried on : Tass Agency, Moscow, U.S.S.R." On July 2, 1948, a month after the issue of the writ, further particulars under the Act were filed which showed that the second defendant had ceased to carry on the agency in August, 1946, and gave the name of another person, B. In these second particulars it was not stated that the agency was being carried on as agent for a Russian firm. By cl. 15 of the Russian statute establishing the Tass Agency it was provided that the agency should enjoy all the rights of a juridical person, and the Soviet Ambassador in Great Britain certified that the agency constituted a department of the Soviet State " exercising the rights of a legal entity." The master ordered the writ against the first defendants to be set aside and his decision was affirmed by BIRKETT, J. On appeal,

HELD : (i) having regard to the certificate of the ambassador that the Tass Agency was a department of the Soviet State, the burden of disproving that the agency constituted such a department was on the plaintiff ; the question must be decided by Russian law ; and the contents of the particulars under the Registration of Business Names Act, 1916, did not establish that the agency was an independent corporation liable to suit in the English courts ;

(ii) although the Soviet statute provided that the agency should enjoy all the rights of a juridical person and the Soviet Ambassador had certified that the agency had the rights of a legal entity, no evidence was before the court to show what were the essential requisites of a separate juridical existence under Soviet law ;

(iii) even if the agency was a State department having a separate entity, it did not follow that the Soviet government, by procuring its incorporation, had deprived it of the right to assert the immunity normally attaching to a department of a foreign State under international law, and, accordingly, the appeal must be dismissed.

Compania Mercantil Argentina v. *United States Shipping Board,* (1924) (131 L.T. 388), *applied.*

[AS TO THE IMMUNITY OF FOREIGN SOVEREIGNS OR STATES, see HALSBURY, Hailsham Edn., Vol. 1, pp. 27-30, paras. 30, 31 ; and FOR CASES, see DIGEST, Vol. 11, pp. 306-309, Nos. *1-17* and Supplement, Vol. 11, pp. 25, 26, Nos. *1-17a*.]

Cases referred to :

(1) *Compania Mercantil Argentina* v. *United States Shipping Board,* (1924), 93 L.J.K.B. 816 ; 131 L.T. 388 ; Digest Supp.

(2) *The Porto Alexandre,* [1920] P. 30 ; 89 L.J.P. 97 ; 122 L.T. 661 ; Digest Supp.

(3) *Compania Naviera Vascongado* v. *Cristina S.S.*, [1938] 1 All E.R. 719 ; [1938] A.C. 485 ; 107 L.J.P. 1 ; 159 L.T. 394 ; Digest Supp.

(4) *Mackenzie-Kennedy* v. *Air Council*, [1927] 2 K.B. 517 ; 96 L.J.K.B. 1145 ; 138 L.T. 8 ; Digest Supp.

(5) *Pilger* v. *United States Steel Corpn.*, (1925), 127 Atl. Rep. 103 ; *affmd.*, 130 Atl. Rep. 523.

A (6) *Ulen & Co.* v. *Bank Gospodarstwa Krajowego* (*National Economic Bank*), (1940), 24 N.Y.S. 2d. 201.

(7) *United States* v. *Deutsches Kalisyndikat Gesellschaft*, (1929), 3 F. (2d.) 199.

(8) *Tone River Conservators* v. *Ash*, (1829), 10 B. & C. 349 ; 8 L.J.O.S.K.B. 226 ; 13 Digest 295, *265*.

(9) *The Parlement Belge*, (1880), 5 P.D. 197 ; 42 L.T. 273 ; 11 Digest 537, *394*.

B

APPEAL by the plaintiff from an order of BIRKETT, J., dated Dec. 10, 1948.

The plaintiff claimed damages for an alleged libel contained in an article headed " Betrayed British Troops to Gestapo " which appeared on May 7, 1948, in THE SOVIET MONITOR published by the first defendants. The first defendants, after entering a conditional appearance took out a summons asking that the C writ be set aside as they were a department of a foreign State, the Union of Soviet Socialist Republics, and so entitled to immunity. The evidence on which this contention was based is referred to in the judgment of COHEN, L.J. The master's order setting aside the writ was upheld by BIRKETT, J., and the Court of Appeal now confirmed it and dismissed the appeal.

W. T. Wells for the plaintiff.

D *Pritt, K.C.*, and *Gahan* for the defendants.

TUCKER, L.J. : I will ask **COHEN, L.J.**, to deliver the first judgment in this case.

COHEN, L.J. : This appeal is against an order of BIRKETT, J., dated Dec. 10, 1948, whereby he affirmed an order of Master SIMNER dated Nov. 29, E 1948, by which it was ordered that the writ herein and service of it on the Tass Agency of Moscow be set aside. The writ was issued by the plaintiff on June 2, 1948, the defendants being described as " The Tass Agency (of Moscow) (trading as a firm or corporation at No. 72/78, Fleet Street in the city of London) and Frederick Taylor (trading as Tass Agency)." On June 10, 1948, a conditional appearance was entered on behalf of the first defendants, to F whom I shall refer hereafter as Tass, and on June 23, 1948, Tass issued a summons asking for the order which they ultimately obtained from Master SIMNER. Frederick Taylor entered an unconditional appearance to this writ, but denied that, at the material time, he was trading as Tass Agency. He is not a party to this application, and we are not concerned with his position on this appeal.

G In support of the application Tass filed an affirmation by a Mr. Andrienko, who is described as the legal adviser of the trade delegation of the Union of Soviet Socialist Republics in the United Kingdom. The affirmation contains a summary of some of the provisions of the statute concerning Tass, which was published on Jan. 15, 1935, and there was exhibited to it an extract from the statute, which contained the first of its sixteen clauses. In his affirmation H Mr. Andrienko described Tass as " the central information organ of the Union of Soviet Socialist Republics " and as " coming under the Council of Ministers of the Union of Soviet Socialist Republics." He did not make any definite statement as to the legal position of Tass, and the only other evidence before the master at the first hearing was an extract under the heading " Tass Agency " from the register kept under the Registration of Business Names Act, 1916. The master rightly did not consider this evidence sufficient to enable him to reach a decision on the matter, and he adjourned the summons for further evidence. On Nov. 20 an affidavit by Percy Charles Smith was filed, to which was exhibited a certificate from the Soviet Ambassador, the material portion of which was in the following terms :

> " I, Georgi Nikolaevich Zaroubin, ambassador of the Union of Soviet Socialist Republics in Great Britain, hereby certify that the telegraph agency of the Union of Soviet Socialist Republics, commonly known as Tass, or the Tass Agency, constitutes a department of the Soviet State, *i.e.*, the Union of Soviet Socialist Republics, exercising the rights of a legal entity."

On this evidence the master made the order for which Tass asked and that order was confirmed by Birkett, J. Neither the master nor Birkett, J., gave any reasons for his judgment, but it is reasonably clear that both judgments were based on the decision of this court in *Compania Mercantil Argentina* v. *United States Shipping Board* (1), where a similar application was considered.

In that case the evidence before the court included a certificate of the American ambassador, and (131 L.T. 388) an affidavit of a Mr. Gregory, legal adviser to the defendants, a department of State of the United States of America, administered by commissioners nominated by the President of the United States. The defendants owned a large mercantile fleet which was used for ordinary commercial purposes in pursuance of the United States Shipping Act, 1916, which was passed with the object of creating and developing an auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States. The court allowed the application of the defendants and confirmed the decision of the lower court, by which the action was stayed. In the course of his judgment Bankes, L.J., said (131 L.T. 389) :

> " The question as to whether the vessel was or was not employed in private trading really does not arise in a case such as this where proceedings are taken *in personam*, and it is established to the satisfaction of the court that the body against whom the proceedings are taken is a body representing a Sovereign State."

It is to be observed, however, that in that case there was no evidence on which an argument could be based that the United States Shipping Board was a legal entity in any sense of that term. At any rate, if there was any such evidence, it is plain that it was not accepted by the court.

When the present appeal came before us, counsel for the plaintiff asked leave (which was granted) to put in further evidence which consisted of the full text of the statute establishing the Tass agency, and a translation thereof. Clause 1 is in these terms :

> " The telegraphic agency of the Union of Soviet Socialist Republics (TASS) is the central information organ of the U.S.S.R. and is attached to the Soviet of People's Commissars of the U.S.S.R."

It will be observed that this translation does not entirely agree with that in the exhibit to Mr. Andrienko's affirmation, the words, " and comes under the Council " in that exhibit being replaced by " is attached to the Soviet ", but I do not think that anything turns on that discrepancy. It seems clear that, in the light of the ambassador's certificate, we are bound to come to the conclusion that the Tass Agency is a department of the Soviet State, but whether that State has given this department a separate juridical existence is another matter which I shall consider later. Clause 2 defines the duties of Tass, in effect, as being the collection and dissemination of information throughout the U.S.S.R., whether such information might relate to the U.S.S.R. or to foreign States. Clause 3 gives Tass extensive rights to enable it to perform its duties. Clause 4 deals with the organisation to be established to enable it to perform its duties, and, in particular, in sub-cl. (*a*), provides that it shall organise abroad correspondence points and detachments and send there its special correspondents. Clauses 5 and 6 make it clear that the Soviet of People's Commissars retains full control of Tass. Clause 6 throws on the responsible director the sole responsibility for its activities, while cl. 5 provides A that he and his deputies are to be appointed by the Soviet. Clauses 7, 8 and 10 deal with the establishment of similar agencies in the constituent republics of the U.S.S.R., and with the relationship between these bodies and Tass itself. These clauses are immaterial to the point before us. Clause 9 states :

> "The telegraphic agency of the U.S.S.R. and the telegraphic agencies of the Union Republics operate on the principles of cost-accounting."

B Counsel for the plaintiff placed some reliance on this clause, but, as I find its import difficult to follow, I can derive no assistance from it. Clause 14 says :

> "The telegraphic agency of the U.S.S.R. and the telegraphic agencies of Union Republics enjoy all the rights of authorship for information disseminated by them by means of all branches of communications in C accordance with the laws in force concerning authors' rights."

The effect of that is to vest copyright in Tass so far as publications by Tass are concerned. Clause 15, on which the main argument turns, provides :

> "The telegraphic agency of the U.S.S.R. and the telegraphic agencies of the Union Republics enjoy all the rights of a juridical person."

D In the discharge of its activites in this country, Tass published a paper or rather a news sheet, called THE SOVIET MONITOR. This contained, in the issue dated May 7, 1948, the article which was the cause of complaint by the plaintiff in this action. It is unnecessary to give any advertisement to the terms of that article ; it is sufficient to say that we were told that, while THE SOVIET MONITOR is widely distributed, no charge is made to the recipient of the paper E or news sheet.

Clause 15 was, no doubt, the origin of the ambassador's statement that Tass exercised the rights of a legal entity. Counsel for the plaintiff said that, reading the statute as a whole, the effect is that Tass not only has the right of a legal entity, but is also a legal entity, thus distinguishing Tass from the United States Shipping Board in the case to which I have referred, where the F board was merely a department of the United States government without any separate legal existence. If that is established, certain consequences, it is argued, follow—in particular, the doctrine of sovereign immunity is not applicable, since Tass has a separate juridical existence from that of the sovereign, the U.S.S.R. Counsel for the plaintiff also argued that, even if the Tass agency was a department of the U.S.S.R. without separate legal existence, G the nature of its activities was such as to deprive it of sovereign immunity. He admitted that he could not succeed on that point before us in view of the decision of this court in the *United States Shipping Board* case (1) and the decision in *The Porto Alexandre* (2), but he said that the correctness of these decisions had been doubted by LORD MAUGHAM in *Compania Naviera Vascongado* v. *Cristina S.S.* (3). For the plaintiff it was also argued that the H evidence before the court as to the status of the Tass agency was ambiguous and self-contradictory, and that, as the onus of establishing their right to immunity was on the defendants, their application must fail.

It is obvious that the first question we have to decide is whether or not the evidence makes out a *prima facie* case that Tass was a separate legal entity, for, if it was not, it seems quite plain that the evidence does establish that Tass was a department of the Soviet State, and, unless counsel for the plaintiff can establish it to be a separate legal entity, it is not disputed that this appeal, in this court at any rate, must fail. The argument on this point can, I think, be summarised as follows. The burden of proof that Tass is a legal entity rests, it is true, on the plaintiff, but Tass, by registering under the Registration of Business Names Act, 1916, has said that it is either a Russian firm or a Russian corporate entity and the rest of the evidence and the statute show that it is a corporate entity. To appreciate this argument it is necessary to look at the Act of 1916 and to the particulars which have been filed thereunder.

The following provisions are relevant to the matter before us. Section 1 :

> " Subject to the provisions of this Act . . . (*b*) Every individual having a place of business in the United Kingdom and carrying on business under a business name which does not consist of his true surname without any addition other than his true Christian names or the initials therefore ; (*c*) Every individual or firm having a place of business in the United Kingdom, who, or a member of which, has either before or after the passing of this Act changed his name, except in the case of a woman in consequence of marriage ; shall be registered in the manner directed by this Act."

Section 2 :

> " Where a firm, individual, or corporation having a place of business within the United Kingdom carries on the business wholly or mainly as nominee or trustee of or for another person, or other persons, or another corporation, or acts as general agent for any foreign firm, the first-mentioned firm, individual, or corporation shall be registered in manner provided by this Act, and, in addition to the other particulars required to be furnished and registered, there shall be furnished and registered the particulars mentioned in the schedule to this Act."

Section 7 imposes a penalty for default in registration, and s. 16 imposes a duty on persons who have been registered, if and when the firm or individual ceases to carry on business or there is any other relevant change, to file the requisite particulars with the registry. Section 22 contains a number of definitions, making it clear that in this Act an " individual " means a natural person, and does not include a corporation, and it contains this definition of the expression " foreign firm," which is mentioned in s. 2 : " ' Foreign firm ' shall mean any firm, individual, or corporation whose principal place of business is situate outside His Majesty's dominions." The schedule contains particulars of the form which has to be filled in. It has two columns. One is headed, " Description of firm, etc.", and the other is headed, " Additional particulars."

We have had before us evidence as to the particulars that were filed in relation to Tass under this Act. The first is to be found in an exhibit to the affidavit of Mr. Linnell, filed on the original application before the master. The particulars in question, which were filed on June 18, 1938, and registered on July 18, were as follows : " (1) Business name, Tass Agency ; (2) Nature of business, Telegraphic News Agency ; (3) Place of business, 115, Fleet Street, E.C.4." That is a different number in Fleet Street from that appearing in the writ, but I do not think it has any relevance to the matter which we have to decide. " (4) Christian name and surname of individual, Frederick Taylor." I can pass over the rest of the particulars, except for para. 12, " The business name and address of the foreign firm as agent for whom the business is carried on : Tass Agency, 13, Armiansky Pereulok, Moscow, U.S.S.R." I do not think that there can be any doubt that those particulars were filed pursuant to s. 2 of the Act.

That was the position so far as the Registration of Business Names Act, 1916, was concerned, when the case came before the master and Birkett, J., but at the last moment, counsel for the plaintiff produced in this court another affidavit containing some further particulars. The first exhibit was an exhibit for all practical purposes in identical terms to that to which I have already referred. The second contained particulars dated July 2, 1948—a month after the issue of the writ—which stated that Frederick Taylor, of Tass Agency, 85, Fleet Street, London, E.C.4, ceased to carry on business on Aug. 31, 1946. The second, which was registered on June 5, 1948, gave particulars as follows, these particulars being filed under s. 1, not under s. 2, of the Act : " (1) Business name. Tass ; (2) Nature of business. News Agency ; (3) Place of business. 85, Fleet Street, London, E.C.4 "—another different number in Fleet Street from that appearing in the writ and the earlier particulars—" (4) Christian name and surname of individual. Michael Basharin " ; and there was no para. 12. Those are the defendants' particulars. It was contended for the plaintiff that they afford *prima facie* evidence, first, that Mr. Taylor was the agent of Tass Agency, and, secondly, that Tass was either a firm or, in the light of the other evidence, a firm in the eyes of Russian law. Having regard to the fact that Mr. Linnell's affidavit had been filed at an earlier date, and to the fact that no affidavit was filed suggesting that Mr. Taylor was not an employee of Tass agency, and, I might add, to the fact, according to one of those particulars and to what counsel for the defendants told us in court, that it was the agency who filed a statement that Mr. Taylor had ceased to be in their employ in 1946, it is, in my view, a reasonable inference that Mr. Taylor was the agent of Tass Agency, but counsel for the plaintiff said the position goes much further than that. Paragraph 12 of the particulars originally filed under the Act would have been unnecessary unless Tass was a foreign firm as defined in s. 22, and it could only be a foreign firm if it was either a firm, an individual, or a corporation. Therefore, it was argued, we should treat this as *prima facie* evidence that Tass is a foreign corporation since nobody suggests that it is either a firm or an individual.

I feel some difficulty in accepting that argument. It seems to me that the evidence as to the nature of Tass must depend on its constitution and must be a question of Russian law, and that we must look at the Russian statutes and to any relevant evidence that is adduced as to Russian law (and for all practical purposes in this case, that is *nil*) to determine whether or not Tass is a separate legal entity. Mr. Taylor, it seems to me, is wholly incompetent to give evidence on this subject. Even if what he said be regarded as *prima facie* evidence, I am bound to say that, looking at the rest of the evidence, I am unable to accept the view that Tass is a separate legal entity. What is the rest of the evidence ? Mr. Andrienko seems completely neutral on the subject. He does not cite—because he does not seem to have appreciated—the only relevant provisions in the statute, namely, cll. 14 and 15. The ambassador, if I may say so, showed a better appreciation of what was relevant, but he, perhaps not being a lawyer, perhaps out of caution, quotes practically the wording of the statute without expressing any opinion as to its legal effect. After saying that the Tass agency is a department of the Soviet State, he says that it exercises the rights of a legal entity. Does that mean that it is a legal entity ? When the argument first started to say that it meant the same thing seemed an attractive proposition, but on consideration, and having regard to what has happened in this court as regards departments of State, I am unable to think that we should be justified in treating this as establishing that Tass has a separate legal entity.

Counsel for the defendants referred us to the status of a number of government departments, which are set out in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 6. He began on p. 675, which deals with the Crown and the Executive, under s. 8, " The departments of State." He referred first to a number of departments as to which there was nothing to suggest that they were corporate entities or had any bearing on this subject, citing the Home

Secretary who, in para. 896, is said not to be capable of suing or being sued in his official capacity. The first deviation, so to speak, from the ordinary rule to which our attention was called was the Admiralty. The Admiralty are not liable to be sued except with respect to land, the remedy in other cases being by petition of right. As regards the War Office, the Secretary of State is liable to be sued in relation to certain matters which are referred to in paras. 921 and 922. The Air Council may sue and be sued and for all purposes be A described by that name, " but," says the learned author (*ibid.*, para. 925) :

> " . . . it is probably not a corporation, and cannot, in any event, be sued as representing the Crown, or in such a way as to affect Crown property."

That was the conclusion reached by ATKIN, L.J., in *Mackenzie-Kennedy* v. *Air Council* (4). One other instance is the Ministry of Health : B

> " The Minister may sue and be sued by the name of the Minister of Health. For the purpose of acquiring and holding land, he is a corporation sole, and all land vested in him is held in trust for the Crown for the purposes of the Ministry of Health."

The Postmaster-General, for certain purposes, is also a corporation sole. In C all these cases it is clear that for certain purposes a department of State is incorporated, but counsel for the plaintiff did not venture to suggest that they were incorporated for all purposes, and that, in cases not specifically covered, they could be sued and be deprived of the immunity which normally attaches to a department of State.

Turning to the present case, it seems to me that, on the evidence, Tass falls, D so to speak, in a lower category so far as liability is concerned than does the Minister of Health. Our attention has been called to nothing which can be said to amount to a declaration that Tass is a corporation sole. It is said in the translation of the statute and by the ambassador that it has the rights of a juridical or legal entity, but it seems to me that the evidence falls far short of that which would be necessary to establish that Tass is a legal E entity and that the Union of Soviet Socialist Republics, by procuring its incorporation, has deprived that particular department of the immunity which normally attaches to a department of a sovereign State in accordance with the principles of comity established by international law and recognised by this country.

That is really sufficient to dispose of the case and to lead to the dismissal F of the appeal, but, as the case may go higher, I think I ought to say just a few words on what the position would be had I come to the opposite conclusion and been of opinion that the evidence did establish that Tass was given the status of a separate juridical entity. It does not seem to me necessary to follow that it would thereby have been deprived of its immunity. The history of the legislation in this country as regards the departments of State seems G to me to show that it is quite possible that a State may for certain purposes under its own legislation give some department of State the status and the rights of a juridical entity without depriving the department of its general immunity from suit, and it seems to me that it would be impossible to say—no doubt, our government would not wish to say—that the Crown had thereby deprived itself of the right to rely on that immunity if an attempt were made H to sue it in a foreign country. One must look in every case at the facts to reach a conclusion whether the Crown has intended to give up its immunity generally or only for limited and defined purposes.

Our attention was called to a number of American authorities which it was said, showed that departments in the position of Tass have no right to immunity. I do not find it necessary, in view of the conclusion which I have reached on the main point, to go through them in detail, but I think I can summarise the conclusion which I seek to draw from them by referring briefly to them. In *Pilger* v. *United States Steel Corpn.* (5), the question was as to the position of the Public Trustee. It seems to me that counsel for the defendants was right in saying that, having regard to the terms of the statute constituting the Public Trustee and of the trading with the enemy legislation under which he was made Custodian of Enemy Property, the legislature had made it plain that the Public Trustee was, for purposes of suit, to be regarded, not as an officer of State, but as a trustee liable to suit here and abroad in the same way as a private trustee. In *Ulen & Co.* v. *Bank Gospodarstwa Krajowego (National Economic Bank)* (6), the Polish National Economic Bank had been formed as a share company with commercial objectives, and it was plain from the whole history of the matter that the Polish State had intended to make it, not a department of State, but a commercial body which could be used by a department of State. So, too, in *United States* v. *Deutsches Kalisyndikat Gesellschaft* (7), where a question arose as to an agency for the sale of potash which had been founded by the French government to deal with potash produced in Alsace-Lorraine. It was plainly a *société anonyme* formed under French law in which the French government were majority shareholders, but not the sole shareholders. They retained the right to appoint the majority of the board and various other rights, and it was a necessary inference from the history of the matter that the French government had deliberately chosen to make this a commercial concern and not a department of State.

We were referred to certain other cases, which I do not think I need go through in detail. The inference I should draw from these American cases is (and to this extent I do not think I should quarrel with it) that a sovereign government may so incorporate a particular department of State as to make it plain that it is to be an ordinary trading, commercial, or business activity and not to be part of the State so that it can claim immunity, but I think it would be wrong to infer from these authorities, and I should not, without further argument, be prepared to accept the view, that it necessarily followed that, because a department of State was granted incorporation, it was deprived thereby of the right to assert its sovereign immunity in foreign courts. I need not say anything more on that aspect of the question in view of the conclusion which I have reached on the main point, that the evidence does not satisfy me in this case that Tass was a separate legal entity.

I desire to say one word more on the last point in the argument of counsel for the plaintiff that the evidence was ambiguous and self-contradictory, and that, as the onus of establishing their right to immunity is on the defendants, their application must fail. I think that turns upon what I have already said, that, in my view, the defendants do establish that Tass was, and in essence is, a department of State to the necessary extent to shift the onus of proving that they were a separate legal entity to the plaintiff. That onus, in my opinion, he has failed to discharge. For these reasons I think that the decision of BIRKETT, J., was right and ought to be affirmed.

TUCKER, L.J.: No question arises in the present appeal with regard to the immunity of diplomatic officers. The sole question is whether a body called the Tass Agency of Moscow has established that it is part and parcel of a sovereign independent State, namely, the Union of Soviet Socialist Republics. It is common ground that the onus of establishing that lies on them. Furthermore, it is common ground that the certificate of their ambassador in this country is not conclusive of the matter, though, no doubt, it is evidence of very high evidential value, and, in a matter of this kind, I think it is probably the best kind of evidence that can be procured.

I desire to draw attention to one or two dates in this matter before I proceed further. The alleged libel complained of is stated to have been published in an issue of THE SOVIET MONITOR for May 7, 1948, and the writ in the present action was issued on June 2, 1948. In due course a conditional appearance was entered and proceedings were taken consequent thereupon in chambers to establish that the defendants were immune from suit. In the course of those proceedings and in the course of this appeal, it has been shown that until July 2, 1948—that is, a month after the issue of the writ in the present proceedings—there appeared in the register under the Registration of Business Names Act, 1916, an entry showing that an entity or a firm or something called Tass Agency, the nature of whose business was a telegraphic news agency, was registered as being the business name of one Frederick Taylor, a British subject, who was carrying on that business at 115, Fleet Street, E.C.4. The entry shows that he had been carrying it on from June 10, 1938. In those particulars, para. 12 requires to be stated the business name and address of the foreign firm as agent for whom the business is carried on, and that is stated to be " Tass Agency, 13, Armiansky Pereulok, Moscow, U.S.S.R." That was the entry which at all times was on the register until it was removed by an application dated June 2, 1948, by Mr. Frederick Taylor, who gave notice that he, Frederick Taylor, of the Tass Agency, 85, Fleet Street, London, E.C.4 (it is to be observed that it had been previously registered as carrying on business at 115, Fleet Street), had ceased to carry on business on Aug. 31, 1946. Then there also appears to have been an application to register, which is dated Apr. 15, 1948, three weeks before the issue of THE SOVIET MONITOR in question, an entry made by one Michael Basharin, who stated that his business name was Tass, that the nature of his business was a news agency, that his place of business was 85, Fleet Street, that he was a Russian subject, and that he had commenced business, the date of commencement of business of the individual being Apr. 5, 1948. It will be observed that that is simply an entry of the business carried on by an individual without any statement that he was carrying it on as the agent of any foreign firm or principal. We were told that, although that application was dated Apr. 15, 1948, the actual entry in the register appeared to have been made on June 5. I think it is only right to assume—it is, in fact, no assumption—that the existence of the first entry in the register by Mr. Frederick Taylor had been brought to the notice of the defendants, if they did not know of it already, by means of an affidavit sworn by Mr. Frank James Linnell, which was filed on June 30, 1948, and that was in due course answered by an affidavit of Percy Charles Smith, sworn on Nov. 24, 1948, in which he exhibited a certificate by the ambassador dated Nov. 20, 1948, so that, when the ambassador's certificate was given, it was known to the defendants that there was this entry with regard to Frederick Taylor on the Business Names Register, and I should be very surprised, in view of the fact that no affidavit to the contrary has been put in, if they were not also well aware of the entry made by Mr. Basharin. However that may be, no explanation has been forthcoming with regard to those entries, nor has there been laid before this court any further evidence with regard to the status of this organisation in Russian law than is to be found from the statute creating this body, a translation of the complete statute having been put in in the present appeal by and on behalf of the plaintiff. Apart from the translation of the statute and apart from the ambassador's certificate and the affidavit of Mr. Andrienko, there is no material before this court calculated to assist us in determining the questions before us in so far as they are questions of Russian law.

That is a position which I regret. We gave to both parties an opportunity on the hearing of this appeal to adduce further evidence which might assist the court in determining this important question, but neither party was able, or, at any rate, willing, to adduce any further evidence on the matter, and, therefore, we have to do the best we can on the very scanty material before us. The result is that our decision in the present case can only be binding between the immediate parties thereto, and it may be possible, for all I know, that in some further proceedings, if there should, unfortunately, be such a further proceeding, further evidence may be forthcoming which may or might conceivably lead a court to come to a different conclusion. Our task is simply to deal with the matter on the evidence which the parties have thought fit to place before us. On that evidence we have the statement by the Russian ambassador that the Tass Agency constitutes a department of the Soviet State—that is the Union of Soviet Socialist Republics—exercising the rights of a legal entity. There is nothing in the affidavit of Mr. Andrienko which assists the court in any way whatever. It merely consists of a summary of the effect of the statute creating the Tass Agency. In substance, in this case, apart from the entries in the Business Names Register, we have to deal with the matter on the ambassador's certificate, drawing our inferences to the best of our ability from looking at the translation of the statute.

The principal point made by counsel for the plaintiff is that the statement that Tass Agency constitutes a department of the Soviet State is contradicted or nullified or made ambiguous by the further statement that it exercises the rights of a legal entity. The first question is : Has counsel for the plaintiff established (and the onus is on him in this respect, having regard to the statement of the ambassador) on the material on which he has to work that by Russian law the Tass Agency is a separate legal entity ? I agree with Cohen, L.J., that he has not done so. There is nothing in the statute to say that it is a separate legal entity. The statute says in cl. 15 :

> " The telegraphic agency of the U.S.S.R. and the telegraphic agencies of the Union Republics enjoy all the rights of a juridical person "

and the ambassador's certificate says (no doubt, summarising that clause) that it exercises the rights of a legal entity. There is not one word about it being subject to the obligations of a legal entity, nor is there any material to show what are the requisites in Soviet law of acquiring the status of a legal entity.

In this connection I should like to refer to a passage in the judgment of Atkin, L.J., in *Mackenzie-Kennedy* v. *Air Council* (4). There Atkin, L.J., was dealing with the position of the Air Council according to our law, and one of the questions which arose was whether or not the Air Council was a corporation. This is what Atkin, L.J., said ([1927] 2 K.B. 533) :

> " I have, therefore, felt it necessary to consider whether it could be contended in this case that the Air Council was a corporation. ' To create a corporation by charter or Act of Parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident ' : *per* Littledale, J., in *Tone River Conservators* v. *Ash* (8). The learned judge goes on to consider whether in the case of the conservators they have a name, perpetual succession, and a right to sue and be sued in their corporate name. It must be admitted that most, if not all, of these characteristics of a corporation attach to the Air Council. They have a name in which they can sue and be sued, and it would appear that they are to have perpetual succession, for by the Act of 1917, s. 8 (3), the property of the Air Board is to be transferred to them, and by s. 8 (4), it is contemplated that the property of the Admiralty or Secretary of State for War may be transferred to them by Order in Council. I find, however, that in fact under the Order in Council the property of the Secretary of State for War, and such property as the Air Council may acquire under the powers transferred to them, is vested not in the Air Council but in the President. I also bear in mind that there were in existence before 1917 various Acts expressly constituting departments of State corporations. I need only refer to the Acts incorporating

> for certain purposes the Secretary of State in Council in India (Government of India Act, 1858, s. 65) ; the Postmaster-General (Post Office Duties Act, 1840, s. 67) ; and the Commissioners of Public Works (Commissioners of Works Act, 1892, s. 1). If it had been intended to incorporate the Air Council one would have expected the well known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated. In these circumstances I am unable as at present advised to find in the words of the legislature 'the manifest intention to incorporate' which LITTLEDALE, J., in the case cited rightly thought essential." A

Those are the considerations to which we should have to apply our minds if we were considering this matter under English law. No doubt, there are other similar considerations which may fall to be considered under Soviet B law for the purpose of deciding whether or not a separate status has been acquired. We do not know what the tests in Soviet law are with regard to this matter. All we know is that this organisation exercises, or has, the rights of a legal entity, or, putting it the other way, that it enjoys all the rights of a juridical person. Whether it may be sued, we do not know, nor, as I have said, do we know what are the essential requisites of a separate juridical C existence in Soviet law. Therefore, I think that these passages are not sufficient to establish the submission of counsel for the plaintiff that Tass had a separate legal existence.

I agree with COHEN, L.J., that, if that submission had been established, the plaintiff would not necessarily have succeeded in this appeal, and I should desire to reserve for future consideration the question whether or not the mere fact D of a separate legal existence is necessarily inconsistent with the entity being part and parcel of a sovereign independent state. There again, it must depend on the foreign law. It may be that under some foreign systems of law such a separate existence might be considered inconsistent, but it is clear from our Acts of Parliament that we do not consider the fact that a government department may have a separate legal juristic existence as necessarily E incompatible with it being a department of State for which immunity can be claimed.

I do not desire to add anything to what has fallen from COHEN, L.J., with regard to these entries in the Business Names Register. Although I should have been happier to have had some explanation of how they came to have been made, I cannot see that there is anything in them which would justify F this court in saying that it should not accept the statement of the ambassador that Tass Agency constitutes a department of the Soviet State, and that is the matter which is in dispute. That was the matter which was established in the *United States Shipping Board* case (1) by evidence of a very similar nature to that which appears in this certificate of the ambassador. Counsel for the plaintiff has expressly stated that he desires to reserve for argument G elsewhere, if he has the opportunity, the point that this immunity cannot be claimed for an organisation whose activities are other than governmental, but he recognises that he is precluded from arguing it here because of the decision in the *Porto Alexandre* case (2), following on *The Parlement Belge* (9), that the mere fact that trading activities are being pursued is not sufficient to deprive a government of its claim to immunity. I am bound to say, however, H that in the present case I do not know what the evidence is which shows that this agency was carrying on any activity inconsistent with its being a governmental activity, unless any assistance in that respect can be extracted from these entries in the Business Names Register. I agree that this appeal fails.

SINGLETON, L.J. : I am of the same opinion. My judgment is strictly limited to the facts of this case. I do not think that we have before us all the facts necessary to enable us to form a clear view of the position, but we are asked to deal with the case as it stands. We are without any evidence as to Soviet law, except for (*a*) a translation of the statute concerning the Telegraph Agency of the Union of Soviet Socialist Republics, and (*b*) the certificate of the ambassador, which is dated Nov. 10, 1948. It may well be that, if this question has to be considered at some future time, there will be further evidence and more light may be thrown upon the position.

The certificate of the ambassador states that the Tass Agency constitutes a department of the Soviet State. There is nothing to contradict that statement unless the words which follow, "exercising the rights of a legal entity," can be so read. I confess that I do not know what those words mean. They are not equivalent to saying that Tass is a legal entity. If they were, the position might be different. So far as I can see, there is no precedent for extending immunity to a corporate body carrying on business in this country, and I should wish for further argument before deciding that it could be so extended. The decision in the present case I regard as being based on a certificate of the ambassador that Tass is a department of the Soviet State.

Nearly thirty years ago there arose the case of *The Porto Alexandre* (2) to which my Lord referred. There it was decided that:

> "A vessel owned or requisitioned by a sovereign independent State and earning freight for the State, is not deprived of the privilege, decreed by international comity, of immunity from the process of arrest, by reason of the fact that she is being employed in ordinary trading voyages carrying cargoes for private individuals."

HILL, J., said he had arrived at that decision with the greatest reluctance. He added that on the facts he was prepared to find, if it was necessary, that the Porto Alexandre was being used in ordinary commerce, and that the only interest in the Portuguese government was in the earning of freight. In his view, the law as laid down in the *Parlement Belge* case (9) was that a sovereign State could not be impleaded either by being served *in personam* or indirectly by proceedings against its property; and if that were the principle it mattered not how the property was being employed. He continued ([1920] P. 31):

> "I think therefore that this motion succeeds upon the ground that it is established that this ship was the property of the Portuguese government at the time of arrest and is now its property. It therefore follows that so far as the ship and freight are concerned, the writ and all subsequent proceedings must be set aside, but the writ and all subsequent proceedings so far as the cargo is concerned, will remain good. I have already, in previous cases, pointed out what I conceive to be very strong reasons why it is undesirable that cases should be withdrawn, as this is being withdrawn, from the courts, but I have only to assert now what I conceive to be the law."

In the same case in this court BANKES, L.J., said (*ibid.*, 34):

> "I gather from the judgment of HILL, J., and from what has been said by learned counsel, that this question is becoming one of growing importance. In the days when the early decisions were given, no doubt what were called government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times sovereigns and sovereign States have taken to owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. That fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest."

SCRUTTON, L.J., said (*ibid.*, 36):

> "Now this State and other States proceed in their jurisprudence on the assumption that sovereign States are equal and independent, and

> that as a matter of international courtesy no one sovereign independent State will exercise any jurisdiction over the person of the sovereign or the property of any other sovereign State ; and now that sovereigns move about more freely than they used to, and do things which they used not to do, and now that States do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent States and their sovereigns. I think it has been well settled first of all as to the sovereign that there are no limits to the immunity which he enjoys."

And further (*ibid.*, 38) :

> "I quite appreciate the difficulty and doubt which Hill, J., felt in this case, because no one can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many States are trading, or are about to trade, with ships belonging to themselves ; and if these national ships wander about without liabilities, many trading affairs will become difficult . . . These are matters to be dealt with by negotiations between governments, and not by governments exercising their power to interfere with the property of other States contrary to the principles of international courtesy which govern the relations between independent and sovereign States. While appreciating the difficulties which Hill, J., has felt, I think it is clear that we must, in this court, stand by the decision already given, and the appeal must be dismissed."

Those passages which I have read are of even greater importance today than they were when the words were spoken. That is why I have thought it right to draw attention to them, feeling sure, as I do, that this question will receive the attention which it deserves.

Appeal dismissed with costs.

Solicitors : *Denton, Hall & Burgin* (for the appellant, plaintiff) ; *Lawrence Jones & Co.* (for the respondents, defendants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Applied. Baxter *v.* Eckersley.
[1950] 1 All E.R. 139.

REMNANT *v.* SAVOY ESTATE, LTD.

[Court of Appeal (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ.), June 15, 16, 1949.]

Company—Debenture holder's action—Estoppel—Res judicata—Receiver appointed by court—Claim for furniture lent to company—Judgment against claimant—Claim by another claimant—Title of first claimant set up by receiver—Competence of defence.

Some years before 1940 Mrs. R. lent certain furniture to the S. Co. for its use. In 1940 a receiver was appointed by order of the court in a debenture holder's action against the company. In 1943 Mrs. R. took out a summons in that action asking for the delivery up to her of part of the furniture which was specified in an inventory, exhibit 4. In 1944 her claim was dismissed by the Court of Appeal on the ground that she had not established her title to the furniture as she had failed to prove that Sir C.F. (through whom she sought to prove her title) had given it to her. In 1945 she took out a second summons claiming the whole of the furniture, but, on being met with a defence of *res judicata*, she amended her summons by limiting her claim to items of furniture other than those contained in exhibit 4. On July 16, 1945, the personal representatives of Sir C.F. issued a summons in the action claiming the furniture contained in exhibit 4. The receiver and the debenture holder resisted this claim and set up the defence that the true owner of the furniture was Mrs. R. Both summonses were heard at the same time.

HELD : (i) the court must look on the matter as one in which the executors and Mrs. R. were between them claiming the furniture and the receiver and the debenture-holder were resisting that claim. Accordingly, as the latter relied on the defence that Mrs. R. was estopped from asserting a gift to her from Sir C.F., they were as much disabled as Mrs. R. from setting up this gift.

(ii) as bailee the receiver could not set up the *jus tertii* of Sir C.F. and afterwards, when his executors claimed the property, set up as a defence the title of Mrs. R. which he had previously repudiated as bailor.

(iii) as an officer of the court the receiver could not sever the two summonses claiming the property in such a manner as would permit him in the same proceedings to assert a fact against one claimant and to deny the other claimant's right to rely on the same fact.

[AS TO THE EFFECT OF RES JUDICATA BY WAY OF ESTOPPEL, see HALSBURY, Hailsham Edn., Vol. 13, pp. 410-414, paras. 465-469 ; and FOR CASES, see DIGEST, Vol. 21, pp. 159-169, Nos. *213-253* ; and FOR CASES ON ESTOPPEL OF BAILEE, see DIGEST, Vol. 3, pp. 100-102, Nos. *281-293*.]

Cases referred to :

(1) *Rogers, Sons & Co.* v. *Lambert & Co.*, [1891] 1 Q.B. 318 ; 60 L.J.Q.B. 187 ; 64 L.T. 406 ; 55 J.P. 452 ; 3 Digest 101, *285*.

(2) *Biddle* v. *Bond*, (1865), 6 B. & S. 225 ; 5 New Rep. 485 ; 34 L.J.Q.B. 137 ; 12 L.T. 178 ; 29 J.P. 565 ; 3 Digest 101, *287*.

(3) *Shelbury* v. *Scotsford*, (1602), Yelv. 23 ; 3 Digest 101, *286*.

(4) *Betteley* v. *Reed*, (1843), 4 Q.B. 511 ; 3 Gal. & Dav. 561 ; 12 L.J.Q.B. 172 ; 3 Digest 101, *283*.

APPEAL from a decision of VAISEY, J., by a receiver in a debenture holder's action and the debenture holder.

In 1940, in a debenture holder's action against Savoy Estate, Ltd., one E. L. Price was appointed receiver by order of the court. In September, 1943, the respondent, Mrs. O. F. Remnant took out a summons in that action, asking for the delivery up to her of certain furniture, then in store, described in an inventory, exhibit 4, which, she contended, had been lent by her to the company for use in an hotel owned by the company. In May, 1944, UTHWATT, J., gave judgment in her favour for the delivery up to her of the furniture. In October, 1944, that judgment was set aside by the Court of Appeal on the ground that Mrs. Remnant had not proved the gift of the furniture to her by Sir Charles Friswell, who had bought it in 1907. In March, 1945, Mrs. Remnant took out a second summons asking for the delivery up to her of furniture specified in both exhibit 4 and also in a further exhibit, exhibit 7, supporting her claim by the evidence previously tendered and a further affidavit asserting a gift of the furniture to her by Sir Charles Friswell. In July, 1945, EVERSHED, J., gave leave to amend the summons by restricting the claim to furniture which was not specified in exhibit 4 and which, therefore, had not been subject to the decision of the Court of Appeal. Subsequently, the executors of Sir Charles Friswell took out a summons claiming the property mentioned in exhibit 7 (which included that specified in exhibit 4). Both summonses were tried together. VAISEY, J., gave judgment for the executors, but he dismissed the claim of Mrs. Remnant. The receiver and debenture holder appealed. The Court of Appeal dismissed the appeal.

Ungoed-Thomas, K.C., and *J. A. Reid* for the appellants (the receiver and debenture holder).

Pascoe Hayward, K.C., and *Lindner* for the respondents (the executors of Sir Charles Friswell).

The respondent, Mrs. Remnant, did not appear.

SIR RAYMOND EVERSHED, M.R. : The proceeding before the court is an appeal from an order of Vaisey, J., made on two summonses tried by him together in a debenture holder's action. The company concerned is the Savoy Estate, Ltd. The plaintiff in the action, E. S. Randall, is a debenture holder and the present appellants are Mr. Randall and a Mr. Lloyd Price, who was appointed by the court in March, 1940, as receiver of the undertaking of Savoy Estate, Ltd., comprised in the debentures. The respondents to the appeal, subject to the question of amendment of the notice of appeal, are three persons, namely, Mrs. Remnant, Lady Friswell, and Mr. Ashforth, the second and third respondents being the personal representatives of Sir Charles Friswell deceased. Those are the parties involved in the matter and they are before the court, not all being parties to the action, as persons who come into the proceedings by way of summons in a debenture holder's action.

The subject-matter in dispute is some furniture. Counsel for the appellants has conceded that we need not trouble with matters of identity. The furniture which is claimed in one or both of the summonses in question is comprised in exhibit 7. Whether or not all the items in exhibit 7 still exist does not matter, but part of those items are covered by another exhibit to which I will refer as exhibit 4. So far as I am aware, it is not in dispute that the items in exhibit 4 do exist. The whole of the furniture was the subject of certain transactions which took place between the first respondent, Mrs. Remnant, and her husband, now dead, on the one side, and Sir Charles Friswell, on the other. For present purposes it is sufficient to say that in 1907 this furniture was bought by Sir Charles Friswell. It is said that he gave it to Mrs. Remnant, and much has turned, during the nine years of litigation that has followed the appointment of the receiver, on the question whether that assertion is or is not, for some purposes or for all purposes, proved, but it appears to be established clearly that the furniture was lent by Mrs. Remnant, acting on whose behalf for the moment matters not, to Savoy Estate, Ltd., that it might be used by the company as part of the furnishings of an hotel called the Beresford Hotel, Birchington. The furniture having thus arrived at the hotel, misfortune appears to have fallen on the affairs of the company (which, I should interpolate, had been promoted by Mr. Remnant), and when the present proceedings began in 1940 the furniture was stored in a warehouse.

The first material matter to which I must allude is that at the end of 1943 Mrs. Remnant preferred a claim for the return to her of the smaller amount of furniture specified in exhibit 4, and the learned judge made an order for the delivery up of that furniture. The judge made the order on affidavit evidence by Mrs. Remnant, but the present appellants appealed to the Court of Appeal. They based their appeal on the ground that there was a *lacuna* in the evidence which Mrs. Remnant had put forward, because she had failed to establish the last link in the chain, namely, the gift from Sir Charles Friswell to herself, and that argument prevailed in the Court of Appeal. In view of some of the argument which has been put forward in this court, I must, I think, refer briefly to the judgments of Lord Greene, M.R., and Morton, L.J., given in that case. Lord Greene, M.R., began his judgment as follows :

> " I have no doubt whatever that Mrs. Remnant, in putting in a claim to this furniture, is acting in the perfectly honest belief that the furniture is hers. What the court has to consider is whether the evidence which she puts before the court in support of her claim is sufficient to establish it."

Then he deals with the case put before the court by Mrs. Remnant, and in the next paragraph he says :

> " She carries the matter as far as the sale to Sir Charles Friswell. All that the rest of her evidence amounts to is a suggestion that she regarded the furniture as her own. That is quite insufficient to establish a title based on a gift."

MORTON, L.J., said :

> " The applicant, however, wholly fails to make any such statement [that the gift was made] in her affidavit."

The basis of the decision of the court was that she had failed to prove her case.

That being the result of the appeal, Mrs. Remnant thought she would have a second attempt to make good her claim and issued another summons claiming the furniture. On July 11, 1945, that summons came before me, sitting as a judge of first instance, and the present appellants took the point that the matter had been determined and, according to the ordinary principles of *res judicata*, Mrs. Remnant could not litigate again the same question on which she had already been defeated. I took the view that Mrs. Remnant was estopped from litigating afresh her claim to the furniture against the same persons, but that that estoppel was limited to the subject-matter of her first claim, namely, the contents of exhibit 4, and if she were able to prove ownership of other items of furniture, that would be a wholly different cause of action and one which she could litigate. I, therefore, gave her liberty to amend her summons, which she did, and that summons thereafter became and has remained an application for delivery up to her of so much of the furniture in exhibit 7 as is not included in exhibit 4. When that claim came to be tried before VAISEY, J., he found that she had failed to identify any items of property constituting exhibit 7 minus exhibit 4 and on that ground he dismissed her application, but some five days after the summons had been before me there entered (perhaps to the surprise of the present appellants) two new characters into the litigation, namely, the personal representatives of Sir Charles Friswell, and on July 16, 1945, they issued a summons against the present appellants. They say in effect : " You, the receiver and the debenture holder, have managed to defeat Mrs. Remnant by persuading the Court of Appeal that she failed to prove a gift from Sir Charles Friswell to her. We represent Sir Charles Friswell and the furniture belongs to us." To that the present appellants made answer : " No. Against you we shall prove a gift by Sir Charles Friswell to Mrs. Remnant." At first sight that seems an almost Gilbertian situation. Here were the appellants, who had rebuffed A by saying she had established title in claimant B and was thereafter estopped from again asserting her own title, turning immediately afterwards to claimant B and saying : " We will now rebuff you by proving title in claimant A whom we have just disabled from making any effective claim against us."

As SOMERVELL, L.J., pointed out in the course of the argument, *res judicata* may work in mysterious ways and that may be the effect of the application of the doctrine here. I venture to think, however, that there is a relatively simple answer to the appellant's case. It will be observed—and this has been the basis of the argument of counsel for the appellants—that here there were two independent claims—(i) a claim by Sir Charles Friswell's personal representatives for furniture comprised in exhibit 4, and, (ii) a claim by Mrs. Remnant for furniture comprised in exhibit 7 minus exhibit 4, and that, in meeting those claims, there was no inconsistency in the receiver and the debenture holder saying : " On the facts, a gift is proved to her of everything. That, therefore, defeats the personal representatives and would entitle Mrs. Remnant to succeed if she could identify any furniture which answered the description of exhibit 7 minus exhibit 4." The two summonses, however, being summonses in the debenture holder's action, as a matter of convenience were dealt with together.

When they came on before VAISEY, J., it seems plain that there was no attempt to keep the two claims separate for the purpose of leading evidence or for argument. Counsel now appearing for the respondents appeared for all three persons and the same solicitors appeared for Mrs. Remnant and for the executors. It goes even further than that (and this is significant) for counsel for the respondents has made it plain that he is more than a co-applicant, he is an ally and champion, of Mrs. Remnant and appears in the proceedings with the benefit of her indemnity as to costs, and he has said that any furniture he recovers comprised in exhibit 4 he will immediately hand over to Mrs. Remnant.

When the facts are looked at and the matters to which I have referred borne in mind the real situation is that the severance of the claims disappears as an effective point in the case and the court must look on this matter as one in which there are, on the one side, three persons as claimants, claiming between them certain furniture, and, on the other side, the debenture holder and the receiver resisting that claim. True it is that the form of the summonses had limited the individual claimants to specific items, but the case was tried and the whole evidence was led on the footing that the whole of the claims were being dealt with together.

The importance of that seems to lie in the fact that the principle of *res judicata*, is, after all, a rule of evidence. In any proceedings between Mrs. Remnant, on the one hand, and the present appellants, on the other, if my judgment in July, 1945, was correct, both Mrs. Remnant and the appellants were estopped, if the point were relied on, from asserting a gift from Sir Charles Friswell to Mrs. Remnant so far as regarded the furniture specified in exhibit 4. That placed the appellants in a dilemma. If they chose to rely on the estoppel, they must themselves be affected by it. They were in the difficulty that in a proceeding relating to this furniture to which Mrs. Remnant was a party they themselves were as much disabled as Mrs. Remnant from setting up this point, and it may well be, if I appreciate the reasoning correctly, that it was on that ground that VAISEY, J., really decided the present case in favour of the respondents, because he made no finding in regard to the gift, but stated that the question whether there was a gift was one which he doubted could now be raised at all. Having so decided, he held that, the title being established in Sir Charles Friswell's executors, that was conclusive in their favour and that the furniture must be handed over to them. If, on the other hand, this matter of a gift was open—and it is clear, when one looks at the evidence, that it was treated as not only open but established or admitted for all purposes at the hearing—then the whole basis of the judgment which I gave in July, 1945, is destroyed, because here, in proceedings between these parties, the appellants, who had set up and were entitled to set up the estoppel, were themselves alleging this very point which they said Mrs. Remnant was estopped from asserting. I cannot help thinking that, if Mrs. Remnant had, at the hearing before VAISEY, J., sought to amend her summons or had even sought to appeal out of time against my judgment, she could have obtained leave and could have re-asserted jointly with the executors her claim to the exhibit 4 furniture. The matter could have been put in order in other ways. She could have abandoned her claim as donee. She could have assigned whatever rights she might have to the Friswell executors. Had she done that, the appellants would surely have been in a hopeless position in resisting their claim, but, as counsel for the appellants is entitled to say, those things did not happen and, as the matter now comes before the court, we have to treat the case as we find it stated on the summonses.

In my judgment, the answer to the claim is that in proceedings of this nature where the court must do justice to the best of its ability on the facts as proved the right answer is that arrived at by VAISEY, J., either on the ground he stated or on the ground that the substance of the matter is now that Sir Charles's executors, on their own behalf or on behalf of Mrs. Remnant, have established as against the debenture holder and the receiver a title to have this property delivered to them or as they shall direct. That conclusion is, I think, supported by certain other considerations. The first is this, and it has involved an interesting argument upon the question of bailment. To introduce that argument, I desire to refer to the statement which counsel for the appellants made in opening the case to this court of the matters of fact which he said should be treated as admitted and established and which he at least conceded. He put them in the form of questions and gave answers. These were his questions and these his answers : (i) : " Did this property originally belong to Mrs. Remnant and her husband ? (Answer) : I accept it that it did." (ii) : " Was it sold by Mr. and Mrs. Remnant to Sir Charles Friswell ? (Answer) : I accept it that it was." (iii) : " Was it given by Sir Charles Friswell to Mrs. Remnant ? (Answer) : I accept it that it was." (iv) (and this may be the most important in some respects) : " Did Mrs. Remnant lend the furniture to the company, Savoy Estate, Ltd., which had been established by Mr. Remnant ? (Answer) : I accept it that she did."

Counsel for the respondents has based his argument on that last point most forcibly, for he said the company and the persons now deriving title from the company are admittedly, and always were, bailees of this furniture. They had never attempted to establish any right or title of their own to the furniture. Being bailees, they could only defeat the title of their bailor, who, they say, was Mrs. Remnant, by setting up some title paramount in a third party. That was exactly, says counsel for the respondents, what they did in the Court of Appeal on the former occasion. They set up the *jus tertii*, and the *tertius* was Sir Charles Friswell. They could only do that (so runs the argument) with the authority, actual or assumed, of Sir Charles Friswell, and it must follow that there was, therefore, some kind of legal relationship established between Sir Charles Friswell and the appellants. They ought to be treated as having attorned bailees of Sir Charles Friswell, and they could not thereafter turn round and dispute the title of Sir Charles Friswell as bailor by setting up again another *jus tertii*, the *tertia* in this case being Mrs. Remnant whom they had previously repudiated as bailor.

For the proposition that the bailee, in order to resist the claim of the bailor, may only set up the right of a third party with the authority, actual or assumed, of the third party, counsel for the respondents relied on *Rogers, Sons & Co.* v. *Lambert & Co.* (1). I do not, however, find it necessary to pursue that matter. For my part, I think there may be great difficulty in the attornment point, but I think the respondents on this ground are in a stronger position when one considers the line taken before VAISEY, J., and this court. For, in resisting the claim of Sir Charles Friswell, who, on the evidence and on the admissions of counsel for the appellants, was the purchaser of this property, they are setting up the title of Mrs. Remnant. I think there is force in the respondents' argument that they did not really set up Sir Charles Friswell's title on the previous occasion in the Court of Appeal. I am inclined to think the bailment point, which might have been available to Mrs. Remnant, was not then put, at any rate in the forefront of her case, but, undoubtedly, in this court counsel for the appellants is setting up and is relying on the gift. That does seem to place him in somewhat of a difficulty. Either the title he seeks to set up is a good title, in which case he, a receiver, an officer of the court, is claiming to resist the respondents by setting up the title of somebody, in which case *prima facie* he, as an officer of the court, ought to hand it over to that somebody, or he is setting up—and this is really his case—a wholly fictitious title, because he is seeking to say in one and the same breath : " I rely on the gift to Mrs. Remnant, but at the same time, by virtue of the *res judicata*, I say it is a title which she could in no circumstances whatever effectively enforce against me." I am not satisfied that the latter is a possible line of argument to take—certainly not if it be right that the respondents are in the position of bailees *quoad* Sir Charles Friswell.

I have indicated the possibility that Mrs. Remnant might assign or abandon any claim which she might have to the exhibit 4 furniture, and I will just refer to a sentence quoted by LOPES, L.J., in *Rogers*' case (1) ([1891] 1 Q.B. 328) from a judgment of BLACKBURN, J., in *Biddle* v. *Bond* (2). BLACKBURN, J., delivering the judgment of the Court of Queen's Bench, said (6 B. & S. 233) : A

> " We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury* v. *Scotsford* (3), *viz.*, that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. We agree with B what is said in *Betteley* v. *Reed* (4) that 'to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another who makes no claim or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever '."

As SOMERVELL, L.J., pointed out, if you added to those words " who makes no C claim " " or who can make no claim," it would cover the facts of this case as counsel for the appellants says they must be taken to be between himself and Mrs. Remnant.

That does not decide the question, because is it right to say, between Sir Charles Friswell, on the one hand, and the appellants, on the other, that the latter were depositaries in the sense of being bailees of Sir Charles Friswell ? D I think that there are difficulties in that point. For my part, I prefer to leave it there and express no concluded opinion, because I come back now to the matter with which I started. We are, after all, dealing here with two parties, a debenture holder and a receiver. So far as the debenture holder is concerned, it seems to me that for the purposes of this case he rather drops out of the picture. The debenture holder has not got this furniture in his possession. E If the debenture holder is going to claim the furniture, he must prove title, and on a conflict of title he has failed to prove any title whatever in himself. The strength of the claim of counsel for the appellants is on behalf of the receiver who indubitably has got possession, and he is bound in the exercise of his duty to say : " Any claimant to this property in my possession must make good the claim." He is an officer of the court, and the position is that the F furniture is in the possession of the court through its officer, the receiver. I am far from suggesting that there is any impropriety in the attitude that the receiver in this case has taken. I think he has acted perfectly properly, in a very complicated and somewhat obscure matter, in resisting the claims that have been made, addressing to the court the arguments that have been addressed to us, and in putting the other parties to proof of their case, but he is an officer G of the court and, whether the passage that I have cited from *Rogers* v. *Lambert* (1) quite covers the case, at least it presents an analogy, and, in deciding this matter, we have got to consider what ought the officer of the court to do on the facts as they have emerged.

If the receiver can establish a title to this furniture in Mrs. Remnant, is he properly entitled, then, to retain it if he succeeds against her and to rely on H this estoppel ? For reasons that I have already stated, having regard to the way in which these matters have been tried, I do not think he can sever the case to an extent which would enable him at one moment to set up this matter of fact himself and in the next, in the same proceeding, to deny the right of another party to the proceeding to rely on the same fact. I think, therefore, that no sufficient answer was given to the question put by JENKINS, L.J. : If the appellants do succeed in setting up the title of Mrs. Remnant, how can the receiver retain the property ? On the other hand, if they cannot rely on it, either on the ground that it is not a title within the language I have cited from BLACKBURN, J., which they can properly set up against Sir Charles Friswell or because the estoppel works both ways in these proceedings—it is no more open to them than to Mrs. Remnant to set it up—then, it seems to me, the present respondents have made good their case, as VAISEY, J., thought, to have the furniture handed over to them or as they direct, which I understand clearly is to hand it to Mrs. Remnant.

There is one matter that I have left till last, and that is this. I have said that the two summonses were tried concurrently and really as one matter by VAISEY, J. His order was to the effect that Mrs. Remnant's claim failed for reasons, as I have already stated, of her failure to identify the furniture in question. He, therefore, dismissed her claim, save as regards certain matters of costs. I have not gone into that because Mrs. Remnant does not appeal and it has been unnecessary to do so, but in the notice of appeal as before the court when the case was opened Mrs. Remnant was a respondent to the appeal. The appellants were seeking to vary the order as regards Mrs. Remnant as to costs, which was the only matter of which they could complain. As regards the rest of the order which had directed the delivery to the respondents, they sought to have that reversed and that summons dismissed, but, on opening the appeal, counsel for the appellants made it plain that he did not desire to proceed against Mrs. Remnant, that he had so informed her and the other parties, and he asked leave formally to amend the notice of appeal by striking out Mrs. Remnant as a respondent and striking out from the relief he sought any matter relating to Mrs. Remnant. Counsel for the respondents has not objected, and Mrs. Remnant has not appeared in person or by counsel before us on the hearing of the appeal, but, strictly, the notice of appeal remains in its original form. I mention that, because I think it is desirable to have in mind that in a case of this sort the whole matter is before us and it is not right in a case of this kind to ignore the position of the various parties concerned, whether or not they are strictly before the court as parties to the appeal. I think, in the events which have happened, it would be better to allow the amendment and to have the record altered, because otherwise Mrs. Remnant would not have appeared though a party to the appeal, nor have appeared before the court, but it has been right that her name should be kept as a respondent during the hearing because in the administration of the assets in the hands of the receiver she is a person whose claim has obviously to be considered. Had it not been that counsel for the respondents has made it plain that he is really a champion of Mrs. Remnant, we might have taken a different view as to the propriety of making the amendment, but I think the amendment should be allowed in the form suggested, for the reasons I have stated.

It is unnecessary to express any view on the interesting points of law as to the extent of estoppels which might in other cases arise. On the facts of this case, the view taken by VAISEY, J., was right and the direction he gave for delivery of this furniture to the executors of Sir Charles Friswell or as they shall direct should stand and the appeal be dismissed.

SOMERVELL, L.J. : I agree that the appeal should be dismissed for the reasons which have been given by the MASTER OF THE ROLLS. The issues in this appeal fall to be determined in the light of the circumstances which have been referred to, namely, the fact that these two summonses came on and were heard together. In agreeing with what has been said and in regarding this appeal as being disposed of on that basis, I want to make clear that I do not myself rely solely on those circumstances. I am not satisfied that what I may call the main argument put forward by counsel for the appellants would necessarily have succeeded if, for example, the same sort of problem had arisen in a second action at law. I will not trouble to detail the circumstances, which can easily be imagined, in which the same sort of problem might arise in a second action by a second claimant in respect of the goods which an original claimant in an earlier action had unsuccessfully claimed and against whom *res judicata* had been asserted. Whether the argument advanced on behalf of the appellants would succeed in that case or not, it is not necessary to consider, but I wanted to make it clear that I am not satisfied that it would. I agree with what the MASTER OF THE ROLLS has said. I think there are some difficulties about the submission of counsel for the respondents about attornment. On the other hand, it might be that in such a case the principle that has been quoted from *Biddle* v. *Bond* (2) might by a comparatively minor extension be regarded as covering the issue.

JENKINS, L.J. : I also agree that this appeal fails. It is now admitted that the company never had any beneficial interest whatever in this furniture, which, consequently, was never subject to the charge constituted by the debentures. The furniture was in the possession of the company when the receiver was appointed and so passed into his custody. Now it has become clear that the furniture is not and never was the company's property and is not and never was subject to the charge, the sole question is : Who is the owner to whom the furniture should be handed over ? The only possible owner is either Sir Charles Friswell, now represented by his executors, he having admittedly purchased the furniture from Mrs. Remnant, or else Mrs. Remnant under the gift which she says was made of the furniture to her by Sir Charles Friswell after he had purchased it. The receiver has succeeded in defeating Mrs. Remnant's claim through her failure to adduce sufficient evidence to satisfy this court that the gift was ever made. The position, therefore, is that the receiver, holding as bailee these goods as goods which were merely lent to the company and having eliminated one claimant, must hold for the only other possible claimants, namely, Sir Charles Friswell's executors. The receiver, however, seeks to avoid that position by setting up against Sir Charles Friswell's executors the claim of Mrs. Remnant which he has already defeated. If that policy succeeded, the receiver would obtain for his debenture holders an accession to their security to which they had no right, for no secret is made of the fact that, having repelled the executors' claim in that way, the receiver would still insist on *res judicata* as between himself and Mrs. Remnant. I agree with the MASTER OF THE ROLLS that this position is wholly untenable. If the receiver relies on *res judicata*, as he is entitled to do, as barring Mrs. Remnant's claim against him, then, in my judgment, plainly that claim cannot be relied on as a defence against the executors' claim. The matter must be taken as *res judicata* for all purposes, and Mrs. Remnant's claim must be treated as dead for all purposes. If, on the other hand, the receiver is allowed to revive Mrs. Remnant's claim for the purpose of defeating the executors' claim, it must be resuscitated for all purposes, and the receiver, on successfully setting it up, must be taken to have set it up for the benefit of Mrs. Remnant. Of these two possible views, the learned judge took the former and held that in the circumstances Mrs. Remnant's claim must be treated as wholly gone and that the only possible claimants were the executors to whom he directed the furniture to be handed over. In my judgment, that conclusion was a perfectly proper one to come to in the peculiar circumstances of this case, and I agree that this appeal fails and should be dismissed.

Appeal dismissed with costs.

Solicitors : *Evans Baker & Co.*, agents for *Wood, McLellan and Williams*, Chatham (for the appellants) : *George L. Barnett & Co.* (for the respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Affirmed. H.L. [1951] 1 All E.R. 667.

SMITH *v.* LONDON TRANSPORT EXECUTIVE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Jenkins, L.JJ.), June 30, July 1, 6, 1949.]

Street Traffic—Omnibus service—Powers of British Transport Commission—Delegation of powers to Transport Executive—Extent of powers and validity of delegation—Transport Act, 1947 (*c.* 49), *ss.* 2 (1) (3), 12 (1), 14 (4), 65 (1).

By the Transport Act, 1947, s. 1 (1), there was set up a public authority called the British Transport Commission with power, under s. 2 (1), *inter alia*, to carry goods and passengers by road within Great Britain. By s. 3 (1) the duty was imposed on the commission of providing or securing an efficient, adequate, economical and properly integrated system of public inland transport. Section 5 (1) provided that there should be public authorities, known as "executives," to assist the commission, and s. 5 (4) that each executive should, as agents for the commission, exercise such functions of the commission "as are for the time being delegated by the Minister" of Transport. As respects matters falling within the scope of any such delegation, by s. 5 (9) any rights, powers and liabilities of the commission should be treated as rights, powers and liabilities of the executive, and by s. 5 (10) every executive was to have power at the request of the commission to do, as agent for the commission, anything which the commission had power to do.

The defendants, the London Transport Executive, were an executive constituted under the Act of 1947. On Jan. 1, 1948, under s. 12 (1) of the Act and sched. III thereto, the undertaking of the London Passenger Transport Board vested in the commission, which, under s. 14 (2), had thenceforward all the rights and was subject to all the liabilities of the board. The board had been set up under the London Passenger Transport Act, 1933, with power to provide road services in specified areas. Section 15 of the Act of 1933 provided that the board was to have powers to provide road services of (*inter alia*) stage carriages on various roads, and that outside the London traffic area (the "special area") on roads within the London Passenger Transport Area the board could run services subject to the obligation to obtain a road service licence imposed by ss. 72 to 76 of the Road Traffic Act, 1930, but to the extent that the services were kept within the special area the board was absolved from complying with the said ss. 72 to 76. Section 15 (1) also gave power to the board to provide services outside the London Passenger Transport Area subject to the restriction that it should not both pick up and set down passengers outside that area. Section 15 was repealed by the Act of 1947. Section 72 of the Act of 1930 provided: "(1) Subject to the provisions of this section the [Traffic] Commissioners may grant to any person applying therefor a licence . . . to provide such a road service as may be specified therein, and a vehicle shall not be used as a stage carriage . . . except under such a licence."

The plaintiff held a licence under s. 72 and ran a motor omnibus service between H. and W., which was not within the special area, but save for 400 yards was within the London Passenger Transport Area. The defendants began to run a service of omnibuses in competition with the plaintiff's service, and the plaintiff claimed an injunction restraining them from so doing or a declaration that in so doing they were acting *ultra vires*. Section 65 (1) of the Act of 1947 provides: "Sections 72 to 76 of the Road Traffic Act, 1930 . . . shall not apply to any passenger road transport service provided, whether under a scheme under . . . this Act or otherwise, by the commission or by any person acting as agent for the commission, but neither the commission nor any such person as aforesaid shall use any public service vehicle for the conveyance of passengers for hire or reward at

separate fares except—(*a*) on a route approved, as respects so much thereof as falls within any traffic area, by the licensing authority for public service vehicles for that area ; and (*b*) in accordance with such restrictions as may be imposed by that authority . . . " with regard to certain matters. Route approval under s. 65 had been secured by the defendants. The British Transport Commission in exercise of the powers conferred by s. 5 of the Act of 1947, made a scheme of delegation of functions which provided : A
"(1) . . . 'the executive' means the London Transport Executive . . . (2) This scheme applies to . . . (*a*) activities which the commission are empowered to carry on by virtue of the transfer to them under pt. II of the Act [*viz.*, ss. 12-14] of the undertaking of the London Passenger Transport Board ; (*b*) activities which the commission are empowered to carry on by virtue only of the powers conferred upon them by s. 2 (1) B
of the Act so far as those activities are carried on in connection with the activities referred to in sub-para. (*a*) of this paragraph or are ancillary to such activities ; . . . (3) Subject to the provisions of this scheme, the commission hereby delegate to the executive the functions of the commission in relation to their activities set out in sub-paras. (*a*) and (*b*) of para. 2 of this scheme to the intent that . . . all the rights powers and liabilities C
of the commission in connection with those activities shall be exercisable and dischargeable by the executive. . ."

HELD : (i) there was vested in the British Transport Commission under s. 2 (1) of the Act of 1947 the necessary power to carry on the omnibus service between H. and W., and there was no ground for limiting the words "or otherwise" in s. 65 (1) of that Act so as to exclude therefrom the general D
powers given by s. 2, or for treating the powers of the commission in relation to road passenger transport services in this particular case as comprising only the special powers in that regard under ss. 12 to 14 and ss. 63 to 65.

(ii) having regard to the repeal of s. 15 of the Act of 1933, the commission could not have run a service outside the London Passenger Transport Area by virtue of the transfer of the powers of the Transport Board, but it could do so E
by virtue of its general powers under s. 2 (1) of the Act of 1947, and, therefore, while the operation of the route from H. to W. was substantially within the powers of the commission referred to in para. 2 (*a*) of the scheme (such powers having been transferred from the board to the commission by virtue of s. 14 (4) of the Act of 1947), the 400 yards of the route outside the London Passenger Transport Area could only be operated under s. 2 (1), F
but such operation was within para. 2 (*b*) of the scheme as being an activity carried on in connection with or ancillary to the activities referred to in para. 2 (*a*), and the powers were properly delegated to the defendants by para. 3.

Decision of VAISEY, J. ([1948] 2 All E.R. 306), *affirmed.*

[FOR THE TRANSPORT ACT, 1947, ss. 2, 12, 14 and 65, see HALSBURY'S STATUTES, Vol. 40, pp. 926, 940, 941, 1234.] G

APPEAL by the plaintiff from an order of VAISEY, J., dated July 1, 1948, and reported [1948] 2 All E.R. 306.

The plaintiff brought this action to restrain the defendants, the London Transport Executive, from operating an omnibus service in competition with the plaintiff's service, or a declaration that such operation was *ultra vires*, with H
consequential claims for damages and costs. VAISEY, J., dismissed the action, and the Court of Appeal now affirmed his decision. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

Sir Valentine Holmes, K.C., and *G. R. F. Morris* for the plaintiff.

Paull, K.C., *Fox-Andrews, K.C.*, and *J. P. Ashworth* for the defendants, the London Transport Executive.

Cur. adv. vult.

July 6. **SIR RAYMOND EVERSHED, M.R.:** The question raised in this appeal concerns the right of the plaintiff and of the defendants, the London Transport Executive, to run a passenger omnibus service as stage carriages over a route in Hertfordshire between Hitchin and Weston. It is significant that, whereas by far the greater part of the route in question is within an area known as the London Passenger Transport Area, an area defined in the London Passenger Transport Act, 1933, a small part of it, about 400 yards in length, is outside that area.

The question on the appeal is the effect of the Transport Act, 1947, which so far as relevant came into operation on Jan. 1, 1948. It has been necessary to consider a number of sections in that Act, in the Road Traffic Act, 1930, and in the London Passenger Transport Act, 1933. Many of those sections are set out in full in the judgment of Vaisey, J., and in the circumstances I shall not read them again. I shall make only such references to parts of those Acts as are required to make this judgment intelligible. I must, however, say that, if the defendants are entitled to succeed, as Vaisey, J., held, and, as I think, rightly held, the result, is, undoubtedly, that the position of the plaintiff, an omnibus operator in a relatively small way of business, has been appreciably affected for the worse by the Act of 1947, while the position of the London Transport Executive is appreciably stronger than that of its statutory predecessor, the London Passenger Transport Board, in the area in question. That is, I think, the result of two words, namely " or otherwise " which are found in s. 65 (1) of the Act of 1947. That result, if I am right, I must, of course, assume to be deliberate, but the result is not one which I think would be expected from a cursory reading of the Act of 1947 and the arrangement of the sections in the Act, and I am not, therefore, for myself entirely surprised that the plaintiff has felt somewhat aggrieved.

He has for many years operated an omnibus route for stage carriages over this road on three days during the week. In March, 1947, the London Passenger Transport Board applied for a road service licence under s. 72 of the Act of 1930 for running an omnibus service over this same road. That application they were then bound to make. Anybody who wanted to run an omnibus route over this section of the country was bound to get a road service licence under the Act of 1930. The plaintiff opposed the application, as he was entitled to do, and the application was still pending when the Act of 1947 came into operation. By virtue of that Act the defendants, as successors of the London Passenger Transport Board, claim that they are now entitled to operate the omnibus service in question without complying with the formalities of s. 72 of the Act of 1930, provided only that they get a " route approval " from the licensing authority, an individual who is himself the successor of the old traffic commissioner. That route approval they obtained, and they, therefore, started running their omnibuses over this route in February, 1948. The question is : Are they entitled to do so ?

The Act of 1947 is the Act which, according to popular language " nationalised " the railways and also brought certain other transport undertakings and services under public control. Section 1 (1) of the Act created a public authority known as the British Transport Commission, which was the controlling authority responsible for the various public transport services by rail, road and water in Great Britain covered by the Act. For the purpose of the carrying out of the duties imposed on the commission, the Act also created or provided for the creation of a number of subordinate public authorities, and one of those subordinate public authorities is the London Transport Executive, the defendants. Speaking broadly, I think there can be no doubt that the London Transport Executive was intended to be the successor for practical purposes of the old London Passenger Transport Board in the area covered by the activities of the board. The scheme of the Act, in the case of those subordinate authorities, was that the Transport Commission should delegate in a form and manner prescribed so much of the commission's powers as was requisite to enable the subordinate authorities to carry on the delegated activities. Such an instrument of delegation in favour of the London Transport Executive has been executed, and the defendants are the London Transport Executive alone, the British Transport Commission not having been joined.

The questions, therefore, raised in the action were two-fold. First, were A the powers conferred by the Act on the British Transport Commission sufficient to enable them to do what the London Transport Executive has done, that is, operate on this route as stage carriages the omnibus service which I have described in opposition to the plaintiff merely on getting route approval, and without the obligation previously necessary of obtaining a road service licence ? The second question is, assuming that the British Transport Commission was B invested with the necessary powers, were those powers effectively delegated to the London Transport Executive by the commission by the instrument of delegation which I mentioned ?

As to the first question, I think that the answer is plainly yes. I think it is sufficient to look at s. 2 of the Act of 1947, which has been fairly described as being, so to speak, the charter or memorandum of association of the new C British Transport Commission. It provides :

> "(1) Subject to the provisions of this Act, the commission shall have power (*a*) to carry goods and passengers by rail, road and inland waterway, within Great Britain."

Further subsections were read, including sub-s. (3), which also appears to D give to the commission wide general powers for carrying on, among other things, omnibus undertakings. In connection with that it is, I think, useful to refer at once to s. 65 (1) which is in these terms :

> "Sections 72 to 76 of the Road Traffic Act, 1930 (which relate to road service licences) shall not apply to any passenger road transport service E provided, whether under a scheme under the preceding provisions of this Part of this Act or otherwise, by the commission. . ."

It was suggested in argument that the words "or otherwise" should be in some way limited. The reference to a "scheme under the preceding provisions" of the Act is a reference to the power given to the authorities created under the Act to obtain in the form and by the manner stated a scheme for the running F of transport services over a specific area. There is no question in this case that the provisions of those sections, ss. 63 and 64, have not been invoked, but I have been unable to see a good reason for limiting the words "or otherwise" so as to exclude any powers under which the Transport Commission could carry on or, to use the language of the section, provide a passenger road transport service including the general powers under s. 2. G

A further argument which counsel for the plaintiff pressed on us was to the effect that when regard is had to the circumstances with which we are concerned, namely, the transfer under certain other sections of the Act of the undertaking of the London Passenger Transport Board, then, on a true reading of the Act, the only powers which the commission should be treated as having *quoad* that transferred undertaking are the powers which by the transfer provisions, in H this case s. 14, are expressly vested in the commission as transferee. Counsel bases his argument first on the opening words of s. 2 which are "Subject to the provisions of this Act," and also on his analysis of the Act as a whole. I hope that he will excuse my not following him in detail through the whole Act, but the effect of it, he says, briefly is this. Part II of the Act covers railways, canals and other undertakings which are taken over by the express terms of the sections in that part. Part III refers to the special case of road haulage, with which we are not concerned here. Then pt. IV includes ss. 63, 64 and 65, which are directly related to passenger road transport services. Later in pt. IV there are provisions as regards ports, and again provision is made for them by way of schemes, and, finally, there are provisions in s. 70 *et seq.* in regard to coastal shipping where provision is made for working agreements covering that particular activity. Counsel for the plaintiff says that, on the true construction A of the Act and looking at it as a whole, the scheme of it is that in the present case one ought to treat the powers of the commission, not as being the general ones under s. 2, but as being the special ones provided in ss. 12 to 14 as regards transferred undertakings and ss. 63 to 65 which relate exclusively to road passenger transport services. But, as I have indicated, I have come to the conclusion that it is not possible as a matter of construction to give such a very B limiting effect to these opening words, " Subject to the provisions of this Act," and I think, therefore, that it is on that view reasonably clear that there is vested under those general provisions in the commission the necessary powers to carry on this particular road omnibus service.

I would add by way of support to that (and the force of the point was conceded by counsel for the plaintiff) that the fasciculus of sections with regard to coastal C shipping opens with the words, " Without prejudice to any powers possessed by the commission apart from the provisions of this section," indicating clearly as regards coastal shipping that the powers of the commission are not limited to the powers to make working agreements which are specifically referred to in those sections. I think, however, and this is, perhaps, of some importance, that the commission's powers are not only those general powers conferred by s. 2, D but include also the special powers which are vested in the commission by virtue, *e.g.*, of the transfer sections, ss. 12 to 14. I shall have to refer to those sections in a moment, but it follows, if I am right, that there are both the general and the special powers conferred on the commission. To some extent, no doubt, there is duplication.

I now come to the question which I have found more difficult and that E is the question what was the effect of the instrument of delegation ? The document was executed on Dec. 5, 1947, to come into operation on Jan. 1, 1948. Before I refer to its terms I should, I think, allude a little more specifically to ss. 12 and 14 of the Act, both of which sections are in pt. II thereof. Section 12 provides :

> " (1) Subject to the provisions of this Act, the whole of the undertakings F of the bodies of persons specified in sched. III to this Act [including the London Passenger Transport Board] . . . shall, on Jan. 1, 1948 . . . vest by virtue of this Act in the commission."

Section 14 provides :

> " (1) The provisions of this section shall, subject to the other provisions G of this Act, have effect where, under the preceding provisions of this Part of this Act, the whole of the undertaking of any body is to vest in the commission.

Sub-section (2) provides that the property of the board shall pass and become the property of the commission. I do not propose to go all through those details, but sub-s. (3) has for present purposes the effect that where there are H agreements or like instruments to which the London Passenger Transport Board is a party, thenceforth those agreements and instruments must be read as though the party had been the British Transport Commission instead of the London Passenger Transport Board. Sub-section (4) provides :

> " The provisions of the last preceding sub-section . . . shall apply in relation to any statutory provision, and any provision of any agreement to which the body were not a party, any provision of any . . . document not being an agreement, as they apply in relation to an agreement to

> which the body [the London Passenger Transport Board] were a party, and, in relation to any such statutory or other provision as aforesaid . . . The statutory or other provisions to which this sub-section applies include statutory or other provisions passed or made after the passing of this Act but before the date of transfer."

I read that sub-section, again expressing it quite briefly, as having the effect that the statutory powers which the London Passenger Transport Board had by the express terms of the Act of 1933 passed to and became vested in the British Transport Commission, so that they have the statutory powers defined in the Act of 1933 just as the London Passenger Transport Board used to have them.

Sub-section (6) of s. 14 was referred to in argument, and it is convenient to mention it now. That provides that

> "Notwithstanding anything in this section . . . (*c*) the commission shall not, by reason of the vesting, have any rights or powers of the body as respects the borrowing of money or the raising of money by the issue of securities, and the provisions of sub-ss. (3) and (4) of this section shall not apply to agreements, statutory provisions or documents"

in relation to borrowing money. It was said that the terms of that sub-section indicate that the general powers of the old board should be treated as vesting automatically by virtue of s. 12 rather than by the effect of sub-s. (4) of s. 14, but I do not myself read that paragraph as indicating such a result. Under the Act of 1933 there were special borrowing powers which the London Passenger Transport Board had. It was obviously necessary that those should be preserved so long as the London Passenger Transport Board was alive as otherwise it might have been said that the borrowings had become *ultra vires.* I treat this paragraph, therefore, as indicating that the provisions I have read of s. 14 (4), which transferred, so to speak, the special powers of the board to the commission, do not confer on the commission the borrowing powers which the Transport Board had. I think that it is true to say, as counsel for the plaintiff said, that the mere vesting of the undertaking by s. 12 (1) would not itself carry the statutory powers, but that it is necessary to refer to s. 14 (4) to get that result as an effect of the vesting. The side note is, perhaps, of interest on that view, for it states: "General effect of vesting of undertakings." I think counsel for the plaintiff was right when he pointed out that there is in s. 12 no express reference to powers, whereas in other sections of the Act dealing with the acquisition of undertakings you do find express reference to the powers of the undertakings transferred, so that, whether or not in the absence of any other context the vesting of the undertaking would automatically vest the powers, in this case, my opinion is that the special powers vest and vest only by virtue of s. 14.

That raises the question, what were the powers? They were numerous and contained, as I have said, in the Act of 1933. I refer very briefly to four of those sections. Section 3 contained what is described as the general duty of the board as to passenger transport, and stated that it was its general duty to provide an adequate and properly co-ordinated system of passenger transport within the London Passenger Transport Area. Sub-section (3) gives, so to speak, general "charter" powers to the board, and the first of them was:

> "Subject to the provisions of this Act, the board may in the exercise of their duty . . . (*a*) maintain, manage, carry on, extend and improve their undertaking."

Section 5 sets out, by reference largely to schedules, what were the existing undertakings which were taken over by the London Passenger Transport Board. They included very large numbers of omnibus undertakings (among other things), operating in various parts of London, including, of course, metropolitan London itself, but also extending to other parts of the London Passenger

Transport Area. Section 15 of the Act of 1933 is of great importance. I must refer to that a little more in detail, because, as counsel for the plaintiff pointed out, no reference is made by the learned judge in his judgment to this section or, what is more important, to the fact that it was repealed by the Act of 1947. Section 15 provided that the board was to have powers to provide road services of stage carriages (among other things) on various roads, and it provided, first, that outside what was called the special area, the London traffic area, on roads within the London Passenger Transport Area the board could run these services subject to the obligation imposed by ss. 72 to 76 of the Act of 1930, but so long as and to the extent that they kept within the special area entirely they were absolved from getting a road service licence. That is the effect of s. 15 (3), which says that ss. 72 to 76 shall not apply to a road service provided by the board wholly within such portion of the London Passenger Transport Area as lies within the London traffic area,

> " . . . and in the case of a road service provided by the board partly within and partly without the special area shall not apply to that service in so far as it is within the special area."

That sub-section had the effect, therefore, of relieving the London Passenger Transport Board from obligations which would otherwise have applied to them (albeit they were acting under their general powers) by virtue of the Act of 1930. The section also went further, because it gave the board power to go outside the London Passenger Transport Area altogether, but (so far as relevant to this case) subject to a certain restriction, to wit, that they should not both pick up and set down passengers outside the area. So far as this case is concerned, it was necessary, because the service in question was not one which was wholly within the area to which the exemption applied, for the board to ask for a road service licence, and, though it was *intra vires* the board to run their omnibuses (if they got their licence) over the 400 yards outside the London Passenger Transport Area, it was also as a result of this section impossible for the board both to pick up and set down on the 400 yards. Nevertheless, and I emphasise this because I shall come back to it in a moment, I think there is no doubt on its fair construction that s. 15 was not a mere limiting section, but was an enabling section that gave to the board powers which by virtue of the general terms they would not otherwise have had, powers to do things free from restrictions which would otherwise have applied, or powers to do things which they could not otherwise do at all, albeit subject to the special restrictions specified in the section.

Section 16 gave to the board within the London traffic area, in effect, a monopoly. As I say, there were very many other powers of all kinds to which reference was made, but those I think will be sufficient to illustrate the point that I now want to deal with, which arises from the fact that by virtue of s. 128 of the Act of 1947 a number of sections or sub-sections of the Act of 1933 were repealed, and included among the repeals were all the sub-sections of s. 3, except sub-s. (3), and s. 15. The effect of those repeals, as I construe the Act of 1947, was that the powers which went over to the commission by virtue of s. 14 (4) were the residuary powers which the board had under the Act of 1933 as amended by the repeals. For practical purposes I take that as having the effect, so far as this case is concerned, that the special powers of the board which went over to the commission were such that the commission could not by virtue of these powers have run an omnibus service at all over the 400 yards which lies outside the London Passenger Transport Area, because I take it that the only power they could have found under the Act of 1933 to do so would have been in s. 15 which has been repealed. That still left the general power to run omnibuses within the London Passenger Transport Area. I take the statement which I have just made to be the effect of the repeals on the powers under the Act of 1933 as transferred to or vested in the commission by virtue of s. 14 (4). Among those powers there were left, as I have indicated (and they must have been left for some purpose), s. 3 (3) (which gives the general right to run omnibuses within, as I construe it, the London Passenger Transport Area), s. 5 (which described the undertaking of the board which goes over to the commission), and s. 16 (which left to be transferred the monopoly position of the London Passenger Transport Board).

I now refer to the instrument of delegation, and parts of two paragraphs in it only need be read. The first is para. 2, and, as Jenkins, L.J., pointed out during the course of the argument, that really is a recital. It defines what it is to which this scheme of delegation applies, and it says :

> " This scheme applies to the following activities of the commission : (*a*) activities which the commission are empowered to carry on by virtue of the transfer to them under pt. II of the Act of the undertaking of the London Passenger Transport Board ; (*b*) activities which the commission are empowered to carry on by virtue only of the powers conferred upon them by s. 2 (1) of the Act so far as those activities are carried on in connection with the activities referred to in sub-para. (*a*) of this paragraph or are ancillary thereto."

Sub-paragraph (*a*) refers plainly to ss. 12 and 14 of the Act of 1947. The words " by virtue only " in sub-para. (*b*) show that what that sub-paragraph is referring to is powers which will not go over to the commission by virtue of ss. 12 and 14—powers, that is, which the commission cannot show they derive from those sections, but which are conferred only by virtue of the general provisions of s. 2. The operative para. 3 is as follows :

> " Subject to the provisions of this scheme the commission hereby delegate to the executive [the defendants] the functions of the commission in relation to their activities as set out in sub-paras. (*a*) and (*b*) of para. 2."

There follow some other words to which I will refer in a moment. Now, translating for this purpose the language of para. 2 (*a*) of the scheme, the question seems to me to be whether the operation of this omnibus route with which we are concerned is wholly or substantially something which the commission is empowered to do by virtue of the transfer to it of the undertaking of the London Passenger Transport Board. I think the answer is substantially, yes. I give that answer because as I construe s. 14 (4) of the Act of 1947, together with the amended Act of 1933, the effect of the transfer of the board's undertaking was to give to the commission the statutory powers of the board to carry on their undertaking—to carry on, maintain and extend it (to use the words of s. 3 (3)) within the London Transport Area.

Counsel for the defendants has argued that the effect of the repeal is to remove all the limitations which previously affected the London Passenger Transport Board, so that the commission, as successors of the board, as the board could itself have done if there had been no vesting, can by virtue of the powers under the Act of 1933, as they now are, carry on their operations anywhere in Great Britain. I reject that argument. It rests, as I follow it, on the view that all the sections or sub-sections of the Act of 1933 which were repealed, including s. 15, were purely limiting sections. I do not take that view. Particularly, as I construe it, s. 15 was not a limiting section but an enabling section. It gave the Passenger Transport Board certain powers within the area free from restrictions which might otherwise have applied to it, and powers subject to the restrictions specified in the Act outside the London Passenger Transport Area altogether. It might, I think, be possible to go further and say that the activities referred to in para. 2 (*a*) of the scheme are all the activities, that is all the functions and operations, which in the exercise of the general powers conferred on the commission by the Act of 1947 the commission can perform in reference to the undertaking, including the omnibus undertaking acquired from

the London Passenger Transport Board. That construction would cover all operations over the whole of the road in question (*inter alia*), because such operations were in truth contemplated by s. 15 of the Act of 1933, albeit subject to restrictions, and the powers of s. 15 are for this purpose, it is said, preserved by s. 2 (3) of the Act of 1947. On that view it would, I think, be unnecessary for the defendants to rely on s. 14 of the Act of 1947 at all, and it would be
A immaterial that s. 15 was in fact repealed. On that view the repeal of s. 15 was necessitated or justified as a drafting matter so as to avoid conflict between the power which would have been expressly vested under s. 14 and the general powers of the commission under the Act of 1947. It may well be that this view of the effect of the Act was the view in the minds of the parties to the instrument of delegation having regard to the latter words in para. 3 which are :

> B "To the intent that, subject as aforesaid, all the rights, powers and liabilities of the commission in connection with those activities shall be exercisable and dischargeable by the executive."

For my part, however, I prefer to rely on the argument which I have tried earlier to express, that is that there was by virtue of s. 14 (4) of the Act of 1947 a transfer to the commission of all the general statutory powers to carry on,
C *inter alia*, their omnibus activities within the London Passenger Transport Area, which the London Passenger Transport Board had under the terms of the Act of 1933 as amended by the repeals, these general powers being, of course, subject to the general provisions of the Act of 1947, including particularly s. 65 of that Act.

If the view which I have expressed is right, then it would be true to say that
D the commission are empowered to carry on the operation of an omnibus route over the whole of the road in question save only the 400 yards or so which lie outside the London Passenger Transport Area, and that is because they have that power as the statutory effect of the transfer to the commission under pt. II of the Act of the undertaking of the London Passenger Transport Board. As to the 400 yards to which I have alluded it is, to my mind, reasonably clear that in the
E circumstances the operation of the omnibuses over those 400 yards is properly to be described as an activity carried on in connection with the main activity which I have already described as falling within para. 2 (*a*) of the scheme or ancillary to such activity. It is an operation, moreover, which the commission would be empowered to carry on, not by virtue of any transfer of the London Passenger Transport Board's powers, but only by virtue of the general
F powers of the commission under s. 2 (1) of the Act of 1947. As to the last point counsel for the plaintiff urged that there was no evidence which would entitle the court to say that the 400 yards operations were, properly speaking, in connection with or ancillary to the main operation of the omnibus route. On the particular facts of this case, however, I cannot accept that argument. I think they plainly were.

G For those reasons, which I think are the same as those which influenced the learned judge, I come to the conclusion that the appeal fails. I have, I am afraid, stated it at rather greater length, but I have been concerned particularly to deal with the argument that counsel for the plaintiff addressed to us based on the repeal of s. 15 of the Act of 1933, and because it did not appear from the judgment of VAISEY, J., that he had considered it. No doubt he had, but,
H in fact, it was not referred to in his judgment. But I agree with the view he took, and the appeal, in my judgment, fails.

SOMERVELL, L.J. : I agree that the appeal fails and for the reasons which have been given by the MASTER OF THE ROLLS, and I only wish to add very few words with regard to the repeal of s. 15 of the London Passenger Transport Act, 1933, and the effect of that repeal, if any, on the construction of the words in para. 2 (*a*) of the instrument of delegation. The general scheme of this legislation in the light of the provisions, to which reference has already been made, as from Jan. 1, 1948, when the Act came into force, seems to me to be that in the Act of 1947 general powers are conferred, some of which have been referred to, and there are restrictions and other administrative provisions which apply to the British Transport Commission as a new body set up under that Act. There also remain on the Statute Book the acts (in cases where there were Acts) which set up and provided for a number of undertakings including that of the London Passenger Transport Board which were vested in the Transport Commission under pt. II of the Transport Act, 1947. In reading those Acts, by reason of s. 14 (4), the British Transport Commission's name is substituted for that of the undertaking. In dealing, therefore, with matters which arise after the scheme has come into operation there is the main Act to look at and also what is unrepealed of the special Act dealing with the transferred undertaking.

In considering the effect of a repeal of a section it is necessary to consider the nature of what is repealed. Let me give a simple example. Suppose one of the undertakings to be transferred had under its statute a power to engage in some activity, and assume that it had not already exercised the power, but it had it and could exercise it at any time, and that that power was not covered by s. 2 or by the general powers conferred on the British Transport Commission under the Act of 1947. If the section conferring that power was repealed, it would, of course, be plain that Parliament did not intend the British Transport Commission to have the power which the transferred undertaking previously had to engage in that activity. When one considers the repeal of s. 15, having regard to what my Lord has already stressed and emphasised—the fact that s. 3 (3) of the Act of 1933 has been left unrepealed—the position, it seems to me, is quite different.

The effect of s. 14 (4) of the Act of 1947 is to write in the British Transport Commission in the Act of 1933 in the places in the Act where you find references to the board. If s. 15 (1) had been left unrepealed one would have had this provision : " Subject to the provisions of this section it shall be lawful for the British Transport Commission to provide road services of stage and express carriages on any of the following roads, but not otherwise." At once there would have been a conflict because there would be something on the statute book purporting to say that the British Transport Commission was restricted to the London Passenger Transport Area and to such extensions of it as are covered by that section, whereas the Act of 1947 gives it powers over the whole country. When you come to s. 15 (3), the references to the Road Traffic Act, 1930, ss. 72 to 76, as they are there applied to the board would be, as I read it, in conflict with s. 65 (1) of the Transport Act of 1947. It seems to me, therefore, that the problem that confronted the draughtsman was that s. 15 had become inapplicable because, in so far as it conferred powers—and it did confer powers—they already existed under the general powers conferred by the Transport Act, and, in so far as it imposed restrictions, they were inapplicable as applied to the British Transport Commission as a whole, and, therefore, in the matter of drafting it seems clear that s. 15 had to go, but the fact that, as a matter of drafting, the position had to be arranged in that way does not, in my view, having regard to the fact that s. 3 (3) of the Act of 1933 was left on the statute book, in any way cut down the construction which ought to be given to the words that have been read in para. 2 (*a*) of the scheme of delegation. The activities which the commission are empowered to carry on by virtue of the transfer to them of the undertakings under pt. II of the Act of 1947 seem to me to be the activities which were previously carried on by the London Passenger Transport Board, and, in my view, the scope of those words is not cut down by the fact that for obvious drafting reasons the powers which the London Passenger Transport Board had is merged in the greater power which the British Transport Commission has. For those reasons, as well as those which my Lord has given, I agree that the appeal fails.

JENKINS, L.J.: I also agree. If literal justification is needed for the reference in the scheme of delegation to activities which the commission are empowered to carry on by virtue of the transfer to them under pt. II of the Act of 1947 of the undertaking of the London Passenger Transport Board, for my part I think that such literal justification is to be found—though I may be alone in so thinking—in s. 2 (3) of the Act of 1947, which provides:

A
> "Where, whether by agreement or otherwise, the commission acquire the whole or any part of any undertaking of any other person, they may, subject to the provisions of this Act, carry on any activities, whether mentioned in sub-s. (1) of this section or not, which were theretofore carried on for the purposes of that undertaking or part of an undertaking or were authorised by any statutory provision to be carried on for the purposes thereof."

B

It was argued by counsel for the plaintiff that that sub-section had no application to undertakings acquired under the provisions of pt. II of the Act itself, but was directed to cases of separate acquisitions which might thereafter take place. For my part, I see no ground for so limiting the operation of the sub-section, and if it applies, as I think it does, to one of the undertakings transferred under pt. II, C as, for example, the London Passenger Transport Board, then it seems to me to follow that literally the Act did empower the commission to carry on any activities which the London Passenger Transport Board was authorised to carry on for the purposes of its undertaking by virtue of the transfer to the commission of the undertaking of the London Passenger Transport Board.

I do not, however, feel it is necessary in this case to search the Act for precise D verbal justification for the form of words used in the scheme of delegation. It is not open to doubt that the commission, among many other powers, have power at all events to carry on all the activities which the London Passenger Transport Board could have carried on prior to the transfer, subject to various qualifications and exceptions which are not material for the present purpose; and the activities which the London Passenger Transport Board could have E carried on undoubtedly included the running of a passenger service between Weston and Hitchin, subject, so far as the London Passenger Transport Board was concerned, to the necessity for getting a licence under the Act of 1930 in respect of the portion of the route outside the London Passenger Transport Area, and subject also to the qualification or restriction in s. 15 (1) of the Act of 1933 to the effect that they could not both pick up and set down a passenger F on that part of the route. The commission are in a better position than the London Passenger Transport Board in that the commission are absolved by s. 65 (1) of the Act of 1947 from any necessity to obtain a licence and are also free from any restriction as to picking up and setting down by virtue of the repeal of s. 15 of the Act of 1933 and of the general power given by s. 2 (1) (*a*) of the Act of 1947 of carrying passengers by road within Great Britain. So one finds G the position that the commission have transferred to them the undertaking of the London Passenger Transport Board, amongst a great many other undertakings, and that they have full power to carry on the undertaking of the London Passenger Transport Board, and all the powers necessary to enable them to do everything the London Passenger Transport Board could have done. The whole aim and object of the Act, when one looks at it, is to enable the central H authority which is set up to carry on the acquired undertakings as heretofore and to extend them.

Looking at the scheme of delegation against that background, one finds that the commission, having powers such as I have described, and having admittedly power to delegate their functions, purport to delegate certain of their functions which they define as functions in relation to activities which the commission are empowered to carry on by virtue of the transfer to them under pt. II of the Act of the undertaking of the London Passenger Transport Board. I should have thought it reasonably plain that the intention of the scheme of delegation was to give the new London Transport Executive power to do everything within the powers of the commission themselves which the old London Passenger Transport Board had power to do before the transfer. That I think is, no doubt, what was intended, but the plaintiff's argument is in effect that, if one puts a strict literal construction on the formula used in the scheme to define the activities in question and then goes to the Act with that strict literal construction in mind, one finds that the scheme of delegation is a mere nullity, a *brutum fulmen*, because there are no such activities of the commission as are described in the scheme of delegation. Apart from s. 2 (3) of the Act of 1947 and the other answers to this argument stated by my Lords, I think it involves a wrong method of approach, for this case, in the last resort, once the question of *ultra vires* is out of the way, turns on the true construction of the scheme of delegation read in conjunction with the Act. The scheme must be applied to the Act and the court must see whether, looking at the Act, the language used in the scheme sufficiently identifies the particular activities to which the delegation is intended to relate. Of course, if, having gone through the Act, the court found it impossible to identify the activities meant, then the result might be that the scheme failed, but that would happen or ought to happen only if identification is impossible.

Looking at the Act as a whole, I find it reasonably plain that the activities to which it was intended to refer in the scheme of delegation were the activities which the old London Passenger Transport Board had power to carry on before the transfer, and that for the purposes of the scheme the commission's powers to carry on these activities are treated—and quite reasonably treated, in my judgment—as powers derived by the commission from the old London Passenger Transport Board, the activities in question being, accordingly, described as activities which the commission are empowered to carry on by virtue of the transfer. I find no difficulty as a matter of construction, reading the scheme and the Act together, in identifying the activities referred to in the scheme in the way I have stated. The result of that is, I think, having regard not only to para. 2 (*a*) but also to para. 2 (*b*) of the scheme, that the powers delegated by the scheme include power to run a passenger transport service on the route between Weston and Hitchin, including, I think, by virtue of para. 2 (*b*), power both to pick up and set down passengers on that part of the route outside the London Passenger Transport Area.

Appeal dismissed with costs.

Solicitors: *Mawby, Barrie & Letts* (for the plaintiff); *Stephen G. Jones* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BRADDOCK *v.* TILLOTSONS NEWSPAPERS, LTD.

[COURT OF APPEAL (Tucker, Cohen and Singleton, L.JJ.), June 20, 21, 22, 1949.]

Appeal—Evidence—Further evidence—Power of Court of Appeal to receive—Credit—Application for leave to recall witness for cross-examination as to credit—R.S.C., Ord. 58, *r.* 4.

By R.S.C., Ord. 58, r. 4: "The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact . . . Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court."

A plaintiff, who was appealing from the verdict of a jury dismissing her claim for damages for alleged libel in a newspaper, applied to the Court of Appeal, under R.S.C., Ord. 58, r. 4, for leave to recall one of the witnesses for the defendants for cross-examination as to credit, on the ground that, after the conclusion of the trial, her solicitor had been informed that this witness had been convicted on several occasions between 1935 and 1948 of offences involving dishonesty.

HELD : it had been the invariable practice of the Court of Appeal to confine the admission of further evidence on questions of fact under R.S.C., Ord. 58, r. 4, to evidence on questions of fact material to an issue in the action ; assuming that the court had power to order the recall of a witness for the purpose of his being cross-examined as to credit, that power should be exercised sparingly and only where the evidence was of such a nature, and the circumstances of the case were such, that no reasonable jury could be expected to act on the evidence of the witness whose character had been called in question ; it was impossible to say that that was established in this case ; and, therefore, the application to adduce further evidence must be dismissed.

R. v. *Hamilton,* (1917) (118 L.T. 180), *distinguished.*

[AS TO POWER OF COURT OF APPEAL TO RECEIVE FURTHER EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 26, pp. 120, 121 ; and FOR CASES, see DIGEST, Practice, pp. 775-778, Nos. *3396-3420.*]

Cases referred to :

(1) *Brown* v. *Dean,* [1910] A.C. 373 ; 79 L.J.K.B. 690 ; 102 L.T. 661 ; Digest, Practice 602, *2431.*
(2) *R.* v. *Copestake, Ex p. Wilkinson,* [1927] 1 K.B. 468 ; 96 L.J.K.B. 65 ; 136 L.T. 100 ; 90 J.P. 191 ; Digest Supp.
(3) *Nash* v. *Rochford Rural Council,* [1917] 1 K.B. 384 ; 86 L.J.K.B. 370 ; 116 L.T. 129 ; 81 J.P. 57 ; Digest, Practice 603, *2437.*
(4) *Shedden* v. *Patrick and A.-G.,* (1869), L.R. 1 Sc. & Div. 470 ; 22 L.T. 631 ; Digest, Practice 603, *2440.*
(5) *Timmins* v. *Timmins,* [1919] P. 75 ; 88 L.J.P. 78 ; 120 L.T. 544 ; Digest, Practice 603, *2436.*
(6) *R.* v. *Hamilton,* (1917), 118 L.T. 180 ; 14 Digest 512, *5711.*
(7) *Robinson* v. *Smith,* [1915] 1 K.B. 711 ; 84 L.J.K.B. 783 ; 112 L.T. 929 ; Digest, Practice 603, *2438.*

APPEAL by the plaintiff from an order of LORD GODDARD, C.J., sitting with a special jury, made on Nov. 11, 1948.

The plaintiff, Mrs. Elizabeth Margaret Braddock, a member of Parliament, claimed damages for an alleged libel in a newspaper of which the defendants were the proprietors, printers and publishers. The article complained of commented on an incident in the House of Commons, stating *inter alia* that the plaintiff "danced a jig on the floor of the House." The defence was a plea of fair comment. At the trial it was admitted on behalf of the plaintiff that the comment complained of at the end of the article in question would have been fair, if the facts on which the defendants commented were true and accurate, and the only issue ultimately before the jury was whether the words stating that the plaintiff had "danced a jig on the floor of the House" were in fact true and accurate. The chief witness for the defendants was one Bradley, a Parliamentary reporter, on whose report the article in the defendants' newspaper was based. The jury returned a verdict in favour of the defendants and the plaintiff's claim was dismissed. The plaintiff appealed to the Court of Appeal on the grounds (*inter alia*) that the verdict of the jury was against the weight of evidence and that there had been a misdirection in the summing-up, and she applied, under R.S.C., Ord. 58, r. 4, for leave to recall the witness Bradley for cross-examination as to credit. The Court of Appeal now held that there was ample evidence to support the verdict of the jury and that there had been no misdirection in the summing-up. In regard to the plaintiff's application under R.S.C., Ord. 58, r. 4, the court held that further evidence which was directed only to the credit of a witness called at the trial could be admitted only where the court was satisfied that the additional evidence would necessarily have led a reasonable jury to a different conclusion from that arrived at, and, as they found it impossible to hold that that would have been the case on the facts before them, they dismissed the application and the appeal. The report deals only with the judgments on the application. The facts appear in the judgment of Tucker, L.J.

Paget, K.C., and *Harold Lever* for the plaintiff.
Sir Walter Monckton, K.C., and *Milmo* for the defendants.

TUCKER, L.J. : This is an appeal from the verdict of a special jury in a trial before Lord Goddard, C.J., in which the plaintiff, Mrs. Braddock, was claiming damages for a libel, as she alleged, which had occurred in the Bolton Evening News, a newspaper of which the defendants, Tillotsons Newspapers, Ltd., are the proprietors, printers and publishers.

[His Lordship reviewed the evidence and the summing-up of Lord Goddard, C.J. ; held that there was ample evidence to support the verdict of the jury and that there had been no misdirection in the summing-up ; and continued :] I pass now to the second and, in my view, more important aspect of the case, namely, the application made by the plaintiff to recall the witness, Bradley, who was, undoubtedly, the most important witness for the defendants, in order that certain questions might be put to him by way of cross-examination. I am assuming, and it is purely a matter of assumption, that, if this witness had been recalled and these matters had been put to him, he would have admitted the accuracy of them, or, failing such admission, the defendants would have established them as facts. An affidavit has been put in by the plaintiff's solicitor, and he refers to the fact that Bradley was called as a witness at the hearing, and that it was on his report that the article in the defendants' newspaper was based. He was a Parliamentary reporter, employed by a news agency, and the plaintiff's solicitor says in his affidavit :

> " I am myself a member of Parliament, and I knew that the said Harold Douglas Bradley was in fact so employed, but I did not know him personally. Until the hearing of the action and for long afterwards I had no reason to suppose that the said Harold Douglas Bradley was not a person of good character, fit to be a member of the Press Gallery. I am informed and verily believe that some time after the said hearing the appropriate authorities of the House of Commons, acting on information received by them, had withdrawn permission for the said Harold Douglas Bradley to be a member of the Press Gallery. This information reached me some four weeks ago. I thereupon caused inquiries to be made. I am now informed, and verily believe that the said Harold Douglas Bradley is a person who has been many times convicted over a period of many years of stealing and other offences involving dishonesty, and that there are recorded eight or nine such convictions, the earliest in December, 1935, and the latest in December, 1948."

This trial took place on Nov. 11, 1948, so that the conviction in December, 1948, could not have been put to him at the trial. Furthermore, I would point out in passing that this affidavit does not state the precise dates on which these convictions took place, so one does not know whether or not, if this witness served in the Army, these convictions were all before, or how many of them were before, the period of his service in the Army, or whether some were current. However, I only mention that in passing.

The application is made pursuant to R.S.C., Ord. 58, r. 4, which reads :

> " The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court."

It has been the invariable practice of this court to confine the admission of fresh evidence in circumstances such as this to evidence which could not reasonably have been discovered before the trial and to evidence which, if believed, either would be conclusive or, as has been said by some judges, would lead to the reasonable probability that the verdict would have been different. But the practice has hitherto been confined to evidence relating to an issue in the case, or, at any rate, to an issue which could and might yet be raised if there were a new trial in the action. No case has been cited in which this court has ever admitted, or been asked to admit, evidence going to credit only. That, of course, is not conclusive, and it is certainly not conclusive in regard to the jurisdiction of this court, and for myself, I think that this court clearly has jurisdiction to take any course which it thinks fit with regard to a matter of this kind. The invariable practice is, however, clear, and, furthermore, when one comes to apply the first test, *viz.*, whether the evidence could have been discovered by reasonable diligence before the trial, that language is hardly applicable to evidence of this kind, because in the ordinary normal event a solicitor or a client would not be expected to inquire into the past record of any witness whom he expected to be called. Generally speaking, he would not know who were the witnesses who were going to be called. In this particular case it so happens that, owing to the necessity for petitioning the House of Commons with regard to these witnesses, in the course of what took place in the House of Commons the plaintiff's solicitor became aware of the name of the witness a week or so before the trial, so that, if inquiries had been made, I suppose it would have been possible for these facts to have been discovered. But I do not think that it is reasonable that any inquiries should have been made with regard to a man in this position. I am only saying that what has always been regarded as the essential test, *viz.*, that the evidence could not have been obtained by reasonable diligence, is hardly applicable to a case of this kind.

There is no doubt that the evidence of this witness, Bradley, was the high water mark of the defendants' case. It is for us to decide what course we should take in this matter, having regard to what has been the invariable practice of the court in the past. There has been some variation in the language used by judges as to the quality of new evidence required by the court before it is admitted, namely, whether it must be such as is presumably to be believed and if believed would be conclusive, or whether it is sufficient if there is a reasonable possibility that, if it were brought before the jury, a different verdict would have been given. In *Brown* v. *Dean* (1) LORD LOREBURN, L.C., said ([1910] A.C. 374):

> " My Lords, the chief effect of the argument which your Lordships have heard is to confirm in my mind the extreme value of the old doctrine ' *Interest*

> *reipublicae ut sit finis litium,*' remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist. With great respect for the authority of Fletcher Moulton, L.J., I am of opinion that the order of the Divisional Court confirmed by the majority of the Court of Appeal is perfectly right. When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds ; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive."

With regard to that, Lord Atkinson concurred. Lord Shaw, however, said (*ibid.*, 376) :

> " My Lords, I concur, but I hope your Lordships will forgive me for expressing doubt upon a single point, and it is not really material to the judgment which has just been pronounced. It is upon the subject of *res noviter veniens ad notitiam.* Speaking for myself, I do not at present see my way to go the whole length of the proposition my noble and learned friend the Lord Chancellor has proposed, to the effect that the *res noviter veniens* must, if believed, be conclusive. It is possible to figure cases in which it might be so gravely material and so clearly relevant as to entitle the court to say that that material and relevant fact should have been before the jury in giving its decision."

In *R.* v. *Copestake, Ex p. Wilkinson* (2), Lord Hanworth, M.R., after quoting the passage which I have just read from the speech of Lord Loreburn, L.C., in *Brown* v. *Dean* (1), said ([1927] 1 K.B. 474) :

> " That statement was not accepted by Lord Shaw, but the other learned Lords agreed with the Lord Chancellor, and the result of it would be that only such fresh evidence could be produced as would satisfy those conditions. That evidence must be of such a character that not merely is it relevant but of such importance that it would have affected the judgment of the tribunal if it had been before them at the original hearing of the case."

Scrutton, L.J., was inclined to the view of Lord Shaw. He said (*ibid.*, 477) :

> " If, however, the justices had been entitled to re-open the question of paternity, then I think I should have held that there was fresh evidence of a kind enabling them to do so. In *Nash* v. *Rochford Rural Council* (3) the question of admission of fresh evidence was before this court, and we followed the rule laid down by Lord Chelmsford in *Shedden* v. *Patrick* (4), and stated it in much the same way as Hill, J., stated it in *Timmins* v. *Timmins* (5), to the effect that the evidence to be admitted must be of such importance as very probably to influence the decision. It seems to me that we in this court have not got so far as the full extent of Lord Loreburn's *dictum* in *Brown* v. *Dean* (1) that the new evidence must be of such a character that it is ' presumably to be believed, and if believed would be conclusive,' but I think we have clearly decided that it must be of such weight as, if believed, would probably have an important influence on the result."

There has been that variation in the language used by the learned judges on this point. These varying expressions have, so far as the decisions of the courts in this country are concerned, always been directed to evidence directly relative to the main issue in the action, or to some issue which could, or would, have been raised at the trial if the evidence had been discovered. It is not necessary in this case to express any opinion as to which is the better view with regard to the quality of the evidence in such a case. If, however, this court is to depart from its invariable practice of confining such evidence to the relative issues and is to admit fresh evidence directed solely to credit, I am of opinion that such a course would, if ever, only be justified where the evidence is of such a nature and the circumstances of the case are such that no reasonable jury could be expected to act on the evidence of the witness whose character has been called in question. It would, in my view, be wrong for this court to admit fresh evidence directed solely to credit, merely because there is a possibility, or merely a reasonable probability, that such evidence would result in a different verdict. There are two conflicting principles always operating in these matters. One is that everything should be done to ascertain the truth ; the other is that there should be some finality in litigation, and, so far as possible, a reasonable limitation of costs. It is to achieve the latter result that it is necessary for the court to impose some limit to the re-opening of decided issues, even at the risk that injustice may result or that there is a possibility of injustice resulting.

The only case relied on by counsel for the plaintiff in this appeal is *R.* v. *Hamilton* (6). In that case, in which the appellant had been convicted of receiving stolen property and of being an accessory after the fact to larceny, a witness called Jarvis had described himself at the trial as a motor engineer and said that he had an establishment of his own in Edgware Road and had been trained at Wembley. In cross-examination he said that his business was carried on under the name of Jarvis & Co., and he gave its address, that it was a limited company in the hands of his family, that he was the managing director, that the capital was £500, and that the business had been established three years before, and he gave particulars of the ages of his children and of the shares which they held. The application made in the Court of Criminal Appeal was to recall that witness that he might be cross-examined to show that his name was not Jarvis, but Jacobs, and that he had no business at the address which had been given. The application was granted, and ultimately the court quashed the conviction on the ground of misdirection at the trial. The case contains no indication of the principles on which that course was taken, but it is to be observed that it was taken pursuant to the special provisions in the Criminal Appeal Act, 1907, s. 9 (*b*). I need not set out that section, but it gives, in the widest possible terms complete and absolute power to the Court of Criminal Appeal to allow the calling of evidence or to call evidence on its own initiative, and the powers expressly conferred on the Court of Criminal Appeal are additional to its power to exercise all the ordinary powers of an appellate court in civil matters. The evidence in *R.* v. *Hamilton* (6) having been admitted pursuant to that section, I do not think that case can form any precedent for this court. Furthermore, although learned counsel described the evidence as going to credit only, which was in a sense true, it was for the purpose of challenging the accuracy of statements of fact which the witness had made at the trial. Moreover, as was pointed out by SINGLETON, L.J., in the course of the argument in this case, the object, the desire, or the principle that in these matters there should be some finality in litigation does not apply quite in the same way in criminal cases. There the principal aim is to see that in any event an innocent man shall not be convicted. With that end in view it may well be that it is proper to take a course which would not be appropriate in a civil case, which is a contest between two parties, and with regard to which the practice in the courts is, so far as possible, to keep the extent of the litigation reasonably within bounds.

For these reasons I think that the application to recall this witness for cross-examination must fail. I would only add that, in applying the test that I have adumbrated as being that which the court may possibly think right to take in other cases, it seems to me impossible to say in this case that, if these questions had been put to this witness and admitted, no reasonable jury could possibly have acted on his evidence. One does not know what view the jury might take in the case of a man who, when questions of this kind are put to him, may frankly admit them, and the putting of questions of this kind sometimes reacts to the detriment of the party who puts them. The jury would have to consider whether they thought that the fact that a man had been convicted of dishonesty necessarily made him an inaccurate reporter of what he had seen in the House of Commons on an occasion some time before the trial. In my view, this appeal fails. A

COHEN, L.J.: I am of the same opinion, and I find myself in such general agreement with what has fallen from the lips of my Lord that I only desire to deal with two points.

[His Lordship dealt with the summing-up and held that the criticisms of counsel for the plaintiff were not well founded, and continued :] The second B point, arising out of the summons to adduce further evidence, has given me greater difficulty. I think we must recognise that Bradley's evidence must have had considerable influence, though not necessarily conclusive influence, on the minds of the jury, and it is possible that they would have reached an opposite conclusion to that which they did reach had he been cross-examined and admitted the truth of the allegations referred to in the affidavit of the plaintiff's solicitor, C but I agree with my Lord that it does not necessarily follow that this would have been the result. As counsel for the plaintiff frankly admitted, this application is, so far as this court is concerned, without precedent, and I think we should be dangerously extending the ambit of cases in which the powers conferred by R.S.C., Ord. 58, r. 4, could be exercised if we were to allow Bradley to be recalled and cross-examined as to credit. D

When I say "without precedent," I am not overlooking *R.* v. *Hamilton* (6), in the Court of Criminal Appeal, to which my Lord has already referred, but I agree with my Lord that that case is different in two material respects. First, the evidence as to credit which it was there sought to adduce disproved facts alleged at the trial, and, secondly, there is a radical distinction between criminal and civil cases. In civil cases the interest of the republic is "*ut sit finis litium,*" E whereas in criminal cases the dominant and paramount interest is that an innocent man should not be found guilty. It was no doubt, for this reason that the Crown in *R.* v. *Hamilton* (6) did not seek to oppose the application to have the witness recalled for cross-examination. In my view, if this court is to extend the ambit of cases in which it allows further evidence to be adduced on appeal to include the cases where the further evidence is directed only to F the credit of a witness called at the trial, it can, if it be right at all, only be right to do so in a case where the court is satisfied that the additional evidence *must* have led a reasonable jury to a different conclusion from that actually arrived at in the case. I find it impossible to say that that state of affairs is established in the case before us, and for these reasons I agree that the appeal fails and that the application to adduce further evidence should be dismissed. G

SINGLETON, L.J.: I am of the same opinion, and I think it right to add a few words in regard to the application under R.S.C., Ord. 58, r. 4. Under that rule the Court of Appeal has full discretionary power to receive further evidence on questions of fact. The plaintiff seeks leave to offer additional oral evidence in that she wishes her counsel to be allowed to cross-examine one Bradley as to credit. Bradley gave evidence for the defendants. At that H time the plaintiff's advisers had not the information which they have since obtained, and they now wish to ask him questions as to his character, and, if necessary, they ask to be allowed to call a police officer to produce the record of Bradley who is said to have been convicted on a number of occasions of stealing or of offences involving dishonesty. The object of this is to support the plaintiff's application that the verdict and judgment in favour of the defendants be set aside, and that a new trial be had between the parties.

It is not often that the Court of Appeal grants an application that further evidence be heard. The principles on which the court acts are set out in the authorities, to three of which we have been referred. So far as one can find, there is no record of any application for the recalling of any witness so that he may be cross-examined as to his credit. The reason for this may well be that it cannot lead to any finality, it is not relevant to any issue, and it does not establish any fact which is an issue between the parties to the litigation. It is impossible to say how much importance the jury attach to the evidence of one witness when there are others, and it cannot be said positively, or with any degree of certainty, that the verdict would have been a different one if the jury had found that a particular witness had been convicted of some offence or offences. Under R.S.C., Ord. 58, r. 4, power is given to this court to receive further evidence on questions of fact. *Prima facie* that means on questions of fact material to an issue in the action. Assuming that the court has power to order the recall of a witness for the purpose of his being cross-examined as to credit, it is clear that that power should be exercised sparingly and only in very special circumstances. I do not regard this as a case in which the court, in its discretion, ought to make such an order. It leads nowhere ; there is no finality about it. If the court were to make the order asked for, it would be a departure from the well-recognised practice of the court, and it would lead to countless applications in other cases. This may appear to be a hardship on the plaintiff, but she is in the same position as any other litigant, and her case must be dealt with in just the same way as theirs—she would not have it otherwise.

R. v. *Hamilton* (6) was cited by counsel for the plaintiff in support of his application. I do not regard that as an authority covering this sort of case in this court. In *R.* v. *Hamilton* (6) the main attack was on the direction given by the trial judge to the jury, and that attack succeeded after the court had examined fully into the facts. During the argument or the submission of counsel for the appellant it appeared that a witness for the prosecution had given some evidence which the defence—the appellant—was then in a position to say was false, and counsel asked for leave to call evidence to show that. It was from the court that the suggestion came that that witness might be recalled, and the court drew attention to the powers given to the Court of Criminal Appeal under the Criminal Appeal Act, 1907, s. 9 (*b*), and, as one can well understand, no objection was taken by counsel for the Crown. The circumstances here are quite different, and I can find no reason in this case for departing from what has always been, so far as one can find, the practice of this court.

For these reasons I agree that the appeal and the application must both be dismissed.

Appeal and application dismissed with costs.

Solicitors : *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the plaintiff) ; *Oswald Hickson, Collier & Co.* (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MINISTER OF PENSIONS *v.* HORSEY.

[KING'S BENCH DIVISION (Ormerod, J.), May 6, June 2, 1949.]

Pension—Service patient in emergency services hospital—Negligence in treatment—Entitlement to award under the Royal Warrant, 1946 (*Cmd.* 6489), *arts.* 4, 56.

Pension — Appeal — Determination — Majority decision of tribunal — Validity—Pensions Appeal Tribunals Act, 1943 (*c.* 39), *s.* 6, *sched., para.* 3.

The respondent, a serving officer in the Royal Navy, broke his arm in A felling a tree when at home on leave. He was taken to the nearest hospital at Penzance and on the following day he was moved to an emergency services hospital at Truro. Here he was so negligently treated that his right hand was damaged beyond repair and he was placed on the retired list. An action brought by him against certain members of the hospital medical staff was settled before trial by the payment of substantial damages, B and he also claimed a pension under the Royal Warrant, 1946, on the ground that his disability was attributable to war service. By a majority, the legal chairman dissenting, the pensions appeal tribunal allowed his appeal and the Minister of Pensions appealed against that decision as being wrong in law.

HELD : (i) that if the respondent went to the Truro hospital merely C because it was the nearest or most convenient he was in the same position as if he were a civilian and would have no claim to an award, but if he were compelled to go because he was in the Royal Navy he would be in the same position as a patient in a service hospital and would be entitled to an award in respect of negligent treatment.

(ii) the case must be remitted to the tribunal to decide whether or not D the respondent was a compulsory patient at Truro.

(iii) that, as there was no provision in the Pensions Appeal Tribunals Act, 1943, empowering a tribunal to allow an appeal by a majority decision, a claim to a pension or award could only be allowed by the unanimous decision of the tribunal.

[AS TO PENSIONS APPEAL TRIBUNALS, see HALSBURY, Hailsham Edn., E Vol. 34, pp. 788, 789, paras. 1117-1119 ; and FOR CASES, see DIGEST, 2nd Supplement.]

Cases referred to :

(1) *Brain* v. *Minister of Pensions, Wilkes* v. *Minister of Pensions,* [1947] 1 All E.R. 892 ; [1947] K.B. 625 ; [1947] L.J.R. 1212 ; 2nd Digest F Supp.

(2) *Lee* v. *Minister of Pensions,* (1948), Reports of Selected War Pensions Appeals, Vol. 3, 1901.

(3) *Carman* v. *Minister of Pensions,* (1948), Reports of Selected War Pensions Appeals, Vol. 3, 2081.

(4) *Minister of Pensions* v. *Chennell,* [1946] 2 All E.R. 719 ; [1947] K.B. G 250 ; [1947] L.J.R. 700 ; 176 L.T. 164 ; 2nd Digest Supp.

APPEAL by the Minister of Pensions against a decision of a pensions appeal tribunal allowing by a majority the claim of the respondent to an award in respect of permanent injury to his arm due to negligent treatment received while an in-patient at an emergency services hospital. The appeal was allowed and the case sent back to the tribunal to determine whether or not the respondent entered H the hospital voluntarily, and to decide accordingly in the terms of the judgment.

H. L. Parker for the Minister of Pensions.

T. J. Kelly for the respondent.

Cur. adv. vult.

June 2. **ORMEROD, J.,** read the following judgment. The respondent was an officer in the Royal Navy who broke his right arm on Oct. 16, 1944, when at home on leave. He was taken to the nearest civilian hospital where an X-ray disclosed a fracture of both bones of the forearm and the next day he was moved —I use that term as a neutral word—to the Royal Cornwall Emergency Medical Services Hospital, Truro, for treatment. He was treated so negligently in the hospital at Truro that his right hand was damaged beyond repair and he was placed on the retired list on Jan. 5, 1946. The respondent then claimed that the consequences of his injury were attributable to war service. The claim was rejected by the Minister of Pensions. The respondent appealed, and a pensions appeal tribunal decided by a majority that the responsibility of the service continued while he was in an officers' ward in a civilian hospital, and the appeal was allowed. These facts, are beyond any dispute.

Two questions were, accordingly, submitted for decision by this court :— (i) that the tribunal was wrong in law in allowing the appeal and (ii) that the decision of the tribunal, being a majority decision, was of no effect. On the first question my attention was drawn to a number of decisions where members of the services had been treated in civilian hospitals and it had been held that there was no liability for pension even though there might have been delay or negligence in treatment. That is not necessarily the position here. There was no sufficient evidence before the tribunal that the circumstances in which the respondent came to be treated in the Truro hospital had been fully investigated. If he went there merely because it was the nearest and most convenient civilian hospital, then, clearly, he is in the same position as if he were a civilian. If, on the other hand, it was his duty by reason of the conditions of his service to attend that hospital, then he was in the same position as he would have been had he been sent to a service hospital. I must assume that in the ordinary way he would have received skilled and careful treatment in a civilian hospital. That is an assumption which is made in favour of an appellant and I think it is an assumption which must be made in a case of this kind. He did not receive it in the hospital to which it was his duty to go, and if these are the facts, then I find that he is entitled to an award. This question was not fully investigated by the tribunal and the case must go back to be dealt with on those lines.

In these circumstances the second question does not arise, but, as my attention has been drawn to it, I think, perhaps, I should say what are my views on that point. It has already been decided by Denning, J., in *Brain* v. *Minister of Pensions* (1) that a claim to a pension is not to be rejected unless the tribunal is unanimous in rejecting it. It was argued on behalf of the respondent that this rule should not apply to a case where the tribunal was not unanimous in allowing a claim as the onus of proof is on the Minister, and, unless all the members of the tribunal are satisfied that the onus is discharged, the claim must be allowed. I cannot accept that argument. A majority verdict in a criminal trial cannot be accepted whether the majority is in favour of conviction or acquittal, and it matters not for this purpose that the burden of proof is on the prosecution. Accepting as I do, and, indeed, as I think I must, the decision of Denning, J., that a claim to a pension cannot be rejected by a majority, I am satisfied, too, that a claim should not be allowed except by the unanimous decision of the members of the tribunal. Denning, J., pointed out in *Brain's* case (1) the serious risk of error in a decision of a majority. That risk is equally great whether the decision be in favour of one party or the other. There is no express statutory provision that the decision of the majority shall be effective, and in these circumstances I have come to the conclusion that a claim cannot be allowed unless there is a unanimous decision of the tribunal.

In these circumstances it follows that the case must be sent back to be dealt with by another tribunal, and the appeal is allowed.

Appeal allowed : case remitted.

Solicitors : *The Treasury Solicitor* (for the Minister) ; *Fowler, Legg & Co.* (for the respondent).

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

Re ISLE OF THANET ELECTRIC SUPPLY CO., LTD.

[Chancery Division (Roxburgh, J.), July 8, 1949.]

Appeal—Court of Appeal—Extension of time—Power of judge to grant extension —" Order . . . in . . . matter not being an action "—Company winding-up —Distribution of surplus assets—R.S.C., Ord. 58, *r.* 15.

By an originating summons dated Dec. 13, 1948, the liquidator of the Isle of Thanet Electric Supply Co., Ltd., in its voluntary winding-up sought the determination by the court of a question relating to the distribution of the surplus assets of the company between the holders of the preference stock and the holders of the ordinary stock. On Feb. 18, 1949, Roxburgh, J., declared that the surplus assets ought to be distributed on the footing that the holders of the preference stock were entitled to participate with the holders of the ordinary stock rateably in proportion to the nominal amount of the stocks held by them respectively. The order was passed and entered on May 26, 1949, and an ordinary stockholder now applied for leave to appeal against it.

Held : the court had jurisdiction under R.S.C., Ord. 58, r. 15, to enlarge the time for appeal, and it was proper to exercise that jurisdiction in this case.

Note in the Annual Practice, 1948, p. 1444, *criticised.*

[As to Time for Appeal, see HALSBURY, Hailsham Edn., Vol. 26, pp. 116-118, paras. 229, 230 ; and for Cases, see DIGEST, Practice and Procedure, pp. 843-846, Nos. *3904-3926.*]

Cases referred to :

(1) *Scottish Insurance Corpn., Ltd.* v. *Wilsons and Clyde Coal Co., Ltd.*, [1949] 1 All E.R. 1068.

(2) *Gatti* v. *Shoosmith*, [1939] 3 All E.R. 916 ; [1939] Ch. 841 ; 108 L.J.Ch. 380 ; 161 L.T. 208 ; Digest Supp.

Application for leave to appeal out of time from a decision relating to the distribution of the surplus assets of a company given in the winding-up of the company. Roxburgh, J., held that under R.S.C., Ord. 58, r. 15, he had jurisdiction to enlarge the time for the lodging of the notice of appeal.

Christie, K.C., and *Cecil Turner* for the applicant (an ordinary stockholder).
Gray, K.C., and *K. W. Mackinnon* for the respondent (a preference stockholder).
J. A. Brightman for the liquidator.

ROXBURGH, J. : This was a summons in companies winding-up in which the class rights of preference and ordinary shareholders were in issue. It is a case in which, above all others, there should be an appeal because, since my decision, the House of Lords has thrown much light on the problem in *Scottish Insurance Corpn., Ltd.* v. *Wilsons and Clyde Coal Co., Ltd.* (1). If a decision of importance bearing on the matters in issue is given after the hearing before the judge, but within the possible time for appealing, obviously the matter ought to be open to re-consideration. The question which puzzled me a little was whether I, as distinct from the Court of Appeal, have any jurisdiction to entertain this application. I am satisfied that I have, though the position at first sight was rather obscure. R.S.C., Ord. 58, r. 9, provides :

> " The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies (Consolidation) Act, 1908, or any Act amending the same or any order or decision made in the matter of any bankruptcy, or in any other matter not being an action, shall be the same as the time limited for appeal from an interlocutory order under r. 15."

This was an order falling within r. 9. Order 58, r. 15, provides :

> " Subject and without prejudice to the power of the Court of Appeal under Ord. 64, r. 7, no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks, A unless the court or judge at the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time."

I have confirmed, by referring to the Statutory Rules and Orders, that there ought to be a comma after the words " six weeks." The point is not without its importance, because, in the absence of that comma, it might be thought that the proviso which follows those words did not qualify the whole of the B previous words, but with the presence of that comma I do not think that point would be arguable. That rule seems to me plainly to confer on me a discretion to enlarge the time, either at the time of the making of the order or at any time subsequently.

Order 58, r. 17, provides :

> C " Wherever under these rules an application may be made either to the court below or to the Court of Appeal . . . it shall be made in the first instance to the court or judge below."

In view of the fact that it appears to me to be for the Court of Appeal rather than for me to discuss the bearing, if any, of Ord. 58, r. 17, on Ord. 64, r. 7, which I am going to read, I say nothing more about Ord. 58, r. 17, because D it does not affect the question of my jurisdiction. Order 64, r. 7, provides—and it will be remembered that the whole of Ord. 58, r. 15, is expressly made subject to this rule :

> " A court or a judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of E the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

The ANNUAL PRACTICE in many places refers to Ord. 58, r. 15, the material part of which was introduced in 1913, and indicates that under that rule the judge of first instance has power to extend the time for appeal, but there is F a note to Ord. 64, r. 7, which, though I think on close inspection it is quite accurate, is liable to be misunderstood if cursorily read. Under the general heading : " Applications under this rule "—it is stated (1948 ed., p. 1444) :

> " Thus application for extension of time to appeal to the Court of Appeal must be made to that court . . ."

G As a matter of construction, those words are clearly governed by the words " under this rule " which open the paragraph. It is not suggested that I have any jurisdiction to act under Ord. 64, r. 7, but, undoubtedly, that note would read more clearly if it repeated the words " under this rule " and added some such words as " but see Ord. 58, r. 15." With that amendment there would be no possibility of misunderstanding. I feel no doubt that I have jurisdiction H to extend the time, and I extend it accordingly.

Notice of appeal to be lodged within seven days. Applicants to pay costs as between party and party.

Solicitors : *Stock & Slater* (for the applicants) ; *Peacock & Goddard* (for the respondents) ; *Ashurst, Morris Crisp & Co.* (for the liquidator).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

HARRIS *v.* HARRIS.

[Probate, Divorce and Admiralty Division (Lord Merriman, P., and Barnard, J.), June 16, 1949].

Maintenance—Order made in New South Wales—Enforcement—Award to wife and child—Custody given to wife—Validity of custody order—Amount of order exceeding jurisdiction of English court—Maintenance Orders (Facilities for Enforcement) Act, 1920 (*c.* 33), *s.* 4 (1), (3) ; *s.* 10.

A wife resident in New South Wales obtained a maintenance order in the Sydney Children's Court against her husband, then resident at Uxbridge, Middlesex, ordering him to pay her £2 16*s.* 0*d.* a week for her own maintenance and £1 4*s.* 0*d.* for her infant child, the custody being granted to her by the same order. Under Australian law the order, having been made in the absence of the husband, required confirmation by a court of summary jurisdiction in this country, and it was confirmed by the Uxbridge justices. On appeal by the husband,

Held : (i) on the construction of the relevant Australian statutes the court at Sydney had jurisdiction to make an order against the husband for the maintenance of the child if they committed the custody of the child to the wife ; they had given the wife the custody ; and, therefore, the child was a " dependant " of the husband within the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 10, with the result that the order was enforceable in this country *in toto* and the justices had power to confirm it under s. 4 (1) of the Act of 1920.

(ii) the husband was entitled under s. 4 (3) of the Act to raise before the justices and on appeal the question of the validity of the order for custody and that of his ability to pay under the other provisions of the order in the same way as that in which he could have raised those questions before the Sydney court, had he been present, but he had not in fact shown that he was entitled to any relief in respect of those matters.

(iii) the fact that the order was for an amount greater than an English court could at present award was immaterial and the appeal failed.

Peagram v. *Peagram* ([1926] 2 K.B. 165), *applied.*

[As to the Enforcement of Maintenance Orders made in His Majesty's Dominions outside the United Kingdom, see HALSBURY, Hailsham Edn., Vol. 10, pp. 825-827, paras. 1321-1324 ; and for Cases, see DIGEST Supplement, Vol. 27, p. 97, Nos. *6233b* to *6233d.*]

Cases referred to :

(1) *Re Wheat,* [1932] 2 K.B. 716 ; 101 L.J.K.B. 720 ; 147 L.T. 437 ; 96 J.P. 399 ; Digest Supp.

(2) *Peagram* v. *Peagram,* [1926] 2 K.B. 165 ; 95 L.J.K.B. 819 ; 135 L.T. 48 ; 90 J.P. 136 ; Digest Supp.

Appeal by the husband from an order of Uxbridge (Middlesex) justices, dated April 20, 1949, confirming a maintenance order made on Oct. 15, 1948, by the Children's Court of Sydney, New South Wales.

The order was made on the application of the wife who was resident with her child in New South Wales. The husband, who lived at Uxbridge, contended that the English court had no jurisdiction to confirm that part of the order which related to the child and that the custody of the child should be given to him. He further contended that the amount of the award was too large and should only have been confirmed for a lesser sum. The Divisional Court found against the husband on both points and also held that he had failed to prove that the award should be reviewed on account of his inability to pay the full amount and the appeal was dismissed.

Heseltine for the husband.

The wife did not appear.

LORD MERRIMAN, P. : This is an appeal by a husband against the decision of Uxbridge justices confirming an order, technically called a maintenance order, made by the Children's Court at Sydney, New South Wales. On the application of the wife, who is now resident in New South Wales, that court awarded, in terms of English money, £2 16*s.* 0*d.* for her and £1 4*s.* 0*d.* in respect of the infant child of the marriage, a girl aged 5, who is also resident A in that State. By the same order the court gave the custody of the child to the wife. The confirmation of this order by the Uxbridge justices is challenged on a number of grounds. It is said that they had no jurisdiction to confirm that part of the order which related to the custody of the child. At the same time it is said that equally they had no power to interfere with it, and, therefore, the custody order should be allowed to stand in so far as it is made by the court B in New South Wales. Alternatively, it is said that the Uxbridge justices should have substituted an order in favour of the husband for the custody of the child. As regards the amount awarded by the order, while it is admitted that there was jurisdiction to make an award in favour of the wife, it is said that the sum is too large and should have been confirmed for some lesser sum, and, incidentally or alternatively, that, if it was admissible to include any allowance for the wife C in respect of the child, the sum should not have been as large as £1 4*s.* 0*d.*

The jurisdiction of the Uxbridge magistrates depends upon the Maintenance Orders (Facilities for Enforcement) Act, 1920, and on the fact that there are reciprocal arrangements between this country and the State of New South Wales for the enforcement of maintenance orders in these matrimonial matters. As that fact is admitted and indisputable, I do not propose to go into the D machinery whereby the reciprocity has been effected. Suffice it to say that it is admitted that the Act applies in this country and that the corresponding Act in New South Wales, the Maintenance Orders (Facilities for Enforcement) Act, 1923, operates reciprocally in that State.

The expression "maintenance order" is defined by the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 10, as follows :

> E "For the purposes of this Act, the expression 'maintenance order' means an order other than an order of affiliation for the periodical payment of sums of money towards the maintenance of the wife or other dependants of the person against whom the order is made, and the expression 'dependants' means such persons as that person is, according to the law in force in the part of His Majesty's dominions in which the maintenance order was made, F liable to maintain."

There are, therefore, two classes of persons in respect of whom a maintenance order may be made. The first is the wife. Mrs. Harris, the respondent to this appeal, is the wife, and comes within this s. 10, and it is admitted that in respect of her it was competent in the Children's Court in Sydney to make the order and competent in the Uxbridge justices to confirm it. With respect G to the child, however, it is necessary to discover how and why she is a person whom, according to the law in force in New South Wales, the husband was liable to maintain. For that purpose it is necessary to see on what authority maintenance in respect of the child (or, to be more accurate, an allowance to the wife in respect of the child), was included in this order, and when it is understood how that has happened it will, I think, be apparent that the argument H that the inclusion of a custody order was wrong and that the justices at Uxbridge had no jurisdiction to deal with it is fallacious.

We have no expert advice about the law in force in New South Wales and it was only at our instance that research was made into this topic because it was clear that it governs the interpretation of the word "dependants" in s. 10 of the Act of 1920 of the Imperial Parliament. It is impossible, therefore, to speak with complete certainty about the relevant Australian Acts, but it is to be observed that in the very full record with which we have been presented it is stated that the proceedings in New South Wales took place under the Deserted Wives and Children Act, 1901, and the Child Welfare Act, 1939, and I think it may be taken to be reasonably clear that those dates are the beginning and end of a code dealing with this subject-matter sometimes referred to as the Deserted Wives and Children Acts, 1901-1939, and the Child Welfare Act, 1939. One of the orders emanating from the court in New South Wales is thus headed. We have been shown the chronological table of statutes in force in New South Wales in 1939, from which it appears that the section now governing this matter, and standing unrepealed in 1939, is the Deserted Wives and Children Act, 1901, s. 7, as amended by s. 3 of the Deserted Wives and Children Amending Act, 1913. That section clearly differs in very marked respects from s. 7 of the Act of 1901. The material part is sub-s. (1) which provides :

> " (1) Upon the hearing the justices shall inquire into the matter of the complaint ; and (*a*) if they are satisfied that the wife is in fact left without means of support, they may order the defendant to pay for the use of the wife such allowance as they think reasonable, and in addition may commit the legal custody of any child of the marriage to the wife or such other person as they think proper, and order the defendant to pay for the support of such child such allowance as they think reasonable ; (*b*) if they are satisfied that any child of the defendant is in fact left without means of support, they may order the defendant to pay for the support of such child such allowance as they think reasonable and may commit the child to the legal custody of the wife or such other person as they think proper."

We are not strictly concerned with paragraph (*b*), because it is clear that the order was not made under that paragraph, but it is plain that under that paragraph the matter can be dealt with on the lines that the substantive order is made in favour of a child whose custody may be committed to the wife (if there is a wife) or to any other person. We are obviously concerned, in my opinion, with the first paragraph, and it is manifest that the scheme of the first paragraph is, in substance though not in actual wording, the same as the scheme of our own Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, whereby, assuming that the custody is given to the wife, any allowance made in respect of the child is, so to speak, ancillary to the allowance, if any, made in respect of the wife, and is made in view of the fact that the custody is awarded to the wife.

That is what has happened in this case. A perusal of the orders and the recitals in the orders makes it clear that it was because custody was awarded to the wife that the allowance of £1 4*s*. 0*d*. in respect of the child was added to the allowance of £2 16*s*. 0*d*. in respect of the wife. In other words, on this branch of the jurisdiction of the Children's Court in Sydney it is a condition precedent to the making of the order in this form that custody of the child should be awarded to the wife. If that is right, it is idle to speak of the Uxbridge justices having no jurisdiction to confirm the order in as much as it purported to contain a custody order. What they are confirming is a maintenance order, but it is a composite maintenance order. It specifies a sum of money directly payable to the wife as such and a further sum of money payable to her by way of allowance for the child because the custody of the child has been committed to her, and it is precisely because the custody of the child has been committed to her that, in the words of the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 10, this child is a dependant whom the husband is liable to maintain according to the laws in force in New South Wales. Therefore, the sum awarded in respect of the child is properly called a maintenance order within the definition of the section. That is not to say that there are no other ways in which the husband could have been made liable to maintain the child. It is only to say that within that definition and for those reasons this order is properly called a maintenance order, and, therefore, is enforceable *in toto*. That seems to dispose entirely of the suggestion that the Uxbridge justices had no jurisdiction to deal with that part of the order which incidentally awarded custody of the child to the wife.

The matter does not end there. Jurisdiction is one thing and the obligation to confirm is another. That brings me to the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 4 (3), which enacts that at the hearing it shall be open to the person on whom the summons was served (that is, the summons for confirmation) to raise any defence which he might have raised in the original proceedings had he been a party thereto. Pausing there, I ought, perhaps, to have said in passing that it is clear that a provision in the corresponding statute in New South Wales—the Maintenance Orders (Facilities for Enforcement) Act, 1923, to which I have already referred but which I do not propose to quote—enables an order to be made against a husband in his absence (that is, without service), but such an order is expressed to be provisional only until it has been confirmed by the appropriate court in the country of his residence. That is the meaning and point of the words "had he been a party thereto." Section 4 (3) of our Act of 1920 reads :

> "At the hearing it shall be open to the person on whom the summons was served to raise any defence which he might have raised in the original proceedings had he been a party thereto, but no other defence, and the certificate from the court which made the provisional order stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings shall be conclusive evidence that those grounds are grounds on which objection may be taken."

At first sight it might be thought that the certificate from the court as to the grounds on which objection might have been taken are themselves exclusive, but it is clear on authority that they are not. The certificate is conclusive that objection might have been taken on certain grounds, but it is not exclusive of the possibility that other grounds of objection were open. That is clear from the decision of the Divisional Court of the King's Bench Division in *Re Wheat* (1). There, as in this case, there was a certificate from the court which made the provisional order setting out the grounds on which the husband could have objected to the order, but there was no reference, among other things, to objections to the jurisdiction which went to the root of the whole matter, and the metropolitan magistrate who dealt with that case asked for the guidance of the Divisional Court on that matter. After reading the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 10 (3), HUMPHREYS, J., delivering the judgment of the court, said ([1932] 2 K.B. 725) :

> "The learned magistrate asks this court to say whether he was right in holding that the above provision did not preclude the husband from raising the defence of want of jurisdiction in the court which made the provisional order, although that ground of defence was not included in the certificate of grounds on which the making of the provisional order might have been opposed. In our opinion he was plainly right in so holding. The sub-section makes the certificate conclusive evidence that the grounds stated therein are grounds upon which objection may be taken, but does not confine the possible objections to those grounds. The only limitation upon the objections which may be raised by the person opposing the confirmation of the order is that the objection must be one which would have been open to him upon the original proceedings had he been a party to them."

HUMPHREYS, J., then points out that objection to the jurisdiction would clearly have been such a ground.

If I am right in what I have said about the grounds on which this order can properly be described as a maintenance order in respect of the incidental inclusion therein of the custody order, it follows that it must be open to the husband to say that no order for custody should have been given to the wife by the Children's Court in New South Wales, and, therefore, no allowance for the child should have been included in this maintenance order. Precisely the same observation applies, on the question of amount. Manifestly, had the husband been present in the Children's Court in Sydney he would have been able to discuss the question of his means, his income and his liabilities, and those of the wife, and all the rest of it. In other words, it would have been open to him to put forward such contentions as occurred to him about the amount to be awarded both in respect of the maintenance to be paid directly to the wife and the allowance in respect of the child of whom she was awarded the custody. In my opinion, all those matters are objections which would have been open to him on the original proceedings had he been a party to them, and, therefore, were open to discussion before the Uxbridge justices and before us. One now has to approach these two questions on the merits. With regard to the question of custody, I have ventured to point out already that this child, a girl of 5, is in New South Wales, where her mother, who appeared before the court there, is also living, and it seems to me, apart from anything else, to be obvious that so far as the suitability of the wife to have the custody and the duty of looking after this child's welfare is concerned the Children's Court in Sydney is far better qualified either than the Uxbridge justices or ourselves to deal with the matter. A correspondence has been read to us, as it was read to the Uxbridge justices. It is suggested that it shows that the wife is indifferent to the welfare of the child. I do not take that view at all. I am bound to say that that correspondence has sown considerable doubt in my mind whether the husband is really concerned with the welfare of the child. As the Uxbridge justices point out, he has now made a new home with another woman, by whom he has had a child, and with regard to this liaison he wrote to his wife as early as February, 1947, saying that he had no regrets and that was the end of their marriage so far as he was concerned. In the absence of any evidence to the contrary, I assume that the court in New South Wales is in the same position as courts in this country to re-consider at any time the question of custody. It is obvious from the Deserted Wives and Children Act, 1901, s. 7, as amended by the Deserted Wives and Children Amending Act, 1913, s. 3, which I have read, that they have ample jurisdiction to award the custody not only to the wife but to any other suitable person, and the Infants' Custody and Settlements Act, 1899, s. 17, as amended by the Guardianship of Infants Act, 1934, s. 3 (*a*), reproduces in substance the provisions of our own Guardianship of Infants Act, 1925, enacting that the welfare of the child in these matters shall be the paramount consideration. It is a commonplace to say that there is no finality in connection with custody orders. They are liable to be changed with the changing circumstances from day to day. If there is any ground for putting forward fresh considerations in the Children's Court in New South Wales, I have not the slightest doubt that that court will give the fullest possible weight to whatever is put before it, without feeling itself in the least hampered by anything which the Uxbridge justices have said, or we have said, or it has said itself on previous occasions. That we have jurisdiction to review the question of custody I do not doubt, for the reasons I have given. There is one other consideration which seems to me to be not unimportant. It is the rarest possible thing for a judge of this Division of the High Court to make a custody order in respect of a child who is out of the jurisdiction. This child is out of our jurisdiction and that of the Uxbridge justices, and it would need evidence a great deal stronger than anything that has been produced before us to induce me even to consider the propriety of making an order adverse to that of the court in whose jurisdiction this child is living. On the merits, therefore, whatever be our jurisdiction, I consider that this application is entirely misconceived, particularly in view of the fact that it has been stated more than once that all that is desired is to strike all mention of custody out of the confirmation by the Uxbridge justices, while leaving it standing in the order of the court in New South Wales. There I leave the question of custody.

As regards the amount, I ought to say in passing that it is conceded, and must be conceded in view of the decision in *Peagram* v. *Peagram* (2), that the mere fact that this order is made for an amount which, in respect of both the wife's maintenance and the allowance in respect of the child, is higher than that which can be awarded by a court of summary jurisdiction in this country is neither here nor there. The Uxbridge justices have jurisdiction to confirm this order, properly made so far as jurisdiction is concerned in New South Wales, notwithstanding the fact that the amount exceeds that which in their own jurisdiction they could award. In my opinion, there is jurisdiction to consider the question of amount, on the simple ground that the husband could have objected, had be been present, to either of the amounts as such, but, here again, the question is whether we should interfere. The evidence is that whereas the wife is left practically penniless, and the child, obviously, is not in good health and needs attention, the husband has ruthlessly cut off all supplies since March, 1948, while, on his own evidence, his gross income is £672 a year. From that he has deducted every conceivable thing which can be deducted, and has reduced his disposable income to £400 a year. Out of that he has been ordered to pay his wife and child, in round figures, £4 a week, or just over £200 a year, leaving about £200 of disposable income after he has paid his house-rent, insurances, income-tax and all the rest of it, and it is said that the order against him is too high because, forsooth, he has taken a mistress and has had a child by her. I think that both the New South Wales court and the Uxbridge justices knew all about that, and, for my part, I can see no question of principle which would justify us in saying that this amount is too high. I am comforted by the reflection that under s. 4 (6) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, it is open to the husband to apply to the Uxbridge justices, if he is so advised, to apply for a variation or reduction, but if the justices of Uxbridge think it is necessary and right to give the wife an opportunity of giving evidence they can do so by remitting the case to the court which made the order. Also the court which made the order has power, under s. 5 (5) of the New South Wales Act of 1923, to vary the order, notwithstanding that it has been confirmed by the Uxbridge justices. So the husband, if he finds that things are really too hard for him and can prove it to the satisfaction of the court, has a remedy, and I do not doubt that the court at Sydney would deal faithfully with any proper representations that are made to it, either on remittance by the Uxbridge justices or on direct application by the husband, if the circumstances warrant it. For the moment I can see no ground on which we should be justified in interfering with this order as it stands.

I am of opinion for these reasons that the Uxbridge justices had jurisdiction to confirm this order and that on the merits there was no reason for their not doing so, either as regards the substance of the order or as regards the amount in either respect. This appeal fails and must be dismissed.

BARNARD, J.: I agree.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Crane & Walton*, Leicester (for the husband, appellant).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Applied. R. *v.* SANDBACH JUSTICES. *Ex parte* SMITH. [1950] 2 All E.R. 781.

COLLINS *v.* HOWARD.

[Court of Appeal (Tucker, Cohen and Singleton, L.JJ.), June 29, 30, 1949.]

Damage—Remoteness—Breach of contract—Contract by defendant to form company—Agreement by plaintiff to contribute capital—Sale of shares to provide funds—Contract repudiated by defendant—Shares re-purchased at enhanced cost—Recovery of excess.

The plaintiff agreed with the defendant that he would provide capital for the formation of a limited company to exploit for building purposes a material which the defendant had invented. Unknown to the defendant, the plaintiff, to provide the necessary funds, disposed of a block of shares. The defendant subsequently refused to go on with the matter, and the plaintiff thereupon bought an equal number of the same shares. Owing to fluctuations in the market they cost him £245 more than he had received on the sale.

Held: there were no "special circumstances" from which knowledge should be imputed to the defendant that the plaintiff might have to sell his shares and re-purchase them at a loss, nor could such loss be said to "arise naturally" from the breach of contract; the case was, therefore, not covered by the rules in *Hadley* v. *Baxendale* (1854) (9 Exch. 341); and the sum of £245 was not recoverable by the plaintiff from the defendant as damages.

Decision of Humphreys, J. ([1949] 1 All E.R. 507), *reversed.*

[As to Remoteness of Damage in Contract, see HALSBURY, Hailsham Edn., Vol. 10, pp. 97-102, paras. 122-127; and for Cases, see DIGEST, Vol. 17, pp. 96-99, Nos. *115-141.*]

Cases referred to:

(1) *Hadley* v. *Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 17 Digest 93, *101.*

(2) *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.*, [1949] 1 All E.R. 997.

Appeal by the defendant from a judgment of Humphreys, J., dated Feb. 11, 1949, and reported [1949] 1 All E.R. 507, whereby he awarded the plaintiff damages for breach of contract.

In 1946 the plaintiff, a civil engineer, answered an advertisement inserted in a newspaper by the agents of the defendant, the inventor of "Lignacite," a material for building purposes designed to take the place of concrete. To exploit the invention the defendant was proposing to form a limited company which would have a share capital of £8,500, of which £1,000 would be ordinary shares of £1 each allotted to the defendant and the balance a working capital of £7,500 in six per cent. preference shares of £1 each to be subscribed in cash by three directors in equal amounts of £2,500 each. The plaintiff agreed to subscribe £2,500 and two other intending directors, one Cox and one Baynton, agreed to subscribe £1,000 and £1,500 respectively. After consultation with the plaintiff's bank it was agreed that the four parties should form a company to be called Lignacite (South Eastern), Ltd., with a working capital of £5,000 only. This was confirmed by letters of Sept. 3, and 4, 1946, between the plaintiff and the defendant, final terms being settled at a meeting held on Sept. 9, 1946. In pursuance of the agreement the three directors providing capital agreed between them to find £2,000 at once, the plaintiff producing £1,000 and Mr. Baynton and Mr. Cox £500 each. To provide his share the plaintiff disposed of a block of Central Argentine Railway shares which realised £1,042. On Sept. 11 the defendant sent a letter to the plaintiff, which the latter received on Sept. 13, stating that the proposal to form the company with a subscribed capital of £5,000 only was unacceptable to him (the defendant), and that, unless the plaintiff could arrange for the subscription of the complete nominal capital of £7,500, the defendant was unable to proceed further in the matter. On Sept. 16 the plaintiff re-purchased the shares which he had sold, and for them, owing to fluctuations in the market, he had to pay, with expenses amounting to £5, an additional £250. HUMPHREYS, J., held that there had been A a breach of contract by the defendant and that the extra cost at which the plaintiff had to re-purchase the shares was recoverable as damages. The Court of Appeal now held that, apart from the £5 expenses, the extra cost of the shares was not recoverable and allowed the appeal.

Salmon, K.C., and *H. E. G. Browning* for the defendant.
Jukes for the plaintiff.

B

TUCKER, L.J. : This is an appeal from a judgment of HUMPHREYS, J., in an action in which he awarded the plaintiff £250 damages for breach of contract. There were issues at the trial whether there had been a concluded contract, and, if so, whether it was repudiated by the plaintiff or by the defendant. Both these issues were decided on the facts in favour of the plaintiff and there C is no appeal by the defendant with regard thereto. The appeal before us relates only to the assessment of damages.

[HIS LORDSHIP stated the facts and continued :] It was submitted on behalf of the defendant that the plaintiff had failed to show any damage resulting to him from the defendant's breach of contract. It was argued that there were no "special circumstances" which would bring the case within the second D rule for assessing damages laid down in *Hadley* v. *Baxendale* (1) and that the facts clearly did not bring the case within the first rule. *Hadley* v. *Baxendale* (1) and the cases that followed it have recently been considered by this court in *Victoria Laundry* (*Windsor*), *Ltd.* v. *Newman Industries, Ltd.* (2), and the result of the authorities is summarised in the judgment in the latter case. In the present case HUMPHREYS, J., said clearly that he did not think there were any E "special circumstances." After referring to *Hadley* v. *Baxendale* (1) and quoting a passage from the judgment of ALDERSON, B., he said ([1949] 1 All E.R. 509) :

> "Then he deals with the case of special circumstances. It is not suggested that there are any special circumstances in the present case, so it is the first rule that applies."

F Notwithstanding that, counsel for the plaintiff has submitted that there were special circumstances from which, at any rate, knowledge should be imputed to the defendant that it was a serious possibility or that there was a real danger that the plaintiff might have to sell his shares ; that, if he sold them, he might wish to re-purchase them ; and that, if he did that, there might be a loss on the transaction. If that knowledge cannot be shown G to have existed in fact or if it cannot be imputed, none the less counsel submits that he can bring himself under the first rule in *Hadley* v. *Baxendale* (1), namely, that in cases of breach of contract the aggrieved party is entitled to recover such part of the loss as was, at the time of the contract, reasonably foreseeable as likely to result from a breach.

In my view, however, the evidence is quite insufficient to bring the case within H the rules in *Hadley* v. *Baxendale* (1). We were referred to passages in the evidence from which it appears that at an interview a conversation took place in which the plaintiff was asked whether he had money available or whether he would have money available. The use of the expression "available" shows, it is said, that the defendant knew or ought to have known that the plaintiff had not got the money in actual cash. A similar conversation took place after the final terms of the contract had been settled on Sept. 9. Generally speaking, when one man contracts with another that that other will provide a sum of money, it is no concern of his to enquire where and how the other party is going to obtain the money which will enable him to implement his contract. There may be special cases in which it is expressly brought to the notice of one party that the other party will have to take certain definite steps to obtain the money, but I think it would be going beyond any previous authority to say that, in a case of this kind, the contract being eventually broken, the plaintiff can recover as part of his damages the loss he has suffered from realising shares A and then buying them back again. In the present case the plaintiff obtained £1,042 for the sale of his shares, and up to that moment I cannot see that he suffered any loss at all. He chose to re-invest the money in the shares which he formerly held. That choice of his resulted in his having to pay an additional sum to buy back the same number of shares as he owned before. I cannot see on what principle the defendant can be made liable for that additional sum. B There are no sufficient special circumstances from which knowledge can be imputed to the defendant and this case clearly does not come within the main rule in *Hadley* v. *Baxendale* (1).

The learned judge seems to have dealt with the case as if the contract was a contract for the sale and purchase of shares in the Argentine Railway and to have held that the plaintiff was acting reasonably when he bought back those shares. C That would have been a proper test if the contract had been one relating to the sale and purchase of those shares. The contract, however, related, not to those shares, but to shares in a new company to be formed, and nobody knows what the value of the latter shares would have been if the plaintiff had ever acquired them. The measure of his damage is the difference between the shares he would have been entitled to in the new company and his present D position. As to that, nobody knows what it is. I think the learned judge came to a wrong decision, and that the plaintiff's claim cannot be substantiated on any of the principles governing the assessment or the measure of damages in cases of breach of contract. The highest at which it could be put for the plaintiff would be to say that he might have been entitled to some quite nominal sum for the period of time during which this money had lain idle, *i.e.*, from Sept. E 5 to 16. Some small sum might possibly have been added in respect thereof to the sum of £5 which it is conceded he is entitled to recover for incidental expenses. I think this appeal should succeed and should be allowed with costs.

COHEN, L.J.: I agree.

F

SINGLETON, L.J.: I also agree.

Appeal allowed with costs.

Solicitors: *Ravenscroft, Woodward & Co.*, agents for *Staffurth & Bray*, Bognor Regis (for the plaintiff); *Gregory, Rowcliffe & Co.*, agents for *Bedell & Driver*, Manchester (for the defendant).

G

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

TAMLIN *v.* HANNAFORD.

[COURT OF APPEAL (Bucknill, Asquith and Denning, L.JJ.), June 24, 27, July 8, 1949.]

Rent Restriction—Crown property—House owned by British Transport Commission—Application of Acts.

The British Transport Commission is not a servant or agent of the Crown, and its property is as much subject to the Rent Restrictions Acts as the property of any other person.

Per cur. : "When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly, as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947, which was passed on the same day as the Transport Act, 1947. In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department."

[AS TO PREMISES WITHIN THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-316, paras. 368-373 ; and FOR CASES, see DIGEST, Vol. 31, pp. 557-559, Nos. *7042-7067*.]

Cases referred to :

(1) *Territorial Auxilliary Forces Assocn.* v. *Nichols*, [1948] 2 All E.R. 432 ; [1949] 1 K.B. 35 ; [1948] L.J.R. 1600.

(2) *Gilbert* v. *Trinity House Corpn.*, (1886), 17 Q.B.D. 795 ; 56 L.J.Q.B. 85 ; 13 Digest 274, *41*.

(3) *International Ry. Co.* v. *Niagara Parks Commission*, [1941] 2 All E.R. 456 ; [1941] A.C. 328 ; 111 L.J.P.C. 55 ; 2nd Digest Supp.

(4) *Territorial Forces Assocn.* v. *Philpot*, [1947] 2 All E.R. 376 ; 2nd Digest Supp.

(5) *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co., Ltd.*, [1919] A.C. 744 ; 88 L.J.Ch. 464 ; 121 L.T. 361 ; 83 J.P. 261 ; *affg., S.C. sub nom., Cannon Brewery Co.* v. *Central Control Board* (*Liquor Traffic*), [1918] 2 Ch. 101 ; 87 L.J.Ch. 399 ; 118 L.T. 577 ; 42 Digest 705, *1217*.

APPEAL by the defendant from an order of His Honour JUDGE SCOBELL ARMSTRONG at Plymouth County Court, dated Oct. 28, 1948.

The plaintiff was the lessee of a house at Plymouth which formerly belonged to the Great Western Railway but became vested in the British Transport Commission under the Transport Act, 1947, and the defendant was the subtenant of some rooms in the house which constituted a separate dwelling within the meaning of the Rent Restrictions Acts. The plaintiff sued for possession of the rooms, and the defendant claimed the protection of the Rent Restrictions Acts. The county court judge held that the house must be regarded as owned by the Crown and administered by the Transport Commission as agents of the Crown, and, as the Crown was not bound by the Rent Acts, he made an order for possession. The Court of Appeal reversed his decision, and remitted the case to the county court to be dealt with on the basis that the house was within the Rent Restrictions Acts. No opinion was expressed whether, if the house had been Crown property, the plaintiff, as lessee of the Crown, would have been able to avail himself of the rule that the Rent Acts did not bind the Crown.

Sir Valentine Holmes, K.C., and *J. P. Ashworth* for the defendant.

Barry, K.C., and *Cridlan* for the plaintiff.

Cur. adv. vult.

July 8. **DENNING, L.J.**, read the following judgment of the court. The plaintiff was the lessee of a house No. 2, Buckland Street, Plymouth, which used to belong to the Great Western Railway. The defendant was the sub-tenant of some rooms in the house and was protected in those days by the Rent Restrictions Acts. On the nationalisation of the railways, however, the house became vested in the British Transport Commission, and the county court judge has held that on that account the defendant has lost the protection of the Rent Restrictions Acts. The judge said that the house "must be regarded as owned by the Crown and administered by the Transport Commission as Crown agents," and that the house, "being now Crown property, is no longer within the scope of the Rent Acts." He, accordingly, made an order for possession.

It is, of course, a settled rule that the Crown is not bound by a statute unless there can be gathered from it an intention that the Crown should be bound, and it has been held that, under this rule, the Crown and its servants and agents are not bound by the Rent Restrictions Acts : see, for instance, *Territorial Forces Assocn.* v. *Nichols* (1). In considering whether any subordinate body is entitled to this Crown privilege the question is not so much whether it is an "emanation of the Crown," a phrase which was first used in *Gilbert* v. *Trinity House Corpn.* (2), but whether it is properly to be regarded as the servant or agent of the Crown : see *International Ry. Co.* v. *Niagara Parks Commission* (3). In the case of the British Transport Commission, this depends on the true construction of the Transport Act, 1947. We have considered the provisions of that statute and, for the sake of clarity, we propose to state their effect without referring to the various sections in detail.

The Transport Act, 1947, brings into being the British Transport Commission, which is a statutory corporation of a kind comparatively new to English law. It has many of the qualities which belong to corporations of other kinds to which we have been accustomed. It has, for instance, defined powers which it cannot exceed, and it is directed by a group of men whose duty it is to see that those powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporation may do, so long as it keeps within the bounds which Parliament has set, but the significant difference in this corporation is that there are no shareholders to subscribe the capital or to have any voice in its affairs. The money which the corporation needs is raised, not by the issue of shares, but by borrowing, and its borrowing is not secured by debentures, but is guaranteed by the Treasury. If it cannot repay, the loss falls on the Consolidated Fund of the United Kingdom, that is to say, on the taxpayer. There are no shareholders to elect the directors or to fix their remuneration. There are no profits to be made or distributed. The duty of the corporation is to make revenue and expenditure balance one another, taking, of course, one year with another, but not to make profits. If it should make losses and be unable to pay its debts, its property is liable to execution, but it is not liable to be wound-up at the suit of any creditor. The taxpayer would, no doubt, be expected to come to its rescue before the creditors stepped in. Indeed, the taxpayer is the universal guarantor of the corporation. But for him it could not have acquired its business at all, nor could it now continue it for a single day. It is his guarantee that has rendered shares, debentures and such like all unnecessary. He is clearly entitled to have his interest protected against extravagance or mismanagement.

There are other persons who have also a vital interest in its affairs. All those who use the services which it provides—and who does not—and all whose supplies depend on it—in short, everyone in the land—is concerned in seeing that it is properly run. The protection of the interests of all these—taxpayer, user and beneficiary—is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject, however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the directors—the members of the commission—and fixes their remuneration. They must give him any information he wants, and, lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature in matters which appear to him to affect the national interest, as to which he is the sole judge, and they are then bound to obey. These are great powers, but still we cannot regard the corporation A as being his agent, any more than a company is the agent of the shareholders or even of a sole shareholder. In the eye of the law the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. B It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.

The correctness of these views is shown by the way in which the railways have been dealt with. Apart from the special provisions as to the constitution of the commission, all that has happened is that there has been an amalgamation C of the previous railway companies into one concern which is expressly made subject to the same rights and liabilities as the railway companies were, including statutory duties, contractual obligations, and even some customary obligations. This one amalgamated concern is run by a statutory corporation called the Railway Executive, but this corporation is nothing more nor less than the agent of the commission. So far as third persons are concerned, the D Railway Executive is treated as running the railways on its own account. For instance, the officers and servants of the former companies are treated as officers and servants of the Railway Executive and not of the commission, but in the last resort it is the commission which is responsible. If a judgment against the Railway Executive is not satisfied, execution can be levied against the property of the commission. All this seems to be quite inconsistent with E the notion that the commission is itself a government department or an agent of the Crown. Execution is not leviable against a government department, even under the Crown Proceedings Act, 1947.

We do not find it very useful to draw analogies from other bodies which are differently constituted and differently controlled and exist for different purposes. The Territorial Army Association, for instance, is not concerned F with commercial matters, but with the defence of the realm, which is essentially the province of government, and it is, therefore, to be considered an agent of the Crown : *Territorial Forces Assocn.* v. *Philpot* (4) ; *Territorial Forces Assocn.* v. *Nichols* (1). The Post Office is the nearest analogy. It is, of course, concerned with commercial matters, but it is, nevertheless, a government department and its servants are civil servants. That is, however, an anomaly due to its G history. The carriage of mail was a Crown monopoly long before the Postmaster-General was incorporated. But the carriage of passengers and goods is a commercial concern which has never been the monopoly of anyone and we do not think that its unification under State control is any ground for conferring Crown privileges on it.

The only fact in this case which can be said to make the British Transport H Commission a servant or agent of the Crown is the control over it which is exercised by the Minister of Transport, but there is ample authority both in this court and the House of Lords for saying that such control as he exercises is insufficient for the purpose : see *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co.* (5) [1918] 2 Ch. 123, and [1919] A.C. 757. When Parliament intends that a new corporation should act on behalf of the Crown, it, as a rule, says so expressly, as it did in the case of the Central Land Board by the Town and Country Planning Act, 1947, which was passed on the same day as the Transport Act, 1947. In the absence of any such express provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department.

In our opinion, therefore, the British Transport Commission is not a servant or agent of the Crown and its property is as much subject to the Rent Restrictions Acts as the property of any other person. Counsel for the defendant mentioned a further point, namely, whether in any case the plaintiff, who was clearly not the servant or agent of the Crown, could avail himself of the rule relating to the Crown, but it was not argued and we express no opinion on it. The appeal is allowed, and the case remitted to be dealt with on the footing that the house is within the Rent Restrictions Acts.

Appeal allowed with costs usual in the case of a poor person.

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *W. H. Sloman*, Plymouth (for the defendant); *Kinch & Richardson*, agents for *Broadbent & Huddart*, Plymouth (for the plaintiff).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

RICHARDSON *v.* RICHARDSON.

[Court of Appeal (Bucknill, Asquith and Denning, L.JJ.), June 30, July 1, 4, 5, 6, 1949.]

Adultery—Condonation—Revival—Conduct not amounting to legal cruelty.

The parties were married in 1942, and in 1944 a child was born. In 1945 the husband, who was serving in the Royal Air Force, went to Norway and there committed an isolated act of adultery. In 1946, after his return to the matrimonial home, he confessed this adultery to his wife, and she forgave him. In 1948 the wife presented a petition for divorce on the ground of the husband's cruelty and the adultery which, she claimed, had been revived. The Court of Appeal found that the charge of cruelty was not proved, and, on the second point,

Held: while the commission by a respondent of a matrimonial offence less than legal cruelty is sufficient to revive condoned adultery, the conduct complained of must be such as, if persisted in, will make married life together impossible; there was no evidence that the conduct of the husband in the present case was of such a character; and the wife, therefore, was not entitled to a decree.

Beard v. *Beard* ([1945] 2 All E.R. 306), *applied.*

[As to Condonation and Revival of Matrimonial Offences, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679, 680, paras. 1004-1006; and for Cases, see DIGEST, Vol. 27, pp. 345, 346, Nos. *3266-3276.*]

Cases referred to:

(1) *Beard* v. *Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 2nd Digest Supp.

(2) *Durant* v. *Durant*, (1825), 1 Hag. Ecc. 733; 27 Digest 337, *3171.*

(3) *Houghton* v. *Houghton*, [1903] P. 150; 72 L.J.P. 31; 89 L.T. 76; 27 Digest 346, *3274.*

(4) *Russell* v. *Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 291, *2661.*

(5) *D'Aguilar* v. *D'Aguilar*, (1794), 1 Hag. Ecc. 773; 1 Hag. Con. 134, *n.*; 27 Digest 407, *4064.*

APPEAL by the wife from a decision of Mr. Commissioner BLANCO WHITE, K.C., on Mar. 18, 1949, whereby he dismissed the wife's petition for divorce on the ground of the husband's cruelty and adultery. He found that cruelty was not proved, and that the adultery, which had been condoned, had not revived. The Court of Appeal upheld his decision.

Norman Parkes and *Kee* for the husband.
I. H. Jacob for the wife.

BUCKNILL, L.J.: This is an appeal from a judgment of Mr. Commissioner BLANCO WHITE, K.C., dismissing a petition by a wife on the ground of the husband's cruelty.

The points raised on the appeal are two :—(i) that the learned commissioner was wrong in finding that there had been no cruelty by the husband ; (ii) that, even if that point failed, nevertheless, the conduct of the husband had been such as to revive the adultery which he admittedly committed on a single occasion in Norway. [HIS LORDSHIP stated the facts, found that the husband had not treated the wife with cruelty, and continued :] As regards the second point, it is said by counsel for the wife that *Beard* v. *Beard* (1) in effect decided that something short of actual cruelty would revive the condoned adultery. It is clear that *Beard* v. *Beard* (1) not only decided that desertion would revive adultery, a different kind of matrimonial misconduct, but also that there need not be such misconduct as would in itself be a basis for a petition, because in *Beard* v. *Beard* (1) the desertion which revived the adultery was for less than the statutory three years. It is said, therefore, by counsel for the wife that it is not necessary to prove cruelty in a case of this kind, but something short of cruelty will revive the adultery. The question is how far short it can be. A number of expressions are used in *Beard* v. *Beard* (1) on that point. SCOTT, L.J., said ([1945] 2 All E.R. 308) :

> " . . . the test to be applied has seemed to depend on the meaning of a particular judicial phrase, 'matrimonial offence,' used in certain reported cases, rather than on the basic reasons of principle which underlie the controversy. It is said by the one side that 'matrimonial offence' means only such a breach of matrimonial duty as will entitle and, perhaps require the Divorce Court to grant a decree to the aggrieved spouse ; and that no degree of matrimonial breach of duty, short of what calls for such a decree, can constitute a 'matrimonial offence' within the meaning of the decisions. Their argument is based on the contention that the word 'offence' correctly construed carries their meaning. The other side reply that the word 'offence' has no statutory force, and is merely a word used compendiously in the cases to cover any matrimonial wrongdoing, whether any decree could or could not be based on the particular wrongdoing in fact established. The dispute has thus seemed to turn on a problem of interpreting a judicial phrase. I think the broader viewpoint is the sounder and that it would be fallacious to limit the argument of principle by any such verbal and restrictive interpretation of a convenient judicial phrase."

If I apply those sentences to the present case, I have to ask myself : Did the conduct of the husband amount to a matrimonial wrongdoing ? Then I have to ask myself : What is a matrimonial wrongdoing ? It is a very broad phrase. If I look further at the cases to which the learned Lord Justice refers, I find several sentences which throw some light on the matter. A little later on SCOTT, L.J., said this (*ibid.*, 310) :

> "If on the other hand those courts treated it as only conditional forgiveness of the guilty party, that is to say, as being granted upon a condition imposed by the law of the court, that the married status so preserved might again be lost if the forgiven spouse again broke his or

> her marriage vows and became guilty of new matrimonial misconduct, then we too ought to treat the word in s. 30 of the [Matrimonial Causes Act, 1857] as connoting only a conditional wiping out of the offence condoned, which would revive on the happening of the new misconduct."

The phrases "matrimonial wrongdoing," "matrimonial misconduct," and "a breach of the marriage vows," throw some light on it, but not so much light as one would like. In earlier cases a different phrase is used, namely, "conjugal kindness." The learned Lord Justice quotes the words of Sir John Nicholl, Dean of Arches, in *Durant* v. *Durant* (2). Sir John said (1 Hag. Ecc. 762:

> "The plainer reason and the good sense of the implied condition is, that 'you shall not only abstain from adultery, but shall in future treat me—in every respect treat me (to use the words of the law)—"with conjugal kindness" . . .'".

Thus we have to consider what amounts to conjugal kindness, and whether the husband in this case committed a breach of it.

Finally, there is a judgment of Sir Francis Jeune, P., in *Houghton* v. *Houghton* (3) where he said ([1903] P. 152) :

> "The principle is as clear as possible. When the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties, and a person who goes back to live with his or her guilty spouse goes back on that implied condition alone. Desertion is as serious a matrimonial offence as can be imagined, because it probably results in breaking up the matrimonial home."

Therefore, one finds a great number of expressions of dealing with the kind of offence which will revive condoned adultery. The matter must be approached with some care because I cannot believe that, if adultery has been condoned, say for seven years, a wife is entitled to say it is revived because the husband has on one occasion slapped her face, or has come home drunk, or has done something else which may amount to matrimonial misconduct or a breach of conjugal kindness. I think that the proper test to apply is—and I think it is rather indicated in the words of Sir Francis Jeune, P., to which I have just referred—that the conduct at any rate must be such as, if persisted in, will make married life together impossible. That is putting it as broadly as I can. A matrimonial offence, seems to me to mean an offence against the vows of marriage. The vows of marriage are well known. Desertion is certainly one offence, and cruelty as defined by the law is another. The conduct of the wife in *Russell* v. *Russell* (4), though it did not amount to cruelty, made married life impossible and the result was the refusal of a decree of restitution of conjugal rights. If I apply that test in this case and ask myself : Are the various complaints which counsel for the wife has put forward as breaches of conjugal kindness such as to make life between husband and wife impossible, or tend to make it impossible, my answer is : No, they were not. The marriage in fact broke up because the father turned the husband out of the house. Why he turned him out of the house was never explained to the husband. The husband was under the impression he was turned out because the wife had broken her pledge of secrecy and told her parents about her husband's act of adultery. According to the wife the husband was turned out because she complained of his sexual demands. At any rate, it was not the husband who left the wife willingly. It was the father who turned him out. Therefore, this second point fails, and the adultery was not revived by any conduct of the husband. I think the judgment of the learned commissioner was right, and this appeal should be dismissed.

ASQUITH, L.J. : I agree that the appeal should be dismissed.

DENNING, L.J. : I agree. If a husband should commit adultery and the wife should take him back, then in order to revive the condoned adultery it is not necessary that the fresh conduct of the guilty husband should be such as of itself to be a sufficient ground for a judicial separation or a divorce. A good deal less is sufficient. After all, the innocent wife does a praiseworthy thing in taking back the guilty husband, and should not be penalised for so doing. If the guilty husband after being taken back does not behave properly, and the marriage breaks down afresh by reason of his conduct without any fault of the innocent wife, she is entitled to rely on his original guilty act as a ground for divorce. Any other view would greatly hamper attempts at reconciliation, for no innocent party would be inclined to take a guilty party back if it meant being tied for ever to an unhappy marriage. The subsequent conduct may consist of harshness of behaviour short of cruelty, but if it breaks up the marriage that is sufficient to revive the adultery. That was made clear by SIR WILLIAM SCOTT in *D'Aquilar* v. *D'Aquilar* (5) where he said (1 Hag. Ecc. 782) :

> " It is held that words of heat and passion, of incivility, or reproach, are not alone sufficient for an original cause ; nor harshness of behaviour ; but I cannot but think that their operation would be stronger in condonation."

That passage was quoted (1 Hag. Ecc. 765) and accepted by SIR JOHN NICHOLL as good law in *Durant* v. *Durant* (2). He put the matter in his own words thus (*ibid.*, 762) :

> " The plainer reason and the good sense of the implied condition is, that ' you shall not only abstain from adultery, but shall in future treat me —in every respect treat me (to use the words of the law)—" with conjugal kindness "—on this condition I will overlook the past injuries you have done me ' ".

He would be a bold man who would doubt the authority of those two great judges on this subject. SCOTT, L.J., in *Beard* v. *Beard* (1) clearly accepted them as authoritative, and I do the same. In the result, therefore, harshness, or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party and does indeed lead to a breakdown of the marriage, is sufficient to revive the original offence.

Applying this test, I confess I have felt considerable hesitation in the course of this case as to whether the husband's conduct on his own admission was not sufficient to revive the condoned adultery. He was on some occasions selfish and inconsiderate, and made remarks which were hurtful to a woman of the wife's sensitive temperament. It is an undoubted fact that her health greatly deteriorated. If the judge had found that the husband's conduct was the cause of the breakdown of the marriage, the condoned adultery would, I think, have been revived, but the judge has not so found. There are significant incidents which may also throw light on the breakdown of the marriage such as the wife receiving repeated telephone messages from another man. The judge has found that the husband is a very decent and respectable man. As I read the whole judgment the burden of it is that the husband's conduct was not the cause of the breakdown of the marriage. On that view of the facts it was not sufficient to revive the condoned adultery, and I agree that the appeal should be dismissed.

Appeal dismissed : no order as to costs.

Solicitors : *Kinch & Richardson* (for the husband) ; *Neil MacLean & Co.* (for the wife).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

PERRING *v.* PERRING AND SIMPSON.

[Probate, Divorce and Admiralty Division (His Honour Judge Done), May 20, June 3, 1949.]

Adultery—Evidence—Entry in register of births—Birth of child registered as illegitimate—Register signed by reputed father.

A husband who petitioned for a dissolution of marriage on the ground of his wife's adultery produced as the only evidence of adultery a certified copy of an entry in a register of births showing that his wife had registered the birth of an illegitimate child and that a person bearing the same name as the co-respondent had acknowledged paternity by signing the register as the father of the child.

Held : (i) a wife's declaration made when registering the birth of her child that her husband is not the father is not receivable in evidence either as evidence of that fact or as an admission of adultery, and, therefore, in the absence of other evidence, the certificate produced by the husband could not be accepted as proof of the wife's adultery.

Rimmer v. *Rimmer* ((1930) 144 L.T. 96), *followed.*

Frampton v. *Frampton and Bushell* ([1941] 1 All E.R. 305) and *Mayo* v. *Mayo* ([1948] 2 All E.R. 869), *not followed.*

Warren v. *Warren* ([1925] P. 107), *distinguished.*

[As to Evidence of Adultery, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-664, paras. 973-976 ; and for Cases, see DIGEST, Vol. 27, pp. 294, Nos. *2708-2765.*]

Cases referred to :

(1) *Warren* v. *Warren,* [1925] P. 107 ; 94 L.J.P. 68 ; 133 L.T. 352 ; 27 Digest 298, *2749.*

(2) *Frampton* v. *Frampton and Bushell,* [1941] 1 All E.R. 305 ; [1941] P. 24 ; 110 L.J.P. 20 ; 165 L.T. 48 ; 2nd Digest Supp.

(3) *Mayo* v. *Mayo,* [1948] 2 All E.R. 869 ; [1949] P. 172 ; [1949] L.J.R. 48.

(4) *In the Estate of Goodrich, Payne* v. *Bennett,* [1904] P. 138 ; 90 L.T. 170 ; *sub nom., Payne* v. *Bennett,* 73 L.J.P. 33 ; 22 Digest 322, *3163.*

(5) *Roast* v. *Roast,* [1937] 4 All E.R. 423 ; [1938] P. 8 ; 107 L.J.P. 21 ; 157 L.T. 596 ; 102 J.P. 25 ; Digest Supp.

(6) *Ettenfield* v. *Ettenfield,* [1940] 1 All E.R. 293 ; [1940] P. 96 ; 109 L.J.P. 41 ; 162 L.T. 172 ; 2nd Digest Supp.

(7) *Russell* v. *Russell,* [1924] A.C. 687 ; 93 L.J.P. 97 ; 131 L.T. 482 ; 27 Digest 297, *2743.*

(8) *Goodright d. Stevens* v. *Moss,* (1777), 2 Cowp. 591 ; 3 Digest 365, *58.*

(9) *The Aylesford Peerage,* (1885), 11 App. Cas. 1 ; 3 Digest 367, *80.*

(10) *Rimmer* v. *Rimmer,* (1930), 144 L.T. 96 ; Digest Supp.

Undefended Petition for divorce by husband on the ground of his wife's adultery.

The husband, the only witness called, relied for proof of the adultery on the certified copy of the entry of the birth of a child born to his wife signed in her handwriting in the original register as the mother and giving as the name of the father that of the man who was cited as co-respondent. The husband identified his wife's signature, but could not swear that the signature of the person who acknowledged the paternity of the child was that of the co-respondent. Holding that such evidence was insufficient to establish adultery, the learned commissioner granted an adjournment to permit the husband to tender further evidence.

Jupp for the husband.

The wife and the co-respondent did not appear.

Cur. adv. vult.

June 3. **His Honour JUDGE DONE** (sitting as a commissioner in divorce) read the following judgment. In this undefended suit the husband petitions for dissolution on the ground of adultery. The marriage took place on Sept. 9, 1933. The husband, who was the only witness called, said that during the war he was in the Royal Air Force and served overseas from 1942 until April, 1945, when he returned to this country. He found his wife changed. She said she had no time for him and was in love with an American whom she refused to give up. That man was not the co-respondent. In August, 1945, the husband was demobilised. He worked for a time at Eynsham, where his wife refused to live with him. Later, he rejoined the Royal Air Force, in which he is still serving. He had continued to visit his wife. On several visits in 1945 he saw a man named Simpson at the house. It did not appear from the evidence that the man was staying there. The husband also saw him in company with the wife in the street on five or six occasions. The husband did not speak to Simpson, but he asked his wife about him. She said he was just a friend and denied having committed adultery with him. The husband put in a certified copy of the entry of the birth of a child and proved that the signature " F. H. Perring, mother " in col. 7 of the original register was in the handwriting of the wife. The entry records the birth of a boy on Jan. 7, 1948, the wife thus being named as the mother and Reginald Leonard Simpson, wood merchant, as the father. The petition alleges adultery with Reginald Leonard Simpson between April, 1947, and January, 1948, at Coxmoor Cottages, Crondall, Farnham, which is the address of the wife as given in the birth certificate.

It is clear that, apart from the birth certificate, there was no evidence of adultery and this was conceded by the husband's counsel. His submission was that the declaration made by the wife to the registrar that she had given birth to a child and that R. L. Simpson was the father of that child amounted to an admission of adultery, that the declaration was receivable in evidence as such an admission, and that on that sole evidence the court could, and should, grant a decree. He relied on *Warren* v. *Warren* (1), *Frampton* v. *Frampton and Bushell* (2), *Mayo* v. *Mayo* (3). His submission was that, if a wife is proved to have registered the birth of her child in a form appropriate to illegitimacy, no further evidence is required in order to entitle the husband to a divorce. The point is one of some importance and I took time to consider my decision.

I will first refer to the relevant provisions of the Births and Deaths Registration Act, 1874. Section 1 imposes a duty on the father and mother, and in default of them on the occupier of the house where the child is born and on each person present at the birth and on the person having charge of the child, to give the registrar within 42 days after the birth information of the particulars required to be registered and in the presence of the registrar to sign the register. Section 7 says :

> " In the case of an illegitimate child no person shall, as father of such child, be required to give information under this Act concerning the birth of such child, and the registrar shall not enter in the register the name of any person as father of such child, unless at the joint request of the mother and of the person acknowledging himself to be the father of such child, and such person shall in such case sign the register, together with the mother."

Section 39 provides that the parent of any child who fails to give information concerning the birth of the child as required by the Acts shall be liable to a penalty not exceeding forty shillings. Section 40 provides that any person who wilfully gives false information to the registrar concerning any birth shall be liable on summary conviction to a penalty not exceeding £10. By s. 38 of the Births and Deaths Registration Act, 1836, as amended by s. 38 of the Act of 1874, a sealed certified copy of an entry in the register of births shall be received as evidence of the birth to which the same relates without any further or other proof of such entry, provided the entry is signed by a person professing to be the informant and to be such a person as is required by law to give the registrar information concerning such birth. Under the statutory form the informant is required to state (*a*) the fact of the birth, giving date, place, name (if any) and sex, and (*b*) the parentage of the child. Thus, under ss. 1 and 7 of the Act of 1874 in the case of an illegitimate child the mother must inform the registrar of the illegitimacy, and column 4 (name of father) must be left blank unless the father attends and acknowledges paternity and both parents ask for his name to be inserted, as was done in this case. It was held ([1904] P. 140) by Sir Francis Jeune, P., in *In the Estate of Goodrich* (4) that a birth certificate is " evidence of what the Act requires to be stated." I infer from this that production of the certificate would not be evidence that a person named therein as father of a child registered as illegitimate was in fact the father.

Coming now to counsel's submissions, I ask first : Does the registration of the birth in the form in which it was effected by the respondent necessarily involve an admission by her that she had committed adultery ? The answer must be " yes." The entry records a belief on her part, and an expression of that belief, that R. L. Simpson is the father of her child. I use the word " belief " because on the evidence before the court it must be assumed that the husband had access to his wife at about the time when the child was conceived and may be the father. In law he is presumed to be the father, but the wife's belief is sufficient to found an admission. As Sir Boyd Merriman, P., put it in *Roast* v. *Roast* (5), if a wife uses language expressing a doubt whether her husband was the father, that is an admission that some other man had had sexual intercourse with her at the material time. The crucial question is whether such an admission can be proved by merely putting in a birth certificate and identifying the wife's signature as informant. Goddard, L.J., giving the judgment of the Court of Appeal in *Ettenfield* v. *Ettenfield* (6) said ([1940] 1 All E.R. 301) :

> " The rule that evidence tending to bastardise or legitimise a child conceived and born during wedlock cannot be given by either spouse is absolute . . ."

I refer also to the following passages in the speech of Viscount Finlay in *Russell* v. *Russell* (7). The rule, he says ([1924] A.C. 706) :

> " . . . applies to declarations on the subject of the paternity of the child made by the husband or the wife out of court just as much as to evidence given in court."

He cites (*ibid.*, 707) Lord Mansfield's observation in *Goodright* v. *Moss* (8) that " the declarations of a father or mother, cannot be admitted to bastardise the issue born after marriage " ; and adds (*ibid.*, 708) that the expression " ' bastardise the issue . . .' merely denotes giving evidence to show that the child is illegitimate . . ." He refers to *The Aylesford Peerage* (9), and to Lord Bramwell's acceptance of a proposition put forward by Mr. *Horace Davey, K.C.*, in these terms ([1924] A.C. 714) :

> " It is clear upon the authorities that the mother not only could not be called to state the fact who the father of the child was, but could not be asked any collateral questions tending to prove or disprove that fact, for the rule extends equally to such collateral questions."

The actual decision in *Russell* v. *Russell* (7) was that these principles, long established in legitimacy cases, applied also in divorce proceedings.

It is clear from the authorities that the wife could not have been called to prove that R. L. Simpson was the father of the child. It is, in my view, also clear that the declaration to that effect made by the wife when registering the birth is equally inadmissable, both as a statement of paternity and as tending to show that the child was illegitimate.

In *The Aylesford Peerage* (9) the wife's letters containing (*inter alia*) admissions as to the paternity of the child were admitted, not as evidence of the paternity, but as part of the *res gestae, i.e.*, the fact that she wrote such letters had its place in the history of the conduct of the parties. Assuming, but without deciding, that the registration of a birth in pursuance of a statutory obligation could come within that principle, in the present case I find no evidence of any course of conduct to which the registration could attach. There is nothing in the husband's evidence to show that the relations of the wife with the man Simpson of whom he spoke were of any significance, and there is no evidence to identify that man with the R. L. Simpson of the certificate. Of the latter nothing is known except what appears in the certificate and there is only the wife's statement as to that. The certificate does not make it evidence.

The first case on which counsel for the husband relied in support of his submission that the declaration as to paternity in the birth certificate was admissible was *Warren* v. *Warren* (1). In that case a wife made admissions verbally to her husband and to another man and in certain letters that she had committed adultery and was pregnant in consequence. It was held that the admissions of adultery, although accompanied by statements of her belief that the expected child was the result of the adultery, were admissible in evidence on the ground that they could not bastardise the child without evidence of non-access by the husband. SWIFT, J., says at the conclusion of his judgment ([1925] P. 113) :

> " I do not accept her guess or opinion that the child . . . was not her husband's . . . I hold that the evidence of the statements made by the respondent to the petitioner and to Mr. Charles Warren and the confessions in her letters are true in substance and in fact. On that evidence I believe that the respondent committed adultery . . ."

The birth certificate had been put in, showing that the wife had registered the birth without naming a father, but it is to be observed that SWIFT, J., makes no reference to it in his judgment and does not include it among the admissions of adultery on which he states that his judgment is based.

In *Frampton* v. *Frampton and Bushell* (2), HODSON, J., applied the principle of *Warren* v. *Warren* (1) to a case where the wife's admission, made to the husband and to two other persons, stated that the co-respondent was the father of her expected child. HODSON, J., said ([1941] 1 All E.R. 306) :

> " . . . it does not make any difference in principle whether she simply says ' I have committed adultery ' or says ' I am pregnant by another man ' . . . no question of non-access or non-intercourse arises in this case, and no attempt has been made to bastardise the child."

The birth certificate was apparently not put in and no reference to it appears in the report. *Rimmer* v. *Rimmer* (10), in my view, bears much more directly on the point which I have to decide. The wife had obtained a decree and the King's Proctor intervened alleging adultery on her part. HILL, J., gave a considered judgment, the material part of which is as follows (144 L.T. 97) :

> " The King's Proctor tendered in evidence a statutory declaration made by the wife preceding a rectification of the birth register, deleting the husband's name as father of the child. Any statement by the wife in the original registration that the husband was not the father would not have been admissible in evidence. Her actual declaration is equally inadmissible. It was contended that I could admit that declaration as a confession of adultery and reject it as a declaration of paternity, under the authority of *Warren* v. *Warren* (1). But if I reject all which relates to the paternity

> of the child I have nothing left except certain words in the declaration for rectification into which I cannot read an admission of adultery."

The learned judge held that there was no admissible evidence of adultery and dismissed the intervention. As I read that case, Hill, J., after considering *Warren* v. *Warren* (1), held that a wife's declaration, made when registering the birth, that her husband was not the father of her child is not receivable in evidence either as evidence of that fact or as an admission of adultery. I respectfully follow that decision, which, in my view, gives due effect to the principles to which I have referred earlier in this judgment. A statement by a wife whether made in or out of court that her husband either is or is not the father of her child is not admissible in evidence, and being inadmissible is not available (in the second alternative) as proof of an admission of adultery.

In *Warren* v. *Warren* (1) evidence was given of a series of admissions of adultery which were unqualified, but to each of which was appended a statement that the woman was pregnant as the result of the adultery. Swift, J., rejected the appendage and acted on the admissions. In the present case there is nothing but a declaration which corresponds to the statement which Swift, J., rejected, and on which he did not rely as an admission. But *Frampton* v. *Frampton and Bushell* (2) went further. There the wife's statements were that she was pregnant and that Bushell was the father of the expected child. The admission of pregnancy was not *per se* an admission of adultery ; it only became such when Bushell was named as father. The petitioner, therefore, had to rely on the statement as to paternity, and this was held admissible. *Rimmer* v. *Rimmer* (10) was not cited. I do not find myself able to reconcile *Frampton* v. *Frampton and Bushell* (2) with the principle that a spouse is prohibited from giving evidence as to the paternity of a child conceived and born during wedlock —a prohibition which is not limited to the case where the evidence might tend to bastardise the child. If, as I think, there is a conflict between the decisions in the *Rimmer* (10) and the *Frampton* (2) cases, I prefer to follow the former.

I was also referred to *Mayo* v. *Mayo* (3), a decision of Mr. Commissioner Blanco White, K.C. There the wife, when registering the birth of her child, omitted to give the name of the father. It was held that the entry in the register constituted an admission of adultery and was admissible in evidence as such. In the course of his judgment the learned commissioner said ([1948] 2 All E.R. 870) :

> "It is not to be assumed that she would fail to comply with her duty [*i.e.*, to enter the name and description of the father]. She did not enter the name and surname of the father, and that must mean, if one assumes she is doing her duty, either that she did not know who the father was . . . or she was admitting that the child was illegitimate. Whichever view one takes following the decision in *Frampton* v. *Frampton and Bushell* (2), that is an admissible admission of adultery, and in so far as it is an expression of her opinion that the child is illegitimate the evidence is admissible under the rule in *Russell* v. *Russell* (7)."

That decision obviously bears directly on the point which I have to decide, but for the reasons which I have just given I find myself unable to follow it.

I hold that the declaration as to paternity made by the wife when registering the child's birth is not admissible in evidence and cannot be used as an admission of adultery in this suit. If I am wrong in this view it would be necessary to consider whether the court should grant a decree solely on the admission of the wife with no corroboration of any kind. Before acting on an admission the court would require to be satisfied of its truth. In this case there is nothing in the evidence (apart from the certificate) which throws any light on that question. On the other hand, there is a presumption that the wife did not commit a crime by wilfully giving false information to the registrar. It may, therefore, be assumed that she, at least, believed what she told him. On the whole, I think it would be right to grant a decree, but, for the reasons already given, I must find that adultery is not established.

Counsel for the petitioner then applied for leave to call further evidence and an adjournment was granted for that purpose.

Solicitor : *J. Cory Holcombe* (for the husband).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

Reasoning of DENNING, L.J., at p. 350, *applied.* LISSACK *v.* LISSACK. [1950] 2 All E.R. 233.

WHITE *v.* WHITE.

[Court of Appeal (Bucknill, Asquith and Denning, L.JJ.), June 21, 22, 23, July 4, 1949.]

Cruelty—Defence—Insanity—Knowledge by respondent of nature and quality of acts.

A wife, while suffering from a disease of the mind, treated her husband with cruelty, and thereby caused injury to his health. On a petition by the husband for divorce on the ground of her cruelty, the wife, through the Official Solicitor as her guardian *ad litem*, pleaded that, owing to her mental illness, at all material times she did not know the nature and quality of her acts.

Held (by Bucknill and Asquith, L.JJ.) : if the disease of the mind was not such as to make the wife incapable of understanding what she was doing, or that her conduct was wrong, it afforded no defence to the charge of cruelty ; on the facts, the wife knew what she was doing and that she was doing wrong ; and, therefore the husband was entitled to a decree.

Rules in M'Naghten's Case (1843) (10 Cl. & Fin. 200) and *dictum of* Lord Esher, M.R., in *Hanbury* v. *Hanbury* (1892) (8 T.L.R. 560), *applied.*

Held (by Denning, L.J.) : a specific intent to injure was not an essential ingredient in cruelty, and, accordingly, it was no defence (unless, possibly, the injured party knew that the other was of unsound mind) to prove that the wife did not know the nature and quality of her acts or that what she was doing was wrong.

[As to Insanity as a Bar to Divorce, see HALSBURY, Hailsham Edn., Vol. 10, pp. 669, 670, para. 989 ; and for Cases, see DIGEST, Vol. 27, pp. 323, 324, Nos. *3020-3025.*]

Cases referred to :

(1) *Squire* v. *Squire*, [1948] 2 All E.R. 51 ; [1949] P. 51 ; [1948] L.J.R. 1345 ; 112 J.P. 319.

(2) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200 ; 14 Digest 56, *229*.

(3) *Kellock* v. *Kellock*, [1939] 3 All E.R. 972 ; Digest Supp.

(4) *Hanbury* v. *Hanbury*, [1892] P. 222 ; 61 L.J.P. 115 ; *on appeal*, (1892), 8 T.L.R. 559 ; 27 Digest 324, *3024*.

(5) *Astle* v. *Astle*, [1939] 3 All E.R. 967 ; [1939] P. 415 ; 109 L.J.P. 6 ; Digest Supp.

(6) *Russell* v. *Russell*, [1895] P. 315 ; 64 L.J.P. 105 ; 73 L.T. 295 ; *on appeal*, [1897] A.C. 395 ; 66 L.J.P. 122 ; 77 L.T. 249 ; 61 J.P. 771 ; 27 Digest 291, *2661*.

(7) *R.* v. *Codere*, (1916), 12 Cr. App. Rep. 21 ; 14 Digest 57, *231*.

(8) *Cooper* v. *Cooper*, (1949), unreported.

(9) *Molton* v. *Camroux*, (1849), 4 Exch. 17 ; 18 L.J.Ex. 356 ; 13 L.T.O.S. 305 ; 33 Digest 129, *50*.

(10) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q.B. 599 ; 61 L.J.Q.B. 449 ; 66 L.T. 556 ; 56 J.P. 436 ; 33 Digest 130, *57*.
(11) *Weaver* v. *Ward*, (1616), Hob. 134 ; Moore, K.B. 864 ; 33 Digest 141, *187*.
(12) *Mordaunt* v. *Mordaunt*, (1870), L.R. 2 P. & D. 109 ; 39 L.J.P. & M. 57 ; 23 L.T. 85 ; *revsd.*, S.C. *sub nom.*, *Mordaunt* v. *Moncreiffe*, (1874), L.R. 2 Sc. & Div. 374 ; 43 L.J.P. & M. 49 ; 30 L.T. 649 ; 39 J.P. 4 ; A
33 Digest 141, *186*.
(13) *Williams* v. *Hayes*, (1894), 42 American State Reports, 743.
(14) *Taggard* v. *Innes*, (1862), 12 C.P. 77 ; 33 Digest 141, *p*.
(15) *Donaghy* v. *Brennan*, (1901), 19 N.Z.L.R. 289 ; 33 Digest 141, *q*.
(16) *Public Prosecutions Director* v. *Beard*, [1920] A.C. 479 ; *sub nom.*, *R.* v. *Beard*, 89 L.J.K.B. 437 ; 122 L.T. 625 ; 84 J.P. 129 ; 14 Digest 65, *306*. B
(17) *Williams* v. *Williams*, [1939] 3 All E.R. 825 ; [1939] P. 365 ; 108 L.J.P. 140 ; 161 L.T. 202 ; Digest Supp.
(18) *Yarrow* v. *Yarrow*, [1892] P. 92 ; 61 L.J.P. 69 ; 66 L.T. 383 ; 27 Digest 324, *3025*.
(19) *Westall* v. *Westall*, (1949), 65 T.L.R. 337.
(20) *Kirkman* v. *Kirkman*, (1807), 1 Hag. Con. 409 ; 27 Digest 286, *2579*. C
(21) *Tilley* v. *Tilley*, [1948] 2 All E.R. 1113 ; [1949] P. 240 ; [1949] L.J.R. 929.

APPEAL by the husband from a judgment of HIS HONOUR JUDGE ARCHER, K.C., sitting as a commissioner in divorce, dated Jan. 10, 1949, whereby he dismissed the husband's petition for divorce on the ground of the wife's cruelty.

The learned commissioner found that the wife was suffering from disease of the mind at the time of the acts complained of, and, on his view that the proper D test of responsibility for acts of cruelty was whether there was some physical derangement which might explain cruel conduct, the defence of insanity succeeded. The husband appealed, and the Court of Appeal now allowed his appeal.

Briant for the husband.

Horner for the wife.

Cur. adv. vult. E

July 4. The following judgments were read.

BUCKNILL, L.J. : This is an appeal from a judgment dated Jan. 10, 1949, of HIS HONOUR JUDGE ARCHER, sitting as a commissioner in divorce, dismissing the petition of the husband, John White, for the dissolution of his marriage on the ground of his wife's cruelty. The parties were married F on Aug. 19, 1941. He was 30 and she was 24 years old. There is one child of the marriage born on May 21, 1945.

At the hearing of the petition the husband proved the following facts. He was in the army at the time of the marriage, and had only two or three days' leave with his wife. After his return to the regiment he was sent overseas and remained there for three years. G For some time his wife seemed quite happy, but in 1943 she wrote to him saying that she did not want to have anything more to do with him, but gave no reason. However, she wrote later and said everything was all right again, and continued to write to him until July, 1944, when her letters stopped. About a month before he had had an irrational letter from her, which appears to have been written at a time when she was suffering from a delusion that someone was going to "get her." H In September, 1944, he got compassionate leave to see his wife who was then living with her parents at Pinner. His wife did not seem to know him and ignored him when he went into the house, but she gradually got better. After he had been home a week or two he found two letters addressed to her from a man in the forces. They were very passionate letters, and he spoke to his wife about them. She told him to mind his own business and managed to get the letters back from him. There is no evidence as to the dates when they were written. They then settled down more or less happily as husband and wife, and at her request he obtained an extension of his leave. She then, without any justification, started to accuse her husband of going about with other women, including her own mother. On Dec. 19, 1944, she went as a voluntary patient to Shenley Hospital. While there she was found to be pregnant, and on Jan. 31, 1945, her husband took her out of the hospital to Bexhill where his parents lived and where he was arranging to make a home for her. She had her baby in a nursing home on May 21, 1945. Up to that time she seemed all right, but after her return from the nursing home, the husband said, "she started her tantrums. She would have nothing to do with me whatsoever. She would not live with me. Since about three months before the child was born I have had no intercourse with her." After she had come back from the nursing home she frequently accused him of infidelity and raved at him about it. This went on usually all the time, but there was an occasional break, perhaps, of a few days. She was all right when her father came to stay, much better then and more restrained altogether. In consequence of her treatment of her husband he became ill and had to have sick leave for several weeks. The wife neglected him, and eventually, because she refused to look after him, he left his home and went to stay with his parents for three or four months. The date when he left home was not fixed in evidence, but was probably in the spring of 1946. Meanwhile, the wife stayed in the matrimonial home, and he made her an allowance, and she was also earning money in employment as a receptionist to a chiropodist-osteopath. In October, 1946, the husband went back to his house to see the baby and also to get some clothes, and the wife refused him admission, attacked him, and started kicking and hitting him. A day or so afterwards she went back to Pinner to her parents, and the husband went back to the house on Nov. 3. He found she had not paid certain bills for which he had given her the money. He wrote to her about it, and she then came back to Bexhill in a rage, attacked and scratched him on the back of the head, and used very obscene language. The husband fetched two policemen and she was then slightly quieter, but still violent. The husband went up to his room and locked himself in. Early the following morning he went downstairs to the kitchen, where she was sleeping on the sofa, and made tea and gave her a cup, but she immediately threw it at him. The husband, who was a postman, went off to work, but on his return she attacked him with a chair. This went on during the month of November. She behaved in this sort of way nearly every time when he came in from work. He locked himself in his bedroom nearly every night. About this time he developed chicken-pox, and when he told his wife she said he had got it because he had been out with filthy women. When he told her that he would have to stop in for about ten days, she replied : "You are not going to stop here." Accordingly, he finally left the house at the end of November, 1946, and went to live with his parents. His wife often told him that she wanted a divorce and wanted to be finished with him altogether. The wife behaved well when other people besides the husband were present and made no complaint about him to them.

In April, 1947, the wife summoned her husband for desertion, persistent cruelty and wilful neglect to maintain, but the hearing was adjourned for three months on the husband consenting to pay her an allowance of £1 a week. In July, 1947, the husband filed this petition. On Dec. 18, 1947, the wife was certified as a person of unsound mind and a proper person to be taken charge of and detained under care and treatment, and was received into Shenley Mental Hospital. On Sept. 18, 1948, the Official Solicitor, on behalf of the wife, filed an answer denying the cruelty, and, alternatively, pleading that, if she had been guilty of the alleged acts, she did not know the nature and quality of any of the said acts and asked for the petition to be dismissed. In addition to the evidence of the husband, a neighbour, Mrs. Saul, who lived next door to the husband and his wife from March, 1945, gave evidence. She said that the husband and his wife seemed quite normal and happy at first. The wife gave Mrs. Saul the impression that she was a neurotic. Two or three months after the birth of the baby trouble started between the husband and his wife. She raved at him when he came home. " She had conceived a bitter hatred of him and that is as plain as I can say it," said Mrs. Saul, and that showed itself whenever he came in at night and there was nobody else in the house. Dr. Dick, a medical practitioner at Bexhill, gave evidence as to the husband's ill-health in 1945 and 1946. He also attended the wife in May, 1945, before the birth of the child, and afterwards. Her behaviour in his presence before the birth of the child was perfectly normal, and she did not show any signs of unbalance to him. He also saw her after the confinement about herself and about her child. She told the doctor she wanted a divorce from her husband and to be rid of him and complained about his carrying on with other women. Dr. Dick told her that there was no foundation in these charges, but that made no difference in her attitude towards her husband. Throughout she showed no signs of insanity to Dr. Dick. She looked after her baby very well and took an interest in her health and was very neat, and she was always perfectly controlled in his (Dr. Dick's) presence. He saw her in June, 1947, for the purpose of seeing whether there was anything wrong with her mentally. She knew perfectly well what she was doing. She still kept on the one thing, that what she wanted was a divorce from her husband. Dr. Dick said : " Her one idea in life all along since I knew her was to have a divorce from him, because she hated the sight of him. On that point she had an obsession." In all her dealings with her husband she seemed to know exactly what she was doing. Apart from her allegations against her husband, Dr. Dick saw no sign of any hallucination or delusion. She was excitable and temperamental, but not unbalanced to a degree. The last time he saw her was in September, 1947, when she was in hospital for an operation on her foot.

On behalf of the wife the only witness was Dr. FitzGerald, the medical superintendent of Shenley Hospital. He first saw the wife at a psychiatric clinic in June, 1944, when her husband was serving overseas. He advised the wife's mother, who brought her there, that the wife should be placed in institutional care, that he very much feared she would have to be certified, and that the appropriate thing was to notify the relieving officer. The wife's parents, however, only told the husband that she was very ill and when he came home he lived with his wife and she then became pregnant. The wife was received into Dr. FitzGerald's mental hospital as a rate-aided patient on Dec. 19, 1944. In Dr. FitzGerald's opinion she was then suffering from schizophrenia, had a delusion of antipathy for her husband, and was in a condition in which she might have been certified as a person of unsound mind, a condition which did not show any improvement before she left on Jan. 31, 1945. Dr. FitzGerald advised the husband to take his wife home because he felt she might as well be at home and it would be an advantage to the child to be born in home surroundings. Nearly three years later, *i.e.*, on Dec. 18, 1947, she was admitted to his hospital as one certified " as a person of unsound mind and a proper person to be taken charge of and detained under care and treatment." On Jan. 17, 1948, she was discharged to a relative. Dr. FitzGerald said that, having regard to the whole course of the wife's illness, it was probable that during the interval of three years between her first and second admission to his hospital her mental condition was the same as during the time when she was in hospital. It did not surprise Dr. FitzGerald that the wife was earning her own living during this period, but it certainly surprises me when one looks at the certificate of Dec. 18, 1947, to see what were the facts indicating insanity on which the certifying doctor formed his conclusion. They are as follows :

> " She had bizarre hypochondrical ideas, *e.g.*, that something had entered her stomach and caused her to lose her grip on it, and that she should have

> an operation on her foot in case she met another man. Most of her speech was rambling and indirect."

He, Dr. FitzGerald, also said that the case seemed to have some curious features in that the wife was not violent while she was in hospital although a patient suffering from schizophrenia is very frequently violent and has outbursts of impulsive violence. He said he would have regarded the wife as not being a responsible person, and by that he meant that he would not regard her as a fit person to give directions regarding her monetary affairs and did not consider her capable of forming accurate judgments, but he would not say that she did not know what she was doing. He also said that a person who is mentally abnormal to such a degree as the wife in this case is still quite capable of preserving a sense of social propriety, which explained why she was able to control her impulse to maltreat her husband when in company.

On this evidence the commissioner said that the sole issue in the case was whether the acts of alleged cruelty were attributable to insanity and that a person is not responsible for acts of insanity as the law understands that word. In his opinion, the decision of the Court of Appeal in *Squire* v. *Squire* (1), would have been different if the wife had been insane, and in support of his opinion he cited the words in the judgment of EVERSHED, L.J., in that case ([1948] 2 All E.R. 55) :

> "It is conceded that the wife, though her mind and judgment were distracted by the illnesses from which she had suffered, was not insane. She remained at all material times responsible for her actions."

The commissioner then considered the question whether the wife was really responsible for her actions and declined to apply as a test of that question the rule enunciated by the judges in *M'Naghten's Case* (2) in 1843 as the test of irresponsibility on the ground of insanity in criminal trials. The rule states (10 Cl. & Fin. 210) :

> ". . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing ; or, if he did know it, that he did not know he was doing what was wrong."

The commissioner said that it would be extremely perilous in a case of this kind to apply this test, because of the difficulty of determining what "knowing" really means. He considered that the proper test of responsibility was whether there was some physical derangement which might explain cruel conduct, conduct which differed to some extent from the average acts of normal mankind. "It is not right, it is not just," said the judge, "to impute to such a person things which only a normal person can have imputed to him." The commissioner then asked himself whether, on the evidence as a whole, the wife was responsible for her acts of cruelty. As I understand his judgment, in answering this question he applied the test whether the wife was normal, or had some mental derangement which made her abnormal. He accepted the evidence of the husband, whom he judged to be a thoroughly respectable young man and truthful. He said he was not impressed by the evidence of Dr. Dick because he ought to have known that the wife was certifiable when she was in the hospital for some five weeks at the end of 1944. With great respect to the learned judge, Dr. Dick was expressing his opinion as to the wife's normal mental state from what he saw of her as his patient. He did not see her until after she left the hospital in January, 1945, and had no knowledge of Dr. FitzGerald's opinion at that time. The learned commissioner relied on the evidence of Dr. FitzGerald. He explained the statement of Dr. FitzGerald that he did not deny that the wife may have known what she was doing when she was maltreating her husband by saying that Dr. FitzGerald was not thereby affirming that the wife was ever responsible for what she was doing. "They are two totally different things," the commissioner said. Towards the end of his judgment he said :

> "On the evidence I cannot conscientiously say that when this poor woman did these odd things she was ill, but she knew more or less what she was doing and she should have controlled herself, but the acts she did were, in fact, cruel, and it must be assumed that she intended the consequences of them. I think I should be very wrong if I did any such thing." A

I, therefore, understand the basis of the learned commissioner's decision to be that, although in his judgment the wife knew the nature of the acts which she was doing, her knowledge was based, not on a normal, but on a diseased, state of mind, and was not, therefore, knowledge in the usual sense of the words. B It seems clear that the commissioner considered that the test of insanity laid down in *M'Naghten's Case* (2) did not apply to this case. He said during the argument that, in his view, the judgment of Henn Collins, J., in *Kellock* v. *Kellock* (3), who applied the test in a petition for cruelty, was inconsistent with the judgment of the Court of Appeal in *Squire* v. *Squire* (1).

The question, therefore, which we must decide is whether the rule laid down in C *M'Naghten's Case* (2), or some rule similar in principle to it, applies to a case of cruelty such as this. On behalf of the husband, counsel argued that the test whether the wife was responsible for her conduct towards her husband was the same in a petition for divorce on the ground of cruelty as it would have been if the acts of cruelty had formed the basis of a criminal charge of injury to the husband, and that by the test laid down in *M'Naghten's Case* (2) she would have D been responsible because all the evidence showed she knew quite well the nature of her acts and that she knew what she was doing was wrong because she controlled herself at all times except when she was alone with her husband. On the other hand, counsel on behalf of the Official Solicitor, as guardian *ad litem* for the wife, argued that the rule in *M'Naghten's Case* (2) ought not to be extended to the case of a petition for divorce because the rule was now regarded by scientific E thought as unsatisfactory and harsh in that it did not take sufficient account of acts done by a man under some uncontrollable impulse, an impulse which was probably the product of some physical disorder of the brain.

The test of insanity in divorce cases was considered by Sir Charles Butt, P., in *Hanbury* v. *Hanbury* (4). In that case the wife prayed for the dissolution of her marriage on the ground of her husband's adultery and cruelty. The husband F in his answer alleged, *inter alia*, that, if he had committed the acts charged, he was of unsound mind at the time and incapable of understanding the nature of such acts, or their legal consequences. From the evidence it appeared that from 1881 the husband started to drink heavily, and from that time he was subject to attacks, variously described as *delirium tremens* or recurrent mania, coming on suddenly and without notice, during which he was extremely violent G and difficult to control and which led to his confinement from time to time in various asylums or retreats. During the intervals between the attacks he was admitted to be an amiable and well educated man. Much scientific evidence was called on behalf of the husband to show that he suffered from some disease of the mind, possibly hereditary, which produced these violent outbursts. The President, at the conclusion of the charge to the jury, put certain questions H to them, of which the last three were whether, when the husband committed any of the acts of cruelty and adultery charged against him, he was capable of understanding their nature and consequences. The jury found that, at the time the husband committed them, he was capable of understanding their nature and consequences, and the President then granted a decree *nisi* to the wife. On appeal (before Lord Esher, M.R., and Lindley and Kay, L.JJ.) counsel for the husband argued that the disease from which the husband was said to be suffering produced a craving for drink and that when the attacks came on the impulse to excess was uncontrollable. The Court of Appeal dismissed the appeal without calling on counsel for the wife. The MASTER OF THE ROLLS, in the course of his judgment, said (8 T.L.R. 560) :

> " Assuming a diseased mind, and that the diseased mind gave him certain impulses—he would not call it an uncontrollable impulse, as he did not know what that meant in such a case as this—the respondent knew what he was doing, and that he was doing wrong. An act of adultery was a culpable act against the wife. He was prepared to lay down as the law of England that whenever a person did an act which was either a criminal or a culpable act, which act, if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and consequences of the act which he was doing, that was an act for which he would be civilly or criminally responsible to the law. Consequently, even though the respondent's mind was diseased, he was as responsible to the law as if his mind was not diseased. The judgment of the learned PRESIDENT was therefore right."

The principle laid down by the Court of Appeal in that case was followed by HENN COLLINS, J., in *Astle* v. *Astle* (5). In that case HENN COLLINS, J., declined to accept the view that there is no degree of insanity that will afford an answer to a charge of cruelty in the Divorce Court, and continued ([1939] 3 All E.R. 970) :

> " If there be a degree of insanity which affords an answer to a matrimonial suit, how is it to be safely measured except by the test applied in all other courts ? "

The learned judge cited s. 2 (*c*) of the Matrimonial Causes Act, 1937, and said (*ibid.*, 971) :

> " I emphasise the word ' treated,' because that seems to me to connote a conscious action, and appears to indicate an action of which the doer knows the nature and quality . . . I find that he knew he was uttering threats against his wife. Upon that view of the facts, he was responsible in law for what he then did."

In *Kellock* v. *Kellock* (3) HENN COLLINS, J., had to deal with another case of alleged cruelty by a spouse who pleaded insanity. In the course of his judgment he said that the respondent wife was suffering from a disease of the kind known as manic depressive insanity. He continued ([1939] 3 All E.R. 973) :

> " I have no doubt that the acts of the wife of which complaint is made were the outcome of disease of the mind, a disease which probably had its inception before marriage. At the same time, the medical evidence compels me to find . . . that the wife at all material times knew what she was doing, and that what she was doing was wrong."

On this conclusion the judge granted the husband a decree. In HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 21, p. 293, para. 504, it is stated :

> " In an action at common law or in Chancery, where the responsibility of a person alleged to be of unsound mind is in question, the issue generally directed is, ' Was the person alleged to be of unsound mind at the date in question capable of understanding the nature of the act he was performing ? ' "

Dealing with the facts of the case before us, it seems that the crucial question is the mental condition of the wife during the period from the time when she came home after the birth of her baby at the end of May, 1945, to the time when her husband left her and went to his parents about a year later. During this period there was no evidence of physical violence by the wife, but there was constant, unreasonable and loud nagging and accusations of infidelity which eventually injured the husband's health. If this conduct was due to some disease of the brain it is impossible to say when that disease started. It may have been present when the marriage took place, it may have been the product of some love affair while her husband was abroad, followed by marital intercourse, hateful to her, and the birth of her child, thereby producing conditions which so preyed on her mind as to produce impulses which she did not, and, perhaps, could not, control when alone with her husband. It may not have developed its full force until the time when she was certified. These are speculations to which there is no answer. If the wife deliberately behaved towards her husband in a way which was not in itself quite irrational in circumstances which indicated that she knew what she was doing and that her conduct was wrong and if that treatment had the natural result of injuring his health, then all the elements seem to me to be present to show that she treated him with cruelty.

It is not necessary in this case to express an opinion on the further point argued by counsel for the husband that the husband, for his own protection, would be entitled to a decree on the ground of cruelty although the wife did not know the nature and quality of the acts which were put forward as acts of cruelty. The point was mentioned by Sir Charles Butt, P., in his charge to the jury in *Hanbury* v. *Hanbury* (4), to which I have already referred, where he put forward the view that, if the husband suffered from madness of such a nature as to necessitate keeping him in duress for the rest of his life, there was no danger of violence to the wife, and, therefore, in such a case a plea of insanity might be an answer. On the other hand, if the madness is such as need not entail the permanent incarceration of the husband, but only his restraint from time to time, while it is of such a nature as will produce violence on his part and thereby endanger the safety of the wife, then in such a case a decree in favour of the wife might properly be made. He said ([1892] P. 224) :

> " I conceive that the object of the Divorce Act is not so much, or nearly so much, the punishment or retribution for a marital offence as the protection of the party who is in peril . . . In such a case I can well conceive that, although in some instances insanity may be one of those misfortunes which must be taken by a wife with her husband for better or for worse, and though it may assume the form of a disease, yet if it is such as to imperil the wife's safety she is entitled to the protection of this court. Assuming for a moment that these attacks were not brought on the respondent by his own self-indulgence, assuming that they were the result of hereditary disease, I should be still disposed to hold that acts of cruelty committed in one of these fits of mania would entitle the wife to the remedy which she asks—separation from her husband. If the mania is intermittent and recurrent, the husband is entitled to go home when he recovers from time to time—the wife cannot refuse him admission to the conjugal home ; and if the mania is likely to recur accompanied with violence which would place the wife in peril, the ordinary protection which she is supposed to obtain by proceedings in lunacy is a delusion, because it does not protect her against the return home of her husband, who is liable at any moment to become a lunatic."

On appeal Lord Esher, M.R., dealt with the question in this way. He said (8 T.L.R. 560) :

> " There was a larger question which the President touched upon, but did not decide—namely, whether, even if the respondent's mind had been such that he did not know the nature of what he was doing or that he was doing wrong, the petitioner would or would not be entitled to a divorce."

Lord Esher said it was unnecessary to decide that question, and he desired to leave it open. Henn Collins, J., in *Astle* v. *Astle* (5) decided against such a view, on the ground that it would introduce a measure of legal responsibility not applied to any other court. He said ([1939] 3 All E.R. 970) :

> " On the facts of this case the respondent could not be held answerable outside this court, either civilly or criminally, for his assaults, and it is therefore a very strong step to say that in this court, by those self same acts, he has done something which, in this court, is not only an offence, but may, and, indeed, must, since divorce is not a discretionary remedy, alter his civil status."

There seems to be much to say on either side of this difficult question. Without some considerable qualifications such a doctrine would in some cases lead to obviously unjust results. Since the decision of the Court of Appeal in *Russell* v. *Russell* (6) that a spouse in certain circumstances may defeat a petition for restitution of conjugal rights although he fails to prove legal cruelty, the danger to one spouse owing to the intermittent insanity of the other spouse may be removed to some extent. However, it is not necessary in this case to decide this difficult question, and I do not wish to express any opinion about it. I am in favour of allowing this appeal.

ASQUITH, L.J. : I agree. According to one view no type or degree of insanity can excuse acts which in a sane person would amount to cruelty. This view assumes that the sole object of granting matrimonial relief in cases of cruelty is the protection of the victim. The victim, so the argument runs, is just as much injured or imperilled by the acts of a mad spouse as by those of a sane one. The assumption involved receives only a qualified support from the authorities—for example, SIR CHARLES BUTT, P., in *Hanbury* v. *Hanbury* (4), speaks of the protection of the victim not as the sole object but as the " main object." But, apart from this, it leads, if pressed to its logical limits, to the conclusion that not merely is insanity of whatever kind on the part of the aggressor immaterial, but that no state of mind, intention or knowledge on his part can be relevant.

I have had the advantage and pleasure of reading in advance the judgment to be delivered by DENNING, L.J., to the effect that when the charge is one of cruelty insanity is never a defence except, perhaps, when its existence is known to the victim at the time of the acts complained of. With great respect I cannot go the whole way with my brother, nor, on the view I take of the facts, is it necessary to do so. The view he propounds has, in my opinion, never been distinctly affirmed in any decision binding on this court. In more than one case the court has deliberately left the point open, *e.g.*, the Court of Appeal did so in *Hanbury* v. *Hanbury* (4) and the decision of this court in *Squire* v. *Squire* (1), though it decides nothing directly as to insanity, seems to me plainly to affirm that the state of mind of the aggressor is relevant to liability. That case decides that the intentional character of the aggressor's act is material, though its motive is not. Suppose the acts complained of by the petitioner consisted of blows struck by the respondent of a kind likely to cause severe pain. According to *Squire* v. *Squire* (1), as I read it, the respondent, to be found guilty of cruelty, must not only hit the petitioner, but hit the petitioner intentionally, and, therefore, must know he is hitting the petitioner. *Squire* v. *Squire* (1) decides that, while this much must at least be proved, it is not necessary to go further and prove that the respondent intended to cause pain and was animated by spite, for an agent is presumed to intend the natural consequences of his acts. I, therefore, am unable to accept the view that insanity can never be a defence, partly because that view rests on an assumption which, if valid, compels one logically to say that no state of mind on the part of the person charged with cruelty can be relevant to his liability, and I cannot believe that a man whose acts are completely automatic and unconscious, *e.g.*, an epileptic in convulsions, can be guilty of "cruelty" in respect of such acts, partly because the assumption seems to me to be rejected by *Squire* v. *Squire* (1), partly because cruelty is still described as a matrimonial offence and, indeed, in respect of standard of proof, is now assimilated with a crime, and partly because the Matrimonial Causes Act, 1937, speaks of one spouse " treating " the other with cruelty, an unmeaning or inappropriate expression in the case of wholly unconscious or unintended action. In any event, if I am wrong and the protection of the victim is the sole criterion, such protection seems to be necessary whether or not the aggressor was known at the time to the victim to be insane. On the other hand, it is plain that the presence of insanity of some sort or other, without more, will not necessarily afford a defence.

What type or degree, therefore, of insanity will avail a spouse charged with cruelty ? The inference I draw from the authorities is that so to avail the insanity must, at all events, not fall short of such insanity as would afford a defence to a criminal charge within the *M'Naghten* rules. In other words, if the actor knows the " nature and quality of his acts " (that is to say, knows what he is doing and knows he is doing wrong), the fact that he is suffering from a disease of the mind is immaterial, even if he would not have committed the acts complained of but for such disease. It is unnecessary in the present case, having regard to the view I take of the facts, to decide whether the converse holds, namely, that, if the respondent does not know what he is doing, or does not know it is wrong, this is in any or every case a defence, though for myself I incline to that view. Certain authorities, one at least of which is binding on us, seem to me to assume the applicability of the *M'Naghten* rules, and I do not see any logic in applying them unreciprocally or by halves. These authorities are or include the following : *Astle* v. *Astle* (5) (as qualified by *Squire* v. *Squire* (1)) and *Kellock* v. *Kellock* (3), where HENN COLLINS, J., explicitly adopts the *M'Naghten* criterion both in its affirmative and negative applications. These decisions are entitled to great respect, but are not binding on this court. On the other hand, the decision of the Court of Appeal in *Hanbury* v. *Hanbury* (4), is binding on us. In that case SIR CHARLES BUTT, P., in the court of first instance, had expressed the opinion that the criterion was whether the insane aggressor understood the "character and consequences" of the acts complained of. In the Court of Appeal, LORD ESHER, M.R., with whom the other two Lords Justices concurred, used the following language (8 T.L.R. 560) :

> " The jury found that the respondent knew what he was doing when he committed the acts, and understood their nature and consequences . . . The jury were perfectly entitled to come to the conclusion they did, and he thought that it was the only sensible conclusion at which they could have arrived. There remained a question of law. Assuming a diseased mind, and that the diseased mind gave him certain impulses—he would not call it an uncontrollable impulse, as he did not know what that meant in such a case as this—the respondent knew what he was doing, and that he was doing wrong. An act of adultery was a culpable act against the wife. He was prepared to lay down as the law of England that whenever a person did an act which was either a criminal or a culpable act, which act, if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and consequences of the act which he was doing, that was an act for which he would be civilly or criminally responsible to the law. Consequently, even though the respondent's mind was diseased, he was as responsible to the law as if his mind was not diseased."

In this passage the MASTER OF THE ROLLS uses three formulae : (1) knew what he is doing, when he did the acts, and understood their nature and consequences ; (2) knew what he was doing, and that he was doing wrong ; (3) able to understand the nature and consequences of the act he was doing. It is patent that he treats all of these formulae so far as knowledge of what one is doing goes as interchangeable. It is further clear that he had in mind the *M'Naghten* rules as the criterion. Under these rules a person charged with a crime cannot repel the presumption of sanity and his consequent responsibility for his acts unless he can show that he did not know the " nature and quality of his acts," or, knowing this, did not know he was doing wrong. Juries are apt, unless this formulae is paraphrased or explained, to suppose that the " nature " of an act and its " quality " are different things (a fallacy, for, as held by the Court of Criminal Appeal in *R.* v. *Codere* (7) (12 Cr. App. Rep. 27), they are, in fact, synonyms). The time honoured phrase employed to obviate this error is that the accused must show either that he did not know what he was doing, or did not know he was doing wrong. When, in his second formula, LORD ESHER says the respondent knew what he was doing and that he was doing wrong, I feel not a shadow of doubt that he had this popular paraphrase in mind. As indicated above, I feel as little doubt that his first and third formulae are regarded by him as meaning the same thing as his second. The fact that in the first and third reference is made to knowledge, not only of the nature of the act, but of its consequences, is not inconsistent with this conclusion. The more obvious consequences of an act are incorporated in the act itself. An act in the narrowest sense of the word means, as HOLMES, J., in his work on the common law, p. 54, pointed out—merely a muscular contraction, *e.g.*, a contraction of my forefinger. But if my forefinger is on the trigger of a gun and I know the gun is pointed at X, the obvious consequence of the muscular contraction is that X will be killed or injured. The act is then the act of shooting X. In speaking of the consequences as well as the nature of the act, I do not think LORD ESHER, or the other judges who have used the same formula meant more than that, in asking whether the agent knew what he was doing, you must take unto account, in addition to the muscular contraction those of its consequences which must have been plain to the actor.

If this is right, that is to say, if the wife cannot escape liability for cruelty provided it appears that she did know what she was doing and knew that she was doing wrong, I am clearly of opinion that she has failed to make out any defence. The evidence is all the other way. To take the second point first, the evidence is overwhelming that her assaults, tirades, tantrums and insults were known by her to be wrong, for she never indulged in any of them except when alone with her husband. As to the first point, Dr. Dick's evidence is that of a man who saw her repeatedly over the material period and he is emphatic that she knew what she was doing. Not only did she behave unexceptionably before strangers, but she performed successfully a practical wage earning job as receptionist to an osteopath, and looked after the child efficiently. The commissioner rejects this evidence for reasons which, making every allowance for his opportunities of observing the witness's demeanour, seem to me inadequate. Foremost, ostensibly, among these reasons is his acceptance of Dr. Fitzgerald's evidence. One may concur with the learned commissioner's opinion that this evidence was very fairly given without concurring in his conclusion that it displaced what Dr. Dick had said. Dr. Fitzgerald had the wife under observation during two periods, at Shenley Mental Hospital from December, 1944, to January, 1945, and from December, 1947, onwards for a spell. As to the intermediate period of nearly three years, he had no direct contact with or observation of her, and his view of her condition during that period could not be more than an inference from her condition before and after it. His views, whether direct or inferential, should have been invited mainly, if not exclusively, on the question whether she knew, during this *interregnum*, what she was doing and whether it was wrong. But in the main the wrong questions were, in my view, put to Dr. FitzGerald. He was asked whether in his opinion the wife was " responsible " or " certifiable," questions based on the learned commissioner's view that the *M'Naghten* criterion was irrelevant, and that some other, wider, but quite undefined, criterion of insanity was applicable. He does not seem to have appreciated either that the Court of Appeal had, in fact, asserted the *M'Naghten* criterion or that a person may suffer from insanity of the will (as opposed by the intellect), and may, indeed, be certifiable without being insane within the *M'Naghten* rules. This robs the bulk of Dr. FitzGerald's very fair and candid evidence, for reasons for which he is not in any degree responsible, of much value in the present case. He himself at one point protested at being asked whether the wife was "responsible," and no wonder. No one tells him whether "responsible" is intended to mean morally or legally responsible, and, if the latter, in what precisely legal responsibility consists. In those circumstances it is impossible to treat his evidence as invalidating that of Dr. Dick, especially in view of replies such as the following :

> "*Q.*—In pursuance of that she apparently did those acts, but when she did them she would know, would she not, the sort of thing she was doing ? *A.*—She might have, Sir. *Q.*—You have seen no evidence from anybody, have you, to support the view that she did not know what she was doing at the time when she was not in your care ? *A.*—No, I quite agree I have no evidence. We all want to be fair to these two people. It is very difficult, I agree, but that is my answer. I have no evidence that during that period she did not know what she was doing."

For these reasons I think the appeal should be allowed.

DENNING, L.J. : If the wife had committed a criminal offence at any time after Dec. 19, 1944, and had set up the defence of insanity, I should have thought it almost certain that the jury would have found her guilty but insane at the time. They would have rightly given great weight to the fact that she had been twice in a mental hospital and that, in view of the very experienced medical superintendent of that hospital, she was suffering from schizophrenia and was certifiable as a lunatic. His testimony would have impressed the jury just as it did the commissioner here. The views of the general practitioner would not have prevailed against it. I assume, of course, that the jury would be properly directed according to the *M'Naghten* rules, but even so I feel sure they would find her to have been insane at the time of doing the act. Their verdict would be given under the Trial of Lunatics Act, 1883, s. 2 (1), the words of which seem almost exactly to express the commissioner's finding in this case, namely, that she was "insane, so as not to be responsible, according to law, for [her] actions at the time when the act was done. . ." In my opinion, therefore, the commissioner's finding to that effect should not be upset. It is because I have come to this conclusion that I do not feel able to dispose of this case on the simple ground that she was not insane within the *M'Naghten* rules. The case, therefore, does raise to my mind the important question whether, in proceedings for divorce on the ground of cruelty, insanity is a defence or not.

In my opinion, both on principle and authority, the effect of insanity is to be regarded differently in the civil courts from what it is in the criminal courts. This is because the presence of mental disease is often hard to recognise. The light of reason may fade gradually and imperceptibly. Friends and neighbours may speculate on this or that cause, but never appreciate which is the right one until the darkness becomes obvious. Then looking back, each one of them can say, as surely as any mental specialist, that, all through the time of fading light, there was an insidious disease worming its way into the mind of the unfortunate sufferer. Each will then readily forgive conduct which before he had felt to be unforgiveable. Does this mean, however, that all that has happened in the half-light is to be wiped out as if it had never been ? During this time innocent third persons may have been injured by the sufferer. He may have made contracts and broken them, or he may have committed civil wrongs, and all done at a time when he was unknown to be a lunatic, although he has since been found to be so. If he is a man of wealth or is insured, are not the injured persons to be compensated from his estate ? If the matter were free from authority I would say they clearly are, because it is not a question of punishing him but only of compensating them. So also it seems to me that, in divorce cases, if such a man has treated his wife with cruelty, she will be entitled to maintenance, judicial separation, or a divorce, because there again it is not a question of punishing him but only of giving her relief from a situation which has been rendered intolerable by his conduct. The presence of mental disease makes this relief more, and not less, necessary. Affection may be destroyed, and the home broken, long before the disease is recognised. That is what happened both in this case and in the recent case of *Cooper* v. *Cooper* (8) where a husband, unknown at the time to be insane, attempted to strangle his wife and afterwards killed their baby. It is quite unlike a criminal case where the only question is punishment. I can well understand that a man should not be punished for acts which are outside his control by reason of mental disease, but I do not see why his wife should not be given relief from her unfortunate plight.

I venture to think that the authorities support these views. In the case of ordinary contracts it is settled law that a person of unsound mind is liable on his contract unless the other party, at the time of the making of the contract, was aware of his incapacity : see *Molton* v. *Camroux* (9), and *Imperial Loan Co.* v. *Stone* (10). In the case of torts such as trespass and assault it is also settled that a person of unsound mind is responsible for wrongful conduct committed by him before he was known by the injured person to be of unsound mind, even though it has since become apparent that such conduct was influenced by mental disease which was unrecognised at the time, and this is so even if the mental disease was such that he did not know what he was doing or that what he was doing was wrong. The reason is that the civil courts are concerned, not to punish him, but to give redress to the person he has injured. This was laid down long ago, not only by the full court in *Weaver* v. *Ward* (11), but also by such great authorities as LORD BACON, in BACON'S WORKS (Spedding ed.), vol. 7, p. 348, and SIR MATTHEW HALE (1 Hale P.C., 15). It has ever since been accepted as the law not only in this country—see *per* KELLY, C.B., in *Mordaunt* v. *Mordaunt* (12) (L.R. 2 P. & D. 142)—but also in the United States (*Williams* v. *Hayes* (13)) ; in Canada (*Taggard* v. *Innes* (14)) ; and in New Zealand (*Donaghy* v. *Brennan* (15)) where all the English authorities are collected. I am aware that these rules of law have been criticised by some jurists who would make responsibility in contract depend on real consent, and liability in tort depend on blameworthiness, but I venture to think that this criticism is somewhat out of date. Recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom the risk should fall. Notable examples occur in the liability of a master for, or to, his servant, and in the escape of dangerous things. I can understand, of course, that where a specific intent is a necessary ingredient of the wrong, a man may not be responsible if he was suffering at the time from a disease which made him incapable of forming that intent, *e.g.*, *Public Prosecutions Director* v. *Beard* (16). But the cases which I have cited show that assault and trespass, to which I would add negligence, do not fall within that exception.

Turning now to divorce cases it will be seen that the same principles have been applied. In the case of desertion, where a specific intent is a necessary ingredient of the offence, insanity is a defence if it is of such a degree as to make the man incapable of forming that intent : *Williams* v. *Williams* (17). But in the cases of adultery and cruelty no specific intent is necessary, and although insanity has often been raised as a defence there is no case in which it has been made good.

It failed in *Yarrow* v. *Yarrow* (18), *Hanbury* v. *Hanbury* (4), *Astle* v. *Astle* (5), and *Kellock* v. *Kellock* (3). Take cruelty in particular, for it is what we have to deal with in this case. A specific intent to injure is not an essential ingredient in cruelty any more than it is in assault and battery : *Squire* v. *Squire* (1). It is sufficient if there is conduct which is aimed at the other : *Westall* v. *Westall* (19). If malignity had been an essential element, as Henn Collins, J., thought in *Astle* v. *Astle* (5), it may be, as he thought, that insanity would be a defence. But this court in *Squire* v. *Squire* (1) held that malignity was not essential. It followed the view of Sir William Scott in *Kirkman* v. *Kirkman* (20), where he said (1 Hag. Con. 410) that in cruelty cases :

> "If . . . safety is endangered by violent and disorderly affections of the mind, it is the same, in its effects, as if it proceeded from mere malignity alone."

Now Sir William Scott, afterwards Lord Stowell, was the greatest judge in these matters that this country has ever produced, and on the strength of his authority I say that a violent and disorderly affection of the mind, *i.e.*, insanity, is of itself no answer to a petition for divorce on the ground of cruelty.

I have not dealt with the difficult question what would be the position if, at the time of the violence, the injured party knew that the other was of unsound mind. I can well understand that a point might be reached when the conduct was so irrational that it was obvious to the injured party that the conduct was not cruelty, but was due to mental disease. Subject to that qualification, which does not arise in this case, I am of opinion that insanity is not a defence to a charge of cruelty. I appreciate that Asquith, L.J., is inclined to think that insanity is a defence if it is of such a degree as to satisfy the *M'Naghten* rules, but that is an unscientific test which is not applied even in criminal cases by the Home Office doctors who often have the final word on the matter. I am myself averse from introducing the tests of the criminal law into the civil code, and divorce, after all, is a civil matter : *Mordaunt* v. *Moncreiffe* (12) ; *Tilley* v. *Tilley* (21).

If insanity is to be of itself a defence to a charge of cruelty, I should have thought that the respondent should be excused for all conduct committed under an impulse which he was, by mental disease, in substance deprived of any power to resist. It may be remembered that Lord Atkin's committee in 1923 in its Report on Insanity and Crime (Cmd. 2005) thought that a man should be excused for his crimes on that ground. That, indeed, was the argument of counsel for the wife, and it is only because I think that insanity is not of itself a defence that I think his argument should be rejected. It is, in my opinion, not a defence unless, at any rate, the husband knew that the conduct was due to mental disease. That was clearly not the case here, and for this reason I think the appeal should be allowed.

Appeal allowed.

Solicitors : *William P. Webb*, agent for *Willett & Phillips*, Bexhill (for the husband) ; *Official Solicitor* (for the wife).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

OLIVER *v.* DAVIS AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Denning, L.JJ.), July 11, 12, 1949.]

Bill of Exchange—Consideration—Cheque given to pay antecedent debt of third party—No forbearance or promise to forbear by creditor—Bills of Exchange Act, 1882 (*c.* 61), *s.* 27 (1) (*a*), (*b*).

By the Bills of Exchange Act, 1882, s. 27 (1) : "Valuable consideration for a bill may be constituted by (*a*) Any consideration sufficient to support a simple contract ; (*b*) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time."

On July 18, 1947, the plaintiff lent £350 to W.D. and received from him a cheque for £400 post-dated to Aug. 8, but it was not presented by Aug. 19. On that date W.D., who was unable to meet his cheque, persuaded M.W. to draw a cheque for £400 in favour of the plaintiff, and an envelope containing M.W.'s cheque without any covering letter was left at the plaintiff's house. The plaintiff was away at the time and did not return home until Aug. 22, when he received M.W.'s cheque but did not know why she had sent it. In the meanwhile M.W. had discovered certain facts about W.D., and she informed the plaintiff, within an hour or two of his receiving her cheque, why she had sent it and also that she had stopped payment of it. On Aug. 23 the plaintiff presented W.D.'s cheque, which was dishonoured. Later he presented M.W.'s cheque, but it was returned by the bank marked : "Stopped by order of drawer." In an action by the plaintiff against M.W. suing her on her cheque, the plaintiff relied *inter alia* on s. 27 (1) (*b*) of the Act of 1882, but M.W. contended that there was no consideration for the cheque.

HELD : (i) "an antecedent debt or liability" within the meaning of s. 27 (1) (*b*) of the Act of 1882 was a debt or liability due from the maker or negotiator of the instrument and not from a third party, and, therefore, the plaintiff could not rely on s. 27 (1) (*b*), but had to show consideration sufficient to support a simple contract under s. 27 (1) (*a*).

(ii) although M.W. drew her cheque with the intention that it should be substituted for W.D.'s cheque, her motives were not communicated at the material time to the plaintiff, and he gave her no promise, express or implied, to forbear in respect of any remedy he might have against W.D., nor, as a result of her cheque, had he changed his position in any way to his detriment in regard to his claim on W.D.'s cheque, and, therefore, there was no evidence of any consideration which would entitle the plaintiff to succeed under s. 27 (1) (*a*), and he could not recover.

Crears v. *Hunter*, (1887) (19 Q.B.D. 341), *applied.*

Ayres v. *Moore* ([1939] 4 All E.R. 351), *criticised by* DENNING, L.J.

[AS TO WHAT CONSTITUTES CONSIDERATION, see HALSBURY, Hailsham Edn., Vol. 2, pp. 646-648, paras. 890, 891 ; and FOR CASES, see DIGEST, Vol. 6, pp. 114-117, Nos. *768-786*.]

Cases referred to :

(1) *Crears* v. *Hunter*, (1887), 19 Q.B.D. 341 ; 57 L.T. 554 ; 12 Digest 190, *1469*.

(2) *Currie* v. *Misa*, (1875), L.R. 10 Exch. 153 ; 44 L.J.Ex. 94 ; 12 Digest 173, *1274*.

(3) *Oldershaw* v. *King*, (1857), 2 H. & N. 517 ; 27 L.J.Ex. 120 ; 29 L.T.O.S. 364 ; 12 Digest 189, *1458*.

(4) *Poplewell* v. *Wilson*, (1720), 1 Stra. 264 ; 6 Digest 116, *775*.

(5) *Ayres* v. *Moore*, [1939] 4 All E.R. 351 ; [1940] 1 K.B. 278 ; 109 L.J.K.B. 91 ; 163 L.T. 337 ; 2nd Digest Supp.

(6) *Baker* v. *Walker*, (1845), 14 M. & W. 465 ; 3 Dow. & L. 46 ; 14 L.J.Ex. 371 ; 6 Digest 117, *786*.

(7) *Bank of England* v. *Vagliano Brothers*, [1891] A.C. 107 ; 60 L.J.Q.B. 145 ; 64 L.T. 353 ; 55 J.P. 676 ; 6 Digest 31, *205*.

(8) *Crofts* v. *Beale*, (1851), 11 C.B. 172 ; 20 L.J.C.P. 186 ; 17 L.T.O.S. 144 ; 6 Digest 116, *779*.

(9) *Wigan* v. *English & Scottish Law Life Assurance Assocn.*, [1909] 1 Ch. 291 ; 78 L.J.Ch. 120 ; 100 L.T. 34 ; 12 Digest 212, *1701*.

Appeal by the second defendant from a judgment of Finnemore, J., dated Mar. 7, 1949.

The plaintiff received from the first defendant a post-dated cheque for £400 in consideration for a loan of £350. After the cheque was payable, but before it was presented, the first defendant, being unable to meet it, persuaded the second defendant to draw a cheque for £400 in favour of the plaintiff and this second cheque was left at the plaintiff's house without any explanation. Shortly after the plaintiff had received the second cheque, the second defendant informed him why it was drawn and that she had stopped payment of it. The plaintiff then presented the first defendant's cheque which was dishonoured, and, later he presented the second defendant's cheque, but it was returned to him by the bank, marked " Stopped by order of drawer." The plaintiff brought an action against both defendants suing them alternatively on their cheques. The first defendant did not appear, and no further proceedings in the action were taken by the plaintiff against him. In his claim against the second defendant, the plaintiff relied *inter alia* on the Bills of Exchange Act, 1882, s. 27 (1) (*b*), on the ground that the consideration for her cheque was the antecedent debt or liability of the first defendant. Finnemore, J., gave judgment for the plaintiff against the second defendant, but the Court of Appeal now reversed his judgment on the ground that an antecedent debt or liability of a third person was not in itself sufficient to constitute valuable consideration for a bill, and, as there had been no forbearance or promise to forbear on the part of the plaintiff, and as he had not changed his position on account of the second defendant's cheque, there had been no consideration for the cheque within the meaning of either para. (*a*) or para. (*b*) of s. 27 (1). The facts appear in the judgment of Sir Raymond Evershed, M.R.

A. L. Stevenson for the second defendant.

Beney, K.C., and *Neil Lawson* for the plaintiff.

SIR RAYMOND EVERSHED, M.R. : This is an appeal from an order of Finnemore, J., whereby the second defendant in the action, Miss Marjorie Woodcock, was ordered to pay to the plaintiff, Mr. Oliver, the sum of £400, the amount of a cheque on which the plaintiff has sued. The story of the case, the scene of which is at Egham, revolves round the first defendant, William R. Davis, who appears to have been a somewhat unsatisfactory character. In 1947 he had gone to Egham and there he became engaged to be married to the second defendant's sister, a thing which he should not have done seeing that he was already married to a wife in Gloucester. On the pretence that he was buying a house as the matrimonial home for himself and Miss Woodcock, he proceeded to enter into a contract to buy a house and furniture for £2,000. He paid £200 by way of deposit and he then extracted from his fiancee some £650, which represented her total savings, on the further pretence that it was going towards the payment of the purchase price. I gather that, in fact, the money went into his own pocket. He carried his deception a stage further by writing in the presence of both sisters a cheque for the sum of £1,847 to the solicitors of the vendors with a covering letter. That cheque and letter also went into, and remained in, his pocket. Being still in further need of finance, on July 18, 1947, he approached the plaintiff and borrowed from him the sum of £350, giving the plaintiff in return a cheque post-dated to Aug. 8, some three weeks thereafter, for £400, the £50 addition representing, no doubt, consideration for the advance. On Aug. 19 the plaintiff had not, in fact, presented Davis's cheque. Davis then represented to the second defendant that, unless he paid £400 to the plaintiff, the plaintiff would get the furniture in the house. Such was the trust imposed in this man by both sisters that the second defendant thereupon wrote her own cheque for £400 (*i.e.*, the £350 lent, plus the £50 bonus) in favour of the plaintiff, and that cheque was taken by hand by Davis and his fiancee to the plaintiff's house on or about Aug. 19. When they arrived there, they found that the plaintiff was away. He did not return until Aug. 22. By that time the true character of Davis had been discovered by the second defendant and on Aug. 22, she stopped payment of her cheque. On the same day she saw the plaintiff, told him that she had stopped the cheque and gave him her reason for doing so. On Aug. 23 the plaintiff presented Davis's cheque which was dishonoured.

The second defendant plainly acted with the utmost lack of the most elementary prudence. The plaintiff, on his part, appears to have observed a no less remarkable reticence. The end of the transaction was that the plaintiff was in possession both of Davis's cheque and the second defendant's cheque. It was not, apparently, suggested to him—certainly he never suggested it himself—that either cheque should, at any stage, be returned by him to the second defendant. He sued both Davis and Miss Woodcock, and in the writ as originally served he sued them both cumulatively on their cheques. That form of action he amended by suing alternatively, and he gave by way of particulars of claim against the second defendant that the consideration for her cheque was his promise to relieve Davis, the first defendant, from liability in respect of his cheque. Since he had joined Davis as a party to the action and was suing him, it is not surprising that those particulars were abandoned. Against the second defendant the plaintiff relies on the Bills of Exchange Act, 1882, ss. 30 and 55, and, in the alternative, in effect, on s. 27 (1) (*b*) of that Act, on the ground that the consideration for the cheque was the antecedent debt or liability of the first defendant, Davis. Two answers to the claim have been put forward, the first being that, on its proper construction and in the light of the facts of this case, the Bills of Exchange Act, 1882, s. 27 (1), does not operate to supply the necessary consideration to support the action on the cheque. The second answer is that the giving of the cheque was induced by a mistake of fact or by the fraud of Davis, or both, and that on that ground the second defendant can escape liability. Both grounds were rejected by the learned judge in the court below. So far as the second ground is concerned (and we have not heard counsel for the plaintiff on it), I confine myself to saying that I see no ground for differing from the view taken by the learned judge that the defence of mistake or fraud will not avail the defendant in this case. The real point in the appeal, which has not been free from difficulty, has been in regard to the first question—the validity of the defence based on want of consideration.

The facts of the case are remarkable, and I draw attention to these features in the narrative which I have given. First, at the time when the cheque was taken to the house of the plaintiff, the plaintiff was himself absent. The plaintiff's wife was there and appears to have received the envelope containing the cheque, but, according to the evidence, no statement or explanation was given to her why the cheque was brought, or, indeed, so far as I know, that the envelope contained a cheque. The plaintiff, therefore, was unaware of the benevolence of the second defendant until he returned to Egham on Aug. 22. The chronology is not entirely clear, but I assume in his favour that he returned to Egham, opened the envelope, and saw the cheque some little time, a matter of an hour or two, before he saw the second defendant and learned from her why she had sent the cheque and, at the same time, of the fact that since she had discovered the truth about Davis she had changed her mind and had stopped, or was about to stop, the cheque. So far as the plaintiff's evidence is concerned, it is, I think, important to take note of the answers he gave both in examination in chief and in cross-examination. It is plain that, at the time of the delivery of the cheque to his wife nothing was communicated to him about the second defendant's intention. At the very end of the plaintiff's examination, FINNEMORE, J., asked him :

> " *Q.*—Was nothing ever said about this cheque ? You found it in the envelope. Was that all you knew about it ?
>
> *A.*—Nothing at all. The point was I was not in Egham until that was drawn—until after it was stopped."

I think that that answer may not be quite accurate in fact because, as I have said, I think that he may have returned to Egham before the cheque was stopped, or, at any rate, that he learned of the cheque's existence before he learned that it had been stopped. Then his counsel asked him :

> " *Q.*—Was the only discussion you had with Miss Woodcock about the cheque when you went to see her on Aug. 22 ?
>
> *A.*—Correct."

In cross-examination by counsel for the second defendant, he was asked :

> " *Q.*—You have told my Lord that you had no communication with [the second defendant] about her cheque before she actually gave the cheque to you.
>
> *A.*—To my wife. That is correct.
>
> *Q.*—So there was no promise by you at all at that time ?
>
> *A.*—What about ?
>
> *Q.*—To [the second defendant] when she gave you her cheque, that you should refrain from taking proceedings against Davis.
>
> *A.*—Definitely not."

There was no re-examination. The learned judge has found, and there is no reason whatever to quarrel with his finding in any respect, that, at the time the second defendant drew the cheque she intended that it should serve the purpose of protecting Davis from being sued by the plaintiff, and, perhaps, worse. I need not refer to the whole of the relevant passage of the judgment, but the conclusion was stated thus :

> " So she [the second defendant] drew the cheque for £400 and gave it to Davis intending that Davis should take it to the plaintiff and intending that the plaintiff should pass it through his bank and collect the money."

That, no doubt, was the second defendant's intention at the time when the cheque was drawn, *i.e.*, on Aug. 18 or 19, but it is quite clear that that intention was not then communicated to the plaintiff, and, when the plaintiff first heard what the second defendant had done and what her intention had been, he heard at the same time that for very good reasons she had changed her mind and that the cheque was stopped. Before I turn to the section and deal with the cases which have been cited I should complete the narrative to this extent. Though both Davis and the second defendant were parties to the action, Davis did not appear, and no further proceedings in the action have been taken by the plaintiff against him. The evidence of the plaintiff was that on the advice of his solicitor at a much later stage he presented the second defendant's cheque, which was returned marked by the bank : " Stopped by order of drawer."

The Bills of Exchange Act, 1882, s. 27 (1), on which the whole argument turns, is in these terms :

> " Valuable consideration for a bill may be constituted by (*a*) Any consideration sufficient to support a simple contract ; (*b*) An antecedent debt

> or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time."

It is pointed out by counsel for the plaintiff that para. (*b*), referring to an antecedent debt or liability, is on the face of it distinct in subject-matter from para. (*a*), which refers to consideration sufficient to support a simple contract. I think, for myself, that the proper construction of the words in para. (*b*), "an antecedent debt or liability," is that they refer to an antecedent debt or liability of the promisor or drawer of the bill and are intended to get over what would otherwise have been *prima facie* the result at common law by which the giving of a cheque for an amount for which the drawer was already indebted imported no consideration since the obligation was past. On the facts of this case it may not be strictly necessary to express a concluded view on that matter, but *Crears* v. *Hunter* (1), a decision of this court (on the law prior to the Bills of Exchange Act, 1882, but generally codified by that Act), in my judgment, strongly supports the view that "an antecedent debt or liability" in the sub-section ought so to be construed. If that view is right, the case falls under para. (*a*) rather than under para. (*b*) of the sub-section. It is, at any rate, plain that, if the antecedent debt or liability of a third party is to be relied on as supplying "valuable consideration for a bill," there must at least be some relationship between the receipt of the bill and the antecedent debt or liability. For practical purposes it is difficult to see how there can be any distinction between a case in which there is a sufficient relationship for this purpose between the bill and the antecedent debt or liability and a case in which, as a result of that relationship, there is in the ordinary sense a consideration passing from the payee to the drawer of the bill. Otherwise the creditor might recover both on the debt from the third party and on the cheque from the drawer.

Reference has also been made to the second part of s. 27 (1) (*b*):

> "Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time."

There seems little doubt that that part of the paragraph was inserted to meet a point left in some doubt as the result of *Currie* v. *Misa* (2) in which, with the dissent of LORD COLERIDGE, C.J., and without the assent of QUAIN, J., the view had been expressed that there was no difference in principle, where a debtor gave a bill or cheque to the creditor, between the case where the bill or cheque was post-dated and when it was payable on demand. In *Currie* v. *Misa* (2) the giver of the bill or cheque was himself the debtor. I do not think that that case can be relied on (as was suggested in argument) as casting any doubt on the authority of other decisions, particularly *Crears* v. *Hunter* (1) (which, as I have said, is a decision of this court) to the effect that, where the debt or liability is that of a third party, one must find something in the transaction sufficient at the very least to connect the receipt of the bill with the antecedent debt or liability, and, as I think, to provide, within the meaning of para. (*a*) of the sub-section, some consideration for the cheque in the form of forbearance or a promise to forbear, express or implied, on the part of the recipient of the cheque in regard to the third party's antecedent debt or liability.

As I have mentioned *Crears* v. *Hunter* (1) I would like to refer to one or two passages in the judgment to which SOMERVELL, L.J., referred during the argument. In that case the antecedent debt or liability was that of a third party, namely, the father of the defendant. The defendant's father had borrowed a certain sum of money from the plaintiff, and to induce the plaintiff to give time to the defendant's father for payment of the debt the defendant signed a promissory note whereby the defendant's father and the defendant jointly and severally promised to pay to the plaintiff instalments of the debt with interest half-yearly at the rate of five per cent. per annum until the amount was paid. In the course of his judgment Lord Esher, M.R., used this language after referring to certain passages in *Oldershaw* v. *King* (3) (19 Q.B.D. 345) :

> " It clearly follows . . . that, if at the request of the guarantor the creditor does in fact forbear, there is a sufficient consideration to bind the guarantor, who has promised to pay the debt. It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence. If a request is to be implied from the circumstances, it is the same as if there were an express request." A

Lindley, L.J., dealing with the facts of the particular case, said (*ibid.*, 346) :

> " But, except on the theory that such [*viz.*, that the plaintiff would give the father time] was the understanding between the parties, the defendant's conduct is inexplicable. I cannot think that there was no evidence for the jury that there was forbearance by the plaintiff at the request of the defendant." B

Finally, Lopes, L.J., said (*ibid.*) :

> " The law appears to be that a promise to forbear is a good consideration, but also that actual forbearance at the request, express or implied, of the defendant would be a good consideration. Taking the latter of these two alternatives, it is undisputed that there was actual forbearance from suing in this case. That by itself would not be sufficient ; such forbearance must have been at the request, express or implied, of the defendant." C

There is no doubt that in some cases, particularly where the bill or cheque given has been post-dated, the court has, in the absence of express evidence, readily implied a promise, at any rate during the interval before the post-dated bill or cheque becomes payable, not to press the claim against the debtor. A number of cases to that effect were cited in argument by counsel for the plaintiff starting from *Poplewell* v. *Wilson* (4) and ending with a recent decision of Hallett, J., in *Ayres* v. *Moore* (5), but I think it plainly emerges that in each of those cases the plaintiff had forborne, or promised either expressly or impliedly to forbear, from pursuing his claim against the debtor as a consequence of, and, therefore, as consideration for, the giving of the bill which was sued on, and that the decision in each of those cases depended on that fact. Particular reliance was placed on the judgment of Parke, B., in *Baker* v. *Walker* (6), but I think his judgment, when examined, is strictly in line with the general conclusion which I have stated. Parke, B., said (14 M. & W. 468) : D E F

> " Where a man who has a judgment debt takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that period, and if so, that is a good consideration for the giving of the note."

Returning to the Bills of Exchange Act, 1882, s. 27 (1) does not, as I read it, say that, where there is an antecedent debt or liability even on the part of the giver of the cheque, that is, without more, in every case and necessarily valuable consideration for the bill. Certainly in the case with which we are dealing, where the antecedent debt or liability is that of a third party, the matter is, I think—and I adopt the language of Lord Esher, M.R., (19 Q.B.D. 345) in *Crears* v. *Hunter* (1)—a " question of evidence." What is the evidence in this case ? I have already referred to passages from the testimony given by the plaintiff and I can draw from those passages no other conclusion than that he neither forbore, nor promised to forbear, nor ever intended or thought of forbearing for an instant, in respect of any remedy he had against Davis and any steps he might think of taking against him. If there were no oral evidence and if the plaintiff had retained the cheque for some time, albeit knowing that it had been stopped, and during that time, though Davis's cheque had fallen G H due for payment, had taken no step, the court might have inferred that he had altered his position on the faith of the second defendant's cheque, but the facts which I have stated cannot support such an inference. On the evidence given by the plaintiff it is impossible to imply any promise to forbear, just as it is clear that no express promise was given, or, I think, ever would have been given.

One passage in the second defendant's evidence was relied on, in which she was asked, under cross-examination, what steps she had taken after the stopping of the cheque :

> " *Q.*—You did see [the plaintiff] from time to time after the cheque had been stopped ?
>
> *A.*—Yes.
>
> *Q.*—And you did tell him, or ask him, to hold his hand, not to do anything about it for the time being ?
>
> *A.*—Yes, because my sister's money was gone too."

That, I agree, is consistent with the view that the second defendant at that time may have thought or feared that the plaintiff might sue on her cheque or Davis's cheque, or both. She was asking the plaintiff to do nothing, but I confess that I find the whole of this part of the second defendant's evidence far from clear. I have said that she acted with a remarkable lack of prudence. I think it is also clear that she had no very great understanding of what her position was. She had stopped the cheque, I gather, on advice, and in this passage, and, indeed, in the passages which preceded it, she displayed a considerable confusion of mind as to the whole matter. I do not altogether wonder. She had been grossly deceived, as her sister has been, and it is not surprising that she was by this time in a somewhat confused condition in her mind about the whole thing. But I cannot find in that passage sufficient evidence to support the view that she had ever said anything to the plaintiff to justify him in thinking that this cheque remained in any sense security for Davis's debt, or anything which qualifies the effect of the denial on the plaintiff's part of any promise by him, and, as I think, any intention by him, at any stage, to forbear against Davis. Indeed, at the beginning of his argument, counsel for the plaintiff, in answer to a question from me, conceded that there was on this evidence no ground for saying that any promise of forbearance, express or implied, as a consequence of the cheque could be imputed to the plaintiff. Later in the argument counsel for the plaintiff asked the court to draw the inference that the cheque was accepted and held by way of conditional discharge of Davis's debt. I doubt whether the latter contention is consistent with the earlier concession, but I am quite clear that the contention is quite inconsistent with the plaintiff's subsequent conduct. I, therefore, conclude on the whole facts in this case that there is no ground for saying that any consideration for the giving of this cheque is " constituted," to use the words of the section, by the " antecedent debt or liability " of Davis, or otherwise, and in this respect I reach a conclusion differing from that of the learned judge in the court below.

The greater part of the learned judge's judgment was directed to the question which we have not found it necessary to deal with (except very briefly) of mistake or fraud as a defence to the action, but after the passage in the judgment to which I have already made reference, and after referring to s. 27 (1) of the Act of 1882, the learned judge said :

> " Sub-section (*b*), of course, differs from the ordinary law of contract and is a special provision dealing with incidents of this kind. There was an antecedent debt or liability because Davis owed the plaintiff the sum of £400 on a cheque. He had actually received £350 in hard cash a month or so earlier. [The second defendant] knew it. She says so, and it was because of that and knowing the existence of that liability that she paid this cheque

> to [the plaintiff]. It is true that she was actuated by other motives—very natural ones—she wanted to ensure that her sister did not lose the furniture and the bungalow. There was a liability, without any question at all, and, equally without any question, [the second defendant] drew this cheque in favour of the plaintiff because of the antecedent debt or liability of Davis, who was then, apparently, about to be married to her sister. Davis's cheque being out of the way and there being a properly-drawn cheque, there is on the evidence before me plain consideration in the existence of this antecedent debt or liability."

With all respect, I cannot agree that that is an exhaustive statement of the case. An antecedent debt or liability of a third party *in vacuo* cannot form a valuable consideration. Some connection at the least must be shown between the receipt of the bill and the debt, and, even though the motives of the second defendant were as the learned judge stated, there is no doubt that they were not communicated at the material time to the plaintiff. In my judgment, there is nothing in this case which can provide a consideration for the cheque by reference to the antecedent debt or liability of Davis, and nothing which would allow the court to infer any forbearance, any change of attitude to his detriment, on the part of the plaintiff, as a result of this cheque, in regard to Davis and his claim on Davis's cheque.

For these reasons, with all respect to the learned judge, I think that the plaintiff ought not to have obtained judgment against the second defendant on the cheque. I confess I am not sorry to reach that conclusion, for it seems to me that the contrary result would in the circumstances of this case have offended against common sense. I think, therefore, that this appeal should be allowed.

SOMERVELL, L.J. : In suing on this cheque the plaintiff in his amended statement of claim anticipated a possible defence that there was no consideration for it by pleading in para. 3 :

> "Further or alternatively the consideration for the said cheque was the antecedent debt or liability of the first-named defendant to the plaintiff."

That is the first issue which we have to decide.

The question of the effect of an antecedent debt is dealt with in the Bills of Exchange Act, 1882, s. 27 (1). It is important, I think, to read the two paragraphs of the sub-section together :

> "Valuable consideration for a bill may be constituted by (*a*) Any consideration sufficient to support a simple contract ; (*b*) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time."

In approaching matters which are at present covered by the Bills of Exchange Act, 1882, one must bear in mind what was laid down by Lord Herschell in respect of this Act in *Bank of England* v. *Vagliano Brothers* (7), and what has been laid down by other judges in respect of Acts which are by their title codifying Acts. I do not propose to read what Lord Herschell said, but I think this is an accurate summary of it. He said that one must first examine the Act, and one must not start by looking at the old cases. One must first construe the Act, and it is only in certain circumstances that one is entitled to refer to earlier decisions. He gives one example ([1891] A.C. 145) :

> "If . . . a provision be of doubtful import, such resort would be perfectly legitimate."

It seems to me that the first question which arises in this case is : Is the antecedent debt or liability referred to in s. 27 (1) (*b*) only an antecedent debt due from the person who gave the negotiable instrument in respect of which no consideration was given ? I am prepared to assume on consideration that, reading

s. 27 (1) (*a*) and (*b*) together, the natural construction of "antecedent debt" is that it means a debt due from the person who gives the negotiable instrument in question. Assuming, however, that the words are of doubtful import, there is the decision of this court in *Crears* v. *Hunter* (1), which, though subsequent in date to the Bills of Exchange Act, 1882, must have been decided on the law prior to the codification in that Act because the instrument in question was given in 1877 before the Act came into force. I presume that the law to be applied would be the law at the time the instrument was given. In the argument in the case no reference is made to s. 27, and the learned judges do not seem to be purporting to construe it. Assuming, however, in favour of counsel for the plaintiff, that the words of the Act are of doubtful import, this is a case which we can apply. On that basis it seems to me to resolve that doubtful import in the sense in which I have indicated, namely, that the antecedent debt or liability in s. 27 (1) (*b*) is a debt or liability due from the maker or negotiator of the instrument and not from a third party. That being so, in this case the plaintiff cannot rely on s. 27 (1) (*b*). He cannot say: "Because there was an antecedent debt or liability from the third party, therefore I am entitled to succeed." *Crears* v. *Hunter* (1) makes it perfectly clear that, when dealing with a negotiable instrument given in respect of a debt of a third party, consideration has to be found such as is now referred to in s. 27 (1) (*a*), namely, consideration sufficient to support a simple contract. If that is right, the plaintiff has here to show a consideration sufficient to support a simple contract. I do not propose to go into the facts which have been already stated by the MASTER OF THE ROLLS, but, for the reasons which he has given, I think that the plaintiff fails to establish any consideration such as would support a simple contract. In my judgment, on the facts there is no evidence that he forbore, nor is there evidence of any other consideration which would entitle him to succeed under s. 27 (1) (*a*). For these reasons I think that this appeal succeeds.

DENNING, L.J.: I agree. At one time under the count for *indebitatus assumpsit* the common law used habitually to enforce promises for which the only consideration was an antecedent debt or liability of the promisor to the promisee: see SMITH'S LEADING CASES, 13th ed., vol. I, pp. 153, 154, and 635, 636. It still does enforce them to some extent as, for instance, in the case of a promise contained in a cheque given for an antecedent debt or liability of the promisor. Section 27 (1) (*b*) of the Act of 1882 gives statutory effect to this rule, but it does not apply to a promise to pay an antecedent debt or liability of a third person. In such a case, in order that the promise may be enforced, there must be shown a consideration which is sufficient to support a simple contract. This is the view expressed in BYLES ON BILLS, 20th ed., p. 133, and it is also adopted in *Crofts* v. *Beale* (8) and *Crears* v. *Hunter* (1). If the judgment of HALLETT, J. ([1939] 4 All E.R. 353) in *Ayres* v. *Moore* (5) contains anything to the contrary, I cannot agree with it. As to what is sufficient consideration, an express or implied agreement by the creditor to forbear from suing the third person is, of course, good consideration. So, also, is the simple fact of forbearance by the creditor, even if it only arises *ex post facto*, providing that the promise to pay was given with the intention of gaining forbearance: see *per* PARKER, J. ([1909] 1 Ch. 298, 303) in *Wigan* v. *English & Scottish Law Life Assurance Assocn.* (9). The enforcement of the promise to pay, where there is no promise to forbear, express or implied, but only the fact of forbearance, is really the enforcement of a simple unilateral contract. There must be consideration before it will be enforced, but the consideration need not arise at the time of the contract. It is sufficient if it arises *ex post facto*. The real reason why the promise to pay is enforced is because it was intended to be binding, intended to be acted on, and was, in fact, acted on. Then once the promise has been acted on, the act done is itself sufficient consideration for the promise. The old common law had no difficulty in enforcing simple unilateral contracts, but it always required that there should be consideration, *i.e.*, some act done or forbearance shown by the promisee on the faith of the promise, or, as it was sometimes put, something done to his detriment, before he could come to the court to enforce it. In my opinion, that is the law to-day. In the present case, as counsel for the plaintiff admitted, the plaintiff in no way changed his position in consequence of the promise. There is, therefore, no consideration for it. He cannot, therefore, recover. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Ellis & Fairbairn* (for the second defendant); *Sidney C. Elphick* (for the plaintiff).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Affirmed. C.A. *post* p. 1007.

ATTORNEY-GENERAL *v.* LONDON STADIUMS, LTD.

[King's Bench Division (Lord Goddard, C.J.), July 11, 1949.]

Company — Stamp duty — Exemption — Capital duty — Transfer duty — Amalgamation of companies—Transfer of undertaking in return for shares in transferee company—Sale by "existing" company of part of shareholding within two years of amalgamation—Finance Act, 1927 (*c.* 10), *s.* 55 (6) (*b*).

By the Finance Act, 1927, s. 55, where a company (called "the transferee company") has increased its capital with a view to the acquisition of the undertaking of an existing company, the transferee company is entitled to exemption from stamp duty on the increase and on the instrument of transfer of the undertaking, but it is provided by sub-s. (6) that if "(*b*) . . . the existing company within a period of two years from the date . . . of the authority for the increase of the capital of the transferee company ceases, otherwise than in consequence of reconstruction, amalgamation or liquidation, to be the beneficial owner of the shares so issued to it . . . the exemption shall be deemed not to have been allowed, and an amount equal to the duty remitted shall become payable forthwith, and shall be recoverable from the transferee company . . ."

L.S., Ltd., increased its capital from £100 to £750,000 with a view to acquiring the undertaking of three existing companies, and it acquired those undertakings in consideration of its own shares which it issued to the existing companies. It applied for and obtained exemption from capital duty on the increase and of transfer stamp duty on the conveyance of the undertakings to it. Within six months the existing companies sold a large portion of the shares so issued to them to a firm of stockbrokers with a view to their being offered for sale to the public, and the Revenue claimed from L.S., Ltd., payment of the capital duty and transfer duty remitted, together with interest.

Held: by ceasing to be beneficial owners of a portion of the shares issued to them, the existing companies ceased to be beneficial owners of "the shares" within the meaning of s. 55 (6) (*b*), and, therefore, L.S., Ltd., lost the exemption from duty which had been granted to it.

[For the Finance Act, 1927, s. 55, see HALSBURY'S STATUTES, Vol. 16, pp. 983-986.]

Case referred to:

(1) *Lever Bros., Ltd.* v. *Inland Revenue Comrs.*, [1938] 2 All E.R. 808; [1938] 2 K.B. 518; 107 L.J.K.B. 669; 159 L.T. 136; Digest Supp.

ACTION by the Crown under the Crown Proceedings Act, 1947, to recover an amount equal to capital duty and transfer duty remitted in connection with an amalgamation of companies. These proceedings were concerned with the preliminary point whether certain transactions had the effect of depriving the defendant company of the exemption previously granted. LORD GODDARD, C.J., found in favour of the Crown, and the case was remitted for trial of the question of the amount for which the defendant company was liable.

Tucker, K.C., and *J. Clements* for the company.

Sir Andrew Clark, K.C., and *J. H. Stamp* for the Attorney-General.

LORD GODDARD, C.J. : I mean no disrespect to the interesting and elaborate argument of counsel for the company if I do not call on counsel for the Crown, because this case raises a short point of construction of a section in an Act of Parliament and I have come to a clear conclusion as to the way in which I ought to construe it. I came to that conclusion even before I saw the judgment of SIR WILFRID GREENE, M.R., in *Lever Bros., Ltd.* v. *Inland Revenue Comrs.* (1), and it is a satisfaction to me to find that his opinion, although I think there is good ground for saying that the conclusion which he expressed was *obiter*, was the same as that which I had formed, and it, therefore, supports my view.

By the Finance Act, 1927, s. 55, Parliament gave certain relief to companies which were reconstructing themselves or amalgamating with other companies. It is unnecessary to go through the elaborate provisions of this rather complicated section, because a full exposition was given by the MASTER OF THE ROLLS in the case to which I have referred. Suffice it to say that, where a company has amalgamated with another company or companies and certain conditions are fulfilled, relief is given by that section from capital and transfer stamp duty. A necessary element in the amalgamation of companies is that the undertaking or the shares of one company are transferred to the company with which it is being amalgamated, and in the ordinary way, and but for this section, stamp duty would have to be paid on the transfer of the undertaking or the shares in the same way as, if I buy on the Stock Exchange shares which are transferred to me, *ad valorem* stamp duty has to be paid. So, if, for instance, a small company was amalgamating with a big company and the terms of amalgamation provided for the acquisition of ninety per cent. of the smaller company's shares, the shares would have to be transferred to the company which is in the Act called the " transferee company " and *ad valorem* duty would have to be paid were it not for this section. Section 55 (6) provides, however :

> " If . . . (*b*) where shares in the transferee company have been issued to the existing company in consideration of the acquisition, the existing company within a period of two years from the date, as the case may be, of the registration or incorporation, or of the authority for the increase of the capital, of the transferee company ceases, otherwise than in consequence of reconstruction, amalgamation or liquidation, to be the beneficial owner of the shares so issued to it "

the transferee company shall repay to the Crown with interest the amount of stamp duty which they have been excused.

On June 5, 1946, an agreement was entered into whereby the defendant company, London Stadiums, Ltd., agreed to acquire the Wandsworth Stadium, the Park Royal Stadium and the Charlton Stadium in return for shares in London Stadiums, Ltd. The London Stadiums Co. enlarged its capital from £100 to £750,000, so that it could issue enough shares to pay for the undertakings that it was acquiring, and " the existing companies " (which is the expression that the Act uses to describe the Wandsworth, Park Royal and Charlton companies) then became shareholders in the London Stadiums Co. The London Stadiums Co. transferred to Wandsworth 2,740,000, to Park Royal 2,250,000, and to

Charlton 2,500,000 two-shilling shares which, on Nov. 4, 1946, were sub-divided into one-shilling shares. On Nov. 5, 1946, the existing companies sold a substantial portion of the shares which had so been transferred to them to a firm of stockbrokers with a view to a market being created and the public coming in as shareholders. The Wandsworth company sold 750,000, the Park Royal company sold 500,000, and Charlton sold 750,000 one-shilling shares in London Stadiums, Ltd. A

The only question that I have to determine is what is the true construction of the words " ceases to be a beneficial owner of the shares so issued to it." Counsel for the company has contended that I should insert the word " all," so that it reads " the beneficial owner of all the shares so issued," and he says that, as the existing companies did not sell all the shares which they had acquired, the section does not catch the transferee company, and it still remains exempt B from stamp duty and does not have to account for it to the Crown. On the other hand, he says that for the Crown to succeed, I have to read these words as " the beneficial owner of the shares so issued to it or any of them." My view is that I do not have to add any words at all. I have simply to see what is the true construction of the words, " the beneficial owner of the shares so issued to it." It seems to me that, if one looks at the object of the section, which deals C with what I may call a genuine amalgamation of companies, it contemplates that, if the transferee company is to get the substantial benefit that is given in the shape of relief from stamp duty, the existing companies must keep those shares and not market them to the public or elsewhere for a period of at least two years. The section was not meant to facilitate the creation of a market in shares. It was meant to facilitate the genuine amalgamation of businesses D which were to remain amalgamated for at least two years. However that may be, and giving the full effect to the rule of construction which counsel for the company has emphasised—that, if there is an ambiguity in a section, it must be resolved in favour of the taxpayer—and assuming that, as this is an exception to an exception, that rule would apply, I fail to find any ambiguity here at all. I think it is impossible to say that, where a person parts with E some of the shares that have been issued to him, he remains the beneficial owner of the shares so issued. He does not. The shares so issued, we will say, are x. If he has sold the shares, he is not the beneficial owner of x. He is the beneficial owner of x minus y. It seems to me, therefore, that on the clear words of the statute, the Crown are right in this case, and, I accordingly, give judgment for them with costs. F

Order accordingly.

Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Kenneth Brown, Baker, Baker* (for the company).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

R. *v.* WAY AND ANOTHER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Streatfeild and Devlin, JJ.), June, 20, 21, July 11, 1949.)

Criminal Law—Betting—Use of office for betting—"Persons resorting thereto"—Automatic "clocks" for timing of bets—Betting slips taken by "runners" and timed by "clock" outside office—"Clocks" later taken to office by "runners"—Money and betting slips in "clocks"—Betting Act, 1853 (c. 119), ss. 1, 3.

Betting "clocks" were issued by a company to persons known as "runners" who collected betting slips outside the office of the company and placed them in the "clocks" so that the exact time at which each bet was received might be automatically recorded. Later, the "clocks," which contained betting slips, and in some cases money, were handed in by the "runners" at the company's office and received by officials of the company. It being contended by the prosecution that the "runners" resorted to the office either to make bets for the "punters" or on their own behalf, contrary to the Betting Act, 1853, ss. 1, 3,

HELD: the "runners" made bets as agents of the company outside the company's office and resorted to the office to give an account of their transactions and not for the purpose of betting, and, therefore, the company was not guilty of using the office for the purpose of betting with persons resorting thereto and the officials of the company could not be convicted of aiding and abetting the company in the commission of that offence.

[AS TO OFFENCES UNDER THE BETTING ACT, 1853, see HALSBURY, Hailsham Edn., Vol. 15, pp. 510-516, paras. 917-921; and FOR CASES, see DIGEST, Vol. 25, pp. 436-439, Nos. *337-349.*]

APPEAL against conviction.

The appellants, Percival John Ernest Way and Woolf Nathan Sherman, were convicted before SELLERS, J., at the Glamorgan Assizes on Mar. 14, 1949, of aiding and abetting a company in the commission of offences against the Betting Act, 1853, ss. 1, 3. The facts appear in the judgment of the court delivered by DEVLIN, J. The appeals were allowed and the convictions quashed.

Beyfus, K.C., and *Roderic Bowen* for the appellants.

Arthian Davies, K.C., and *Meurig Evans* for the Crown.

Cur. adv. vult.

July 11. **DEVLIN, J.**, read the following judgment of the court. On Mar. 14, 1949, the two appellants were convicted at Cardiff Assizes of aiding and abetting a company called Harry Sherman, Ltd., in the commission of offences against the Betting Act, 1853, and were sentenced to be fined £200 and £100 respectively. Harry Sherman, Ltd., carries on a betting business in Cardiff and the two appellants are employed as office manager and clerk respectively. The company was indicted as the principal offender, but for reasons already given ([1949] 2 All E.R. 207) this court has quashed that indictment. Counsel for the appellants accepts, subject to a qualification to which I shall later refer, that, if the company is guilty of the offences charged, the appellants are likewise guilty of aiding and abetting. Accordingly, the substantial question in the appeal is whether the company committed either of the offences alleged in the two counts of the indictment. Counsel for the appellants submits that there was no evidence fit to go to the jury on either count, and, alternatively, that there was misdirection.

The first count charges that on Nov. 10, 1948, the company used an office in its premises for the purpose of betting with persons resorting thereto. The facts material to this charge are short and not in dispute. On the morning of Nov.

10 certain persons, in this case referred to as "runners," attended at the company's offices and received an instrument known as a betting "clock." This instrument enables the "runner" to record accurately and, it is hoped, beyond the possibility of fraud, the exact time at which he receives a betting slip from a "punter." The "runner" having received slips in relation to one or more races to be run, say, at 1.30, would put the slips in bags and insert the bags in the "clock." The time of insertion would automatically be registered so that there could be no doubt whether or not the bets were taken before the result of the race could be known. During the afternoon and evening of Nov. 10 these "runners" returned to the company's office with their betting "clocks" containing the slips they had taken that day and in some cases money as well. It is, therefore, common ground that the "runners" resorted to the office and that they were the only persons who did. The "punters" did not. Accordingly, the only question is whether the "runners" resorted to the office "for the purpose of betting."

It appears to the court that the natural inference to be drawn from the facts set out above is that the "runner" was the agent of the company to make bets; that he made the bet when he accepted the slip and put it in his "clock"—acts which took place outside the company's office; and that he resorted to the office for the purpose of giving an account of his transactions and not for the purpose of betting. The prosecution puts the matter differently. They say that the "runner" resorted to the office either for the purpose of making bets as agent for the "punter" and on his behalf or for the purpose of making bets himself with the company by way of reinsurance of bets he had already made as a principal with the "punter." On the former view, the "runner" did not make a bet when he received the slip, but treated it as an offer which on behalf of the "punter" he conveyed to the company. If the company accepted the offer, it did so in its own office where the bet was, therefore, made. It is obvious, and is not disputed by the prosecution, that bets made when the "runners" returned to the office must in many cases have been made on races that had already been run and the result of which was known. Accordingly, if this view be correct, the company would frequently be able to decide in the light of the result of a race whether to accept or reject a bet made on it. If the alternative view is correct and the bets were being made by the "runner" by way of reinsurance, then the agreement between the company and the "runner" must be that, if the "runner" paid over his winnings on bets made earlier in the day, the company would reimburse him his losses on similar bets. Whether such an agreement is a bet is open to question. It was, however, for the prosecution to establish that when the "runner" arrived at the office on the afternoon of Nov. 10 and handed over his betting "clock," containing slips, and, possibly, money, he was then, either as principal or agent, making a bet with the company. We do not think that there is any material from which a jury could draw that inference. We think, therefore, with respect to SELLERS, J., who ruled otherwise, that the submission that there was no evidence on this count to go to the jury is correct and that the conviction on it must be set aside.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.*, agents for *Stuart Hallinan, Hill & Mackintosh Thomas*, Cardiff (for the appellants); *S. Tapper Jones*, town clerk, Cardiff (for the Crown).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* HEAVER, LTD.

Kɪɴɢ's Bᴇɴᴄʜ Dɪᴠɪsɪᴏɴ (Croom-Johnson, J.), May 16, 1949.]

Excess Profits Tax—Company—Computation of standard profit—Directors with controlling interest—"Working proprietor"—"Director"—Person not holding number of qualification shares prescribed by articles—Finance (No. 2) *Act,* 1939 (*c.* 109), *s.* 13 (2) (*b*), *as amended by Finance Act,* 1940 (*c.* 29), *s.* 31 (1).

The Finance (No. 2) Act, 1939, s. 13 (2), as amended by the Finance Act, 1940, s. 31 (1), provides that, in computing standard profit for the purpose of excess profits tax in the case of a trade or business carried on by a company "the directors whereof have a controlling interest therein," the Commissioners of Inland Revenue have a discretion to make certain allowances. Before so doing the commissioners must be satisfied, having regard to the nature and size of the business as shown by the assets, that the minimum sum of standard profit specified by s. 13 (2) is inadequate and they may then make an allowance limited to £1,000 in respect of each "working proprietor," *i.e.*, a full time working director who owns more than one-twentieth of the share capital of the company, or £4,000 in the aggregate. In the respondent company two individuals each of whom had been fully engaged in the company's business during the relevant period and held more than one-twentieth of the issued share capital were held by general commissioners to be directors although they did not hold the number of shares necessary for qualification as directors under the company's articles of association.

Hᴇʟᴅ : in view of the provisions of the articles of association and of the Companies Act, 1929, s. 141 (1), which imposed on directors a statutory duty to hold the share qualification specified in the articles, neither of the individuals in question was a "director" within the Finance (No. 2) Act, 1939, s. 13 (2) (*b*) (as amended by the Finance Act, 1940, s. 31 (1)), and so not a "working proprietor" within para. (*a*) of s. 13 (2).

[As ᴛᴏ ᴛʜᴇ Qᴜᴀʟɪꜰɪᴄᴀᴛɪᴏɴ ᴏꜰ Dɪʀᴇᴄᴛᴏʀs, see HALSBURY, Hailsham Edn., Vol. 5, pp. 303-307, paras. 517-521 ; and ꜰᴏʀ Cᴀsᴇs, see DIGEST, Vol. 9, p. 443-446, Nos. *2873-2889.*]

ases referred to :

(1) *Royal British Bank* v. *Turquand*, (1856), 6 E. & B. 327 ; 25 L.J.Q.B. 317 ; 9 Digest 615, *4094.*

(2) *Morris* v. *Kanssen*, [1946] 1 All E.R. 586 ; [1946] A.C. 459 ; 115 L.J.Ch. 177 ; 174 L.T. 353 ; 2nd Digest Supp.

Cᴀsᴇ Sᴛᴀᴛᴇᴅ by General Commissioners of Income Tax.

The commissioners found that Mr. John T. Heaver and Mr. John Heaver ere directors of Heaver, Ltd., the respondent company, in the chargeable ccounting periods ending Apr. 30, 1943 and Apr. 30, 1944, for the purpose of an ssessment to excess profits tax on the company. As the result of that finding he special provisions of the Finance (No. 2) Act, 1939, s. 13 (2), as amended y the Finance Act, 1940, s. 31 (1), with regard to the computation of standard rofits could have been put into operation. Cʀᴏᴏᴍ-Jᴏʜɴsᴏɴ, J., now reversed he decision and allowed the appeal by the Commissioners of Inland Revenue.

Ungoed-Thomas, K.C., J. H. Stamp and *R. P. Hills* for the Crown.

Sir Roland Burrows, K.C., and *Honeyman* for the company.

CROOM-JOHNSON, J. : This is a Case stated by the general ommissioners for the Amesbury (Wiltshire) division on the hearing of an ppeal by a company named Heaver, Ltd., against an assessment made on hem for the accounting periods ending Apr. 30, 1943, and Apr. 30, 1944, to xcess profits tax. Excess profits tax is the creature of the Finance (No. 2)

Act, 1939, s. 12. Section 13 of that Act provided that the standard profits of a trade or business in relation to any chargeable accounting period were to be taken in certain circumstances, and, to temper the wind to the shorn lamb—the taxpayer—sub-s. (2) of that section provided some limitation. That sub-section was repealed in the following year and the material provision is now to be found in the Finance Act, 1940, s. 31 (2), a proviso of which enacts that in the case of a trade or business carried on by "a company, the directors whereof have a controlling interest therein," in making the computation of excess profits, the company are allowed to take into account a sum of money calculated in this way :

> "if . . . the commissioners, having regard to the nature of the business and the size of the business as shown by the value of the assets employed therein, are satisfied that the said greater sum is inadequate, they may, if they think fit, direct that there shall be allowed in respect of not more than four working proprietors such additional sum, not exceeding £1,000 for each individual working proprietor or £4,000 in the aggregate, as may be specified in the direction."

In the sub-section the expression "working proprietor" is given a meaning which is satisfied by the findings in the present case, and I need not say anything more about it, but this occurs in paragraph (*b*) of the proviso :

> "The expression 'proprietor' means, in the case of a trade or business carried on by a partnership, a partner therein, and, in the case of a company, any director thereof owning more than one-twentieth of the share capital of the company."

In the facts found relating to this particular company it is stated that two individuals, John T. Heaver and John Heaver, junior, have each held 200 shares since June 25, 1940, which means that each of them hold more than one-twentieth of the issued share capital of the company. The question which remains is : Were they directors ? The general commissioners have found, not as a fact but as a matter of law, expressly, that these two individuals are directors of the company in law and have been fully engaged in the company's business in respect of the period covered by the appeal. Under the company's articles of association it is provided in art. 16 : "The qualification of every director shall be the holding in his own right and as sole holder of shares of the company to the nominal value of not less than £500." Article 18, which is headed "Disqualification of directors," provides : "The office of a director shall be vacated . . . (*d*) If he cease to hold the necessary share qualification or do not obtain the same within one calendar month from the date of his appointment." It is not disputed, and has been found as a fact, that neither of the two individuals named directors for this purpose ever held 500 £1 shares nominal in the capital of this company. Is it right, then, to say that at the material time they were directors of the company ?

The argument which, apparently, found favour with the general commissioners, was this. For the purpose of this legislation the word "director" has the same meaning as in the Finance Act, 1937. On turning to the Finance Act, 1937, to find out what is the meaning of the word in that statute, the inquirer is sent on another voyage of discovery, because para. 13 (*b*) of sched. IV to that Act, provides : "(*b*) the expression 'director' has the same meaning as in s. 144 of the Companies Act, 1929." Section 144 provides for the keeping of a register of directors of a company and prescribes returns which must be made. Of course, the fact that a return is made under the section cannot turn an invalid or unauthorised appointment into a valid or authorised appointment. I have to read s. 144 with s. 380 (1) of the same Act. Counsel for the respondents points out to me that the latter section is not mentioned in the Finance Act, 1937. Section 380 (1) begins : "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say)," and then in partial contradiction of that language they say " director " not " means " but " includes any person occupying the position of director by whatever name called." The argument is that that means that anybody who acts as a director, and, therefore, occupies the position of a director, is a director for the purposes of the Companies Act, 1929, and, therefore, for the purposes of s. 144, and, therefore, for the purposes of the Finance Act, 1937, and in the last resort for the purposes of the Finance (No. 2) Act, 1939, s. 13 (2), as amended by the Finance Act, 1940, s. 31 (1).

It is a highly ingenious argument appropriate to the subject under discussion. I do not think that the words " ' director ' includes any person occupying the position of director by whatever name called " mean otherwise than this. When construing the Companies Act, 1929, it does not matter what the individual is called if he is, in fact, discharging—and I think that must mean lawfully discharging in accordance with the constitution of the company—directorial functions. The Act is then to apply to him as a director. I do not think that that helps me in the present instance. The Companies Act, 1929, s. 141—and having regard to the argument of counsel for the respondents I do not know whether I am permitted even to look at it—deals with the qualification of directors or managers which is reproduced in the articles. Frequently provisions are included in articles of association which are not required to be there because the statute deals with their subject-matter. It is convenient when a question of this sort crops up to have it in the articles, as then there can be no doubt. Section 141 (1) provides :

> ". . . it shall be the duty of every director who is by the articles of the company required to hold a specified share qualification, and who is not already qualified, to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles."

In this case a shorter time—one month—was fixed. Sub-section (3) of s. 141 provides:

> " The office of director of a company shall be vacated if the director does not within two months from the date of his appointment, or within such shorter time as may be fixed by the articles, obtain his qualification, or if after the expiration of the said period or shorter time he ceases at any time to hold his qualification."

Sub-section (4) contains this provision :

> " A person vacating office under this section shall be incapable of being re-appointed director of the company until he has obtained his qualification."

Sub-section (5) provides for a fine not exceeding £5 for every day during which the unqualified person acts as director of the company. By s. 144 (6) :

> " For the purposes of this section a person in accordance with whose directions or instructions the directors of a company are accustomed to act shall be deemed to be a director and officer of the company."

The latter point, however, does not appear to have been raised before the general commissioners. There is no indication of it in their recital of the contentions advanced before them, and there are no facts of necessity found by the commissioners which might lead me to believe that that is what made them think that these persons are directors in law. I, therefore, put that on one side.

It is said that in view of these provisions these persons are to be regarded as directors, although, in fact, they do not hold the qualifying shares prescribed by the articles of the company and required by the Companies Act, 1929, s. 141 (1) or have omitted to alter the articles of association by reducing the figure from

£500 to something less. It is said that, when a director of a company has no qualification shares or an insufficient number of qualification shares, it is, nevertheless, still possible for the company to bind itself by his acts.

While it has not been raised expressly in that form before me today, apparently the contention was relied on below that, according to the principle enunciated in *Royal British Bank* v. *Turquand* (1), a company is nevertheless bound in circumstances such as these and these two people are to be regarded as *de facto* directors and so satisfy the words of the section which I am asked to construe. I think that is a complete misunderstanding of what *Royal British Bank* v. *Turquand* (1) decided. I will read a short passage from the speech of Lord Simonds in the House of Lords in *Morris* v. *Kanssen* (7) ([1946] 1 All E.R. 592) ; (1946 A.C. p. 474) :

> " The so-called rule in *Turquand's* case (1) is, I think, correctly stated in Halsbury's Laws of England, Hailsham edn., vol. V, p. 423 : ' But persons contracting with a company and dealing in good faith may assume that the acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.' "

I asked who are the persons who are said to have contracted with this company, so that I can apply the reasoning and the principle laid down in that case to the facts of the present case. I have not been told. It clearly is not the inspector of taxes ; it clearly is not the Commissioners of Inland Revenue ; it clearly is not the legislature who passed this condition of granting this particular relief. Perhaps I ought to say that in every case of this kind it is on the Crown to discharge the onus of proving the company to be liable. I do not treat this as an exception out of the general liability which the company would have to discharge. Lord Simonds goes on in the judgment from which I have quoted ([1946] 1 All E.R. p. 592 ; [1946] A.C. p. 475):

> " I asked learned counsel for the appellants whether there was any authority for the proposition that a director or *de facto* director could invoke the rule so as to validate a transaction which was in fact irregular and unauthorised. He could point to none. My own researches, though in such a matter they cannot easily be complete, have disclosed no case in which such a proposition has been affirmed. Nor have I met any case in which such a person has, without discussion of the principle, obtained such relief."

I will not read any more. There is some vigorous language used by Lord Simonds in the next few passages of that speech that will repay attention.

I cannot conceive how anybody could find, as a matter of law, as it seems to me in the teeth of the wording of the statute, that the individuals here concerned are directors of this company. In my view, the general commissioners have come to a wrong conclusion and the appeal must be allowed.

Appeal allowed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the Commissioners of Inland Revenue) ; *Church, Rendell & Co.*, agents for *David Nash & Co.*, Plymouth (for the company).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

R. *v.* ST. PANCRAS BOROUGH ASSESSMENT COMMITTEE. *Ex parte* THE RAILWAY EXECUTIVE.

[COURT OF APPEAL (Tucker, Cohen and Singleton, L.JJ.), June 27, 28, July 8, 1949.]

Rates and Rating—Railway hereditament—Occupancy by Crown—Inclusion in supplemental list as so occupied—Resumption of occupancy of railway company—Inclusion in provisional list after passing of Local Government Act, 1948, *and the coming into force of provisions exempting railway hereditaments from rating—Local Government Act,* 1948 (*c.* 26), *ss.* 85, 89 (5).

The Local Government Act, 1948, s. 85 (which came into force on Apr. 1, 1948), provides : " (1) Save as is otherwise provided in this Part of this Act, no premises which are or form part of . . . (*a*) a railway . . . hereditament (as defined for the purposes of this Part of this Act) . . . shall be liable to be rated or be included in any valuation list or in any rate . . ."

Prior to 1941 a hereditament known as Euston House was occupied by a railway company and was entered in the valuation list for the borough of St. Pancras as a railway hereditament. In 1941 the Crown took possession of Euston House and remained in occupation until the end of June, 1947, when the property reverted to the occupancy of the railway company. At all material times since 1947 the railway company, or its successors, the Railway Executive, were in occupation of the property. During the Crown's occupancy, Euston House was not liable to be rated, and it was, therefore, entered in the supplemental valuation list for 1946 as being so occupied, but on Apr. 5, 1948, the rating authority made a provisional list in which they inserted the name of the Railway Executive as occupier and £12,004 and £10,000 as the gross and rateable values. Having regard to s. 85 of the Act of 1948, which was then in force, the Railway Executive objected to the inclusion of the hereditament in the provisional list, but the assessment committee disallowed the objection on the ground that, when read as a whole, pt. V of the Act (which comprises ss. 85-110) justified its inclusion, particularly, in view of s. 89 (5) of the Act which provides : " Save as provided in the preceding provisions of this section, and without prejudice to the provisions of the next following sub-section, no alteration shall be made in any valuation list (*a*) so far as it relates to any hereditament in England or Wales which is . . . to be deemed to be a railway or canal hereditament ; or (*b*) for the purpose of securing that any other hereditament in England or Wales is treated as or as part of a railway or canal hereditament until the provisions of Part III of this Act . . . have come into force." Euston House was not affected by " the preceding provisions of " the section. Part III of the Act had not come into force on Apr. 5, 1948.

HELD : having regard to the terms of s. 85 (1) and the general scheme of pt. V of the Act, s. 89 (5), which was restrictive and not enabling, afforded no justification for the inclusion of Euston House in the provisional list ; apart from that sub-section there was nothing in the Act to qualify the general immunity afforded to railway hereditaments by s. 85 (1) ; and, therefore, the objection of the Railway Executive should be upheld.

[AS TO RATING OF RAILWAYS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 396-417, paras. 829-847 ; and FOR CASES, see DIGEST, Vol. 38, pp. 487-491, Nos. *449-465*, and pp. 534-546, Nos. *796-892*.]

APPEAL by the St. Pancras Borough Assessment Committee from a judgment of the Divisional Court of the King's Bench Division dated Jan. 25, 1949, granting an order of *certiorari* to quash a decision of the assessment committee rejecting an objection by the Railway Executive to a provisional valuation list.

The Court of Appeal now dismissed the appeal. The facts are set out in their Lordships' judgments, and are summarised in the headnote.

Rowe, K.C., and *Squibb* for the assessment committee.

H. B. Williams, K.C., and *Pearson, K.C.*, for the Railway Executive.

Cur. adv. vult.

July 8. The following judgments were read.

TUCKER, L.J. : Prior to 1941 the hereditament known as Euston House, Eversholt Street, in the county of London, was occupied by the London, Midland and Scottish Railway Co., and was entered in the valuation list for the borough of St. Pancras as a railway hereditament in accordance with the procedure provided by the Railways (Valuation for Rating) Act, 1930. During 1941 the hereditament was taken possession of by the Crown who remained in occupation until the end of June, 1947. On the termination of the occupancy of the Crown the hereditament reverted to the occupation of the railway company and at all material times since has been in the occupation of the railway company or its successors, the Railway Executive. During the Crown's occupancy the hereditament was not liable to be rated, and it was, accordingly, entered in the supplemental valuation list for 1946 as being in the occupation of the Air Ministry and Ministry of Supply, and it was also entered in that part of the list in which are shown properties occupied for the purposes of the Crown and exempt from rating and the contributions made in lieu of rates in respect thereof. As a result of the Crown's occupation having ceased at the end of June, 1947, the rating authority, on Apr. 5, 1948, made a provisional list in which they inserted the name of the Railway Executive, London Midland Region, as the occupiers, and £12,004 and £10,000 as the gross and rateable values respectively. On Apr. 1, 1948, however, pt. V of the Local Government Act, 1948, had come into force. Section 85 in that Part of the Act provides :

> " (1) Save as is otherwise provided in this Part of this Act, no premises which are or form part of . . . (*a*) a railway . . . hereditament (as defined for the purposes of this Part of this Act) . . . shall be liable to be rated or be included in any valuation list or in any rate . . ."

The Railway Executive, accordingly, made objection to the provisional list, which objection was in due course disallowed by the assessment committee who confirmed the provisional list. Thereupon the Railway Executive applied to the Divisional Court for an order of *certiorari* directed to the assessment committee to quash their determination or order in relation to this hereditament and in relation to the provisional list purporting to include the said hereditament. Their application succeeded and the determination or order was quashed. From this decision the assessment committee appeal.

The question involved in this appeal depends on the proper construction of ss. 85 and 89 of the Local Government Act, 1948. I have already quoted the words relied on by the Railway Executive who contend that nothing is to be found in pt. V of the Act excluding this hereditament from this general exemption. On the other hand, the assessment committee submit that the sections, when read as a whole, and, particularly s. 89 (5) (*b*), justify the inclusion of this hereditament in the valuation list and the consequential demand for the payment of rates. Section 89 (5), so far as material, reads as follows :

> " Save as provided in the preceding provisions of this section, and without prejudice to the provisions of the next following sub-section, no alteration shall be made in any valuation list (*a*) so far as it relates to any hereditament in England or Wales which is by virtue of sub-s. (3) of this section to be deemed to be a railway or canal hereditament ; or (*b*) for the purpose of securing that any other hereditament in England or Wales is treated as or as part of a railway or canal hereditament until the provisions of pt. III of this

> Act relating to the alteration of valuation lists by means of proposals made by or served on valuation officers have come into force."

It is common ground that the provisions of pt. III of the Act had not come into force on Apr. 5, 1948. It is also common ground that the hereditament in question is a "railway hereditament" as defined by s. 86. It is said by the assessment committee that on the departure of the Crown it became their duty under the Valuation (Metropolis) Act, 1869, to see that correct entries were made in the valuation list, and that, if they altered the list by simply omitting this hereditament altogether, they would be infringing sub-s. (5) (*b*) because the only justification for its omission would be for the purpose of its being treated as or as part of a railway hereditament.

It is to be noted that on Apr. 1, 1948, when pt. V of the Local Government Act, 1948, came into operation, the valuation list in force included the supplemental list of 1946 which showed the Air Ministry and Ministry of Supply as occupiers. On Apr. 1, 1948, the hereditament was, in fact, a railway hereditament occupied by the Railway Executive. Whence do the assessment committee derive their jurisdiction to correct the list and make it accord with the facts where the hereditament is a railway hereditament and as such immune from inclusion in any valuation list by virtue of the opening words of s. 85 ? By Apr. 1, 1948, the railway valuation roll for the fourth quinquennial period under the Railways (Valuation for Rating) Act, 1930, had not been completed. The relevant provisions of that Act were repealed on Apr. 1, 1948. Parts of the roll had, however, been completed in certain areas and the necessary alterations consequential thereon had been made in some valuation lists. To deal with this situation s. 89 (2) provided that such parts of the roll should be deemed never to have come into force, and the consequential alterations in the valuation lists be deemed never to have been made. This must inevitably have resulted in some valuation lists—during the transitional period until pt. III of the Act came into force—containing entries which did not correctly represent the true facts. If in the present case the part of the roll applicable to this hereditament had been completed and the consequential alteration made in the valuation list, the roll would have been deemed never to have come into force and the entry never to have been made. The result would, apparently, have been that the entry of the Air Ministry would have remained.

It would be strange if the result were to be different in cases where the roll has not been completed and no consequential alteration has been made in the valuation list. In such cases there was no need for the legislature to make provision to nullify something that had never taken place. Section 90 makes special provision for hereditaments shown as railway hereditaments on Mar. 31, 1948, but not, in fact, occupied by the Transport Commission, but I can find no provision for the converse case. The meaning of s. 89 (5) (*b*) is by no means clear, but, in my view, having regard to the opening words of s. 85 and the general scheme of this Part of the Act, the sub-section affords no justification for the inclusion of this hereditament in the provisional list, and apart from this sub-section I can find nothing to qualify the general immunity afforded to railway hereditaments by s. 85. For these reasons I would dismiss this appeal.

COHEN, L.J. : The question for determination on this appeal is whether the assessment committee were entitled, having regard to the provisions of the Local Government Act, 1948, to include a hereditament known as Euston House, Eversholt Street, London, in a provisional list, to include the name of the Railway Executive as occupiers of the premises, and to demand rates in respect thereof from the Railway Executive. The assessment committee, on July 29, 1948, approved the inclusion of the hereditament in question in a provisional list, No. 177, dated Apr. 5, 1948, but on Jan. 25, 1949, a Divisional

Court granted an order of *certiorari* quashing the determination of the assessment committee. From this decision the assessment committee appeal.

Counsel on both sides agreed that the point was a short one depending purely on the construction of the Local Government Act, 1948, but, in order to arrive at a determination on it, I think it is necessary to see what the position was before that Act came into force. I start with the Valuation (Metropolis) Act, 1869, s. 51. Under that section it was the duty of the assessment committee to include in the valuation list every hereditament in their area in accordance with the classes mentioned in sched. III to the Act, class 10 being "Railways, Canals, Docks, Tolls, Waterworks and Gas Works." The form of the valuation list was governed by the London (Valuation Lists) Rules, 1933 (S.R. & O., 1933, No. 785). The list had to show as regards each hereditament, among other particulars, the name of the occupier and of the owner. It was divided into three parts—I, hereditaments other than industrial and freight transport hereditaments, II, industrial hereditaments, and III, freight transport hereditaments. Hereditaments used for railway transport purposes fell, of course, under pt. III of the list, but the question whether or not a hereditament could be included in that part was determined by the Railways (Valuation for Rating) Act, 1930. Under that Act a Railway Assessment Authority was constituted on which was cast the responsibility of preparing, as soon as might be after its constitution and thereafter at intervals of five years, a railway valuation roll showing the net annual and rateable values of every railway hereditament in England. The roll was to be divided into parts, and as soon as the authority had determined the rateable values of the several hereditaments occupied by any railway company they were to complete the part of the railway valuation roll relating to the undertaking of that company. Provision was made for revision of the roll from time to time (see s. 11). The authority were to notify the assessment committees of the completion of a part of the roll, and s. 12 provided that on receipt of any such notice the assessment committee was to cause the values entered in that part of the roll and such other particulars as might be prescribed to be entered in the valuation list in substitution for the values or particulars appearing in that list. "Prescribed" meant prescribed by the Rating and Valuation Acts (Railway Valuation Roll) Rules, 1933 (S.R. & O., 1933, No. 451), which, among other things, required (see r. 12) railway hereditaments to be distinguished by inserting the letter "R" and the number of the hereditament in the roll. After the Act of 1930 came into force, a hereditament could only be included or removed from the list of railway hereditaments as a result of a determination arrived at by the authority appointed under the Act of 1930. The first three rolls required to be prepared under the Act of 1930 were prepared. The fourth roll should have been prepared and come into force on Apr. 4, 1946, but it had, in fact, not been completed by the time the Local Government Act, 1948, came into force.

Before I turn to the history of Euston House, I must state briefly the position as regards properties in Crown occupation. So far as hereditaments outside London were concerned, the position was governed by the Rating and Valuation Acts (Form of Valuation List) Rules, 1932 (S.R. & O., 1932, No. 395), which provided in r. 4 that as regards hereditaments in Crown occupation in respect of which a contribution was made in aid of rates they should be entered in one group at the end of that section of pt. I of the list which related to the parish in question. We were informed that a similar practice was adopted in London, although there were no statutory rules prescribing the adoption of that practice.

I turn now to the history of Euston House. Until 1941 it was occupied by the London, Midland and Scottish Railway Co., and was duly entered in pt. III of the list as a freight transport hereditament. During 1941 it was requisitioned by the government. The appropriate steps were taken to remove it from the list of freight transport hereditaments, but, as the Crown made a contribution in lieu of rates in respect of its occupation of Euston House, it had to be entered in the list. It appeared in the supplementary list for 1946 in pt. I, the Air Ministry and the Ministry of Supply being shown as the occupiers. In 1947 the Crown went gradually out of occupation, and by the end of that year the London, Midland and Scottish Railway Co. were back in occupation of the whole building. On Jan. 1, 1948, the Railway Executive took over from the London, Midland and Scottish Railway Co. When the London, Midland and Scottish Railway Co. re-entered into occupation, Euston House should in due course have again been entered in the list as a freight transport hereditament. The assessment committee could not, however, make the necessary correction unless and until the railway valuation roll was amended. It was too late to amend the third roll. The matter could have been put right on the fourth roll, but the preparation of that roll was much in arrears. As a result, the assessment committee could not for the time being recover rates from the Railway Executive nor could they ask a contribution from the Crown. Had the fourth roll been duly completed and become operative, the matter would have been put right owing to the retrospective effect given to amendments by s. 12 (4) of the Act of 1930, but that Act was repealed by the Local Government Act, 1948, and the fourth roll will never be completed.

What, then, is the effect of the Act of 1948 ? Part III contains a new code for valuation and rating procedure, but it did not come into force on the passing of the Act. Power was given to the Minister of Health by s. 72 (1) to fix the day or days on which it was to come into force. We were told that he has exercised that power and that, with certain exceptions, pt. III will come into force on Feb. 1, 1950 : the Local Government Act, 1948 (Appointed Days) Order, 1949 (S.I., 1949, No. 434). Part V, under which the question before us falls to be determined, deals with the rating of transport and electricity authorities. Section 85 (1), so far as material, is in the following terms :

> " Save as is otherwise provided in this Part of this Act, no premises which are or form part of either (*a*) a railway or canal hereditament (as defined for the purposes of this Part of this Act . . . shall be liable to be rated or be included in any valuation list or in any rate, and the British Transport Commission . . . shall, in the year 1948-49 and all subsequent years, make such payments for the benefit of local authorities as are provided for by the subsequent provisions of this Part of this Act in lieu of the rates which would, apart from the provisions of this Part of this Act, be payable to rating authorities in respect of those hereditaments."

Counsel for the Railway Executive was, I think, right in saying that this sub-section confers on railway hereditaments as defined in the Act absolute immunity from rating except so far as in pt. V itself it is otherwise provided. Section 86 defines a railway hereditament. So far as material, it is in the following terms :

> " (1) In this Part of this Act, except where the contrary is expressly provided, the expression ' railway or canal hereditament ' means a hereditament occupied for any of the purposes of the British Transport Commission specified in sub-s. (2) of this section . . . (2) The purposes referred to in sub-s. (1) of this section (elsewhere in this Act referred to as ' non-rateable purposes ') are (*a*) all purposes of the parts of the undertaking of the commission which are concerned with the carriage of goods or passengers by rail or inland waterway or the provision of facilities for traffic by inland waterway ; and (*b*) all purposes of any parts of their undertaking which are subsidiary or incidental to any such part as aforesaid, not being parts thereof concerned with road transport, sea transport or harbours or parts thereof subsidiary or incidental to the parts thereof concerned with road transport, sea transport or harbours."

There follows two provisos with which I do not think we are concerned. There can, I think, be no doubt that the purposes for which the Railway Executive occupy Euston House are " non-rateable purposes " within sub-s. (2) and that as soon as pt. III of the Act comes into force it will be the duty of the new rating authority to treat Euston House as a railway hereditament. Section 87 deals with railway hereditaments partly used for non-rateable purposes and partly for other purposes, and provides that such a hereditament shall not be exempt from rating or from inclusion in a valuation list under s. 85, but shall be included at a fair valuation in respect of its use for purposes other than non-rateable purposes. This, says counsel for the Railway Executive, is the section to which reference is intended by the opening words of s. 85 (1) and it is the only exception to the exemption conferred by that section. Section 88 repeals the Act of 1930 so far as anything material to this appeal is concerned.

I now come to s. 89, on sub-s. (5) of which counsel for the assessment committee relies as containing a provision limiting the operation of s. 85 (1). Section 89 (1) provides that the provisions of pt. V, so far as anything material to the decision of this case is concerned, shall come into force on Apr. 1, 1948, except so far as in sub-s. (2) it is otherwise provided. Sub-section (2) provides that the fourth roll which was in course of preparation under the Act of 1930 should not be completed, that any part of the roll which has been completed should be deemed never to have come into force, and that any alterations made in any valuation list as a result of the preparation of the fourth roll should be deemed never to have been made, and the list corrected accordingly. Sub-section (3) in effect provides that, until other provision is made under pt. III of the Act, all hereditaments shown in the valuation lists on Mar. 31, 1948, as railway hereditaments within the meaning of the Act of 1930 should, subject to s. 90, be treated as railway hereditaments for the purposes of pt. V unless they were shown in the lists as freight transport hereditaments used wholly for purposes which would not be " non-rateable purposes " within s. 86 (2). Sub-section 4 provides that hereditaments which under sub-s. (3) were to be deemed railway hereditaments for all purposes were to be omitted from the lists, unless they were used partly for purposes other than non-rateable purposes, in which case they were to remain on the list, the net annual value being such net annual value as was shown in the list on Mar. 31, 1948, as attributable to the rateable purposes. The exception to sub-s. (4) thus conforms to s. 87 (1). Sub-section (5), which is the corner-stone of the argument of counsel for the assessment committee, is in the following terms :

> " Save as provided in the preceding provisions of this section, and without prejudice to the provisions of the next following sub-section, no alteration shall be made in any valuation list (*a*) so far as it relates to any hereditament in England or Wales which is by virtue of sub-s. (3) of this section to be deemed to be a railway or canal hereditament ; or (*b*) for the purpose of securing that any other hereditament in England or Wales is treated as or as part of a railway or canal hereditament, until the provisions of pt. III of this Act relating to the alteration of valuation lists by means of proposals made by or served on valuation officers have come into force."

This sub-section, as counsel for the Railway Executive points out, does not in terms limit in any way the operation of s. 85 (1), but counsel for the assessment committee says that the underlying principle is to stabilise the list of railway hereditaments on Apr. 1, 1948 ; that it was the duty of the rating authority to correct the list by deleting the Crown as occupier ; that, if it omitted Euston House altogether, it would in effect be treating the property as a railway hereditament in contravention of sub-s. (5) ; and that, therefore, sub-s. (5) impliedly authorises the assessment committee in the transitional period to treat Euston House as rateable under pt. I of the list and to treat the Railway Executive as the occupiers.

Before deciding between these rival contentions, I must refer briefly to the other provisions of the Act to which our attention was called. Section 89 (6) prohibits any alteration in the list in force at the date of the passing of the Act (Mar. 24, 1948), so far as that list related to any hereditament shown therein on Mar. 31, 1948, as a railway hereditament, except (i) as provided in the preceding sub-sections of s. 89; (ii) under pt. III of the Act when that comes into force; (iii) under s. 90. Section 90 provides for the removal from the list of railway hereditaments of any hereditament shown as such in the list on Mar. 31, 1948, which is in the occupation of some person other than the British Transport Commission. The section enables the necessary correction to be made in the transitional period prior to the coming into operation of pt. III, but there is nowhere in the Act a corresponding provision authorising an addition to the list of hereditaments during the transitional period. Any correction made under this section has effect as from the beginning of the quinquennial period current at the date of the passing of the Act, or as from the date of the change of occupation, whichever should be the later date. Section 93 deals with the payments to be made in lieu of rates by the British Transport Commission. This contribution during the transitional period until the list prepared pursuant to pt. III comes into force is fixed for 1948-49 at the standard amount (that is, so far as England and Wales are concerned) of £1,810,000, plus a further sum of £630,000, and for each of the next two years at the standard amount adjusted as provided by s. 94. The provisions as to adjustment do not, in my opinion, affect the question we have to decide.

I have now, I think, referred to all the relevant sections of the Act and I return to s. 89 (5) on which the question before us really depends. Counsel for the Railway Executive was, I think, right when he said that the language of that sub-section is peculiarly inapt if the intention was to make a hereditament which is a railway hereditament within the definition in s. 86 rateable as if it were not a railway hereditament. Moreover, I am unable to accept the argument of counsel for the assessment committee that, unless the inclusion of Euston House in pt. I of the provisional list as in the occupation of the Railway Executive is upheld, his clients will be infringing s. 89 (5). If the assessment committee were to omit the premises altogether from the list (and it is unnecessary for me to decide whether they should have done so), they would be omitting the name, not in order to secure that the premises were treated as a railway hereditament, but in order to record the fact that the Crown were no longer in occupation, but, even if they leave the name of the occupier blank in pt. I or substitute the name of the Railway Executive for that of the Crown in pt. I, the Railway Executive would, in my opinion, not be liable to pay rates. To hold otherwise would be in direct conflict with s. 85 (1) in the absence of a provision rendering the premises liable to be rated. Section 89 (5) is restrictive and not enabling, and I am unable to spell an enabling provision out of s. 89 (5) or any other provision in the Act. The effect of s. 89 (3) and (4) was to exclude from pt. III of the list all railway hereditaments appearing therein on Mar. 31, 1948, except so far as any such hereditaments were being used otherwise than for rateable purposes within s. 86 (2). Sub-section (5), in my opinion, merely prohibits the addition to pt. III of any railway hereditament. If the authority were to remove Euston House from pt. I of the list, they would be making that alteration, not for the purpose of securing that Euston House is treated as a railway hereditament, but to show that it is no longer in Crown occupation. They would, therefore, not, in my opinion, be infringing sub-s. (5).

Counsel for the assessment committee pointed out that, if this view were right, the effect would be that until pt. III of the Act of 1948 comes into operation the rating authority would get no rates on those premises and no contribution in lieu of rates. That is true, but this does not seem to me unreasonable, as, if a hereditament ceases to be a railway hereditament owing to change of occupation, the rating authority will be able to get rates on that hereditament through the operation of s. 90 without, apparently, suffering any reduction in the annual contribution to which it is entitled under ss. 85 (1) and 93. This is rough and ready justice, and I see nothing to justify us in placing a strained construction on s. 89 (5) in order to give effect to the contention of counsel for the assessment committee. For these reasons I would dismiss the appeal.

SINGLETON, L.J. : The appeal relates to a hereditament known as Euston House, Eversholt Street, London, N.W. Until 1941 that hereditament was occupied by the London, Midland and Scottish Railway Co. and it was entered in the valuation list and rated as a railway hereditament. Under the Railways (Valuation for Rating) Act, 1930, it was the duty of the Railway Assessment Authority to arrive at the net annual value of a railway undertaking by reference to the average net receipts of the company, and thereafter to apportion the value among the hereditaments occupied by the company, calculating the rateable value of every such hereditament by reference to its net annual value. They prepared the Railway Valuation Roll, and particulars had to be sent to the various bodies and persons affected. By s. 12 assessment committees were charged with the duty of making entries in the valuation list to correspond with those in the valuation roll—in other words, they had no duties in connection with the valuation of a railway hereditament. They took the figures of the Railway Assessment Authority, and each such hereditament appearing in the valuation list had to be distinguished by the letter " R " : r. 12 of the Rating and Valuation Acts (Railway Valuation Roll) Rules, 1933. In 1941 the Crown requisitioned the hereditament and retained possession until 1947. On June 30, 1947, the London, Midland and Scottish Railway Co. resumed possession and since that date the hereditament has been occupied by them (or by their successors, the Railway Executive) for railway purposes. It is common ground that it is a railway hereditament within the definition in the Local Government Act, 1948, s. 86 (1) : see para. 5 of the affidavit of the clerk to the assessment committee. During the occupancy of the Crown, the hereditament was not rateable, but a contribution to the rates was made by the Crown based on a rateable value of £10,000 (later reduced to £7,660). In the valuation list of 1946 the hereditament appeared as " Not assessed. See government property." On Apr. 5, 1948, the rating authority made a provisional valuation list showing the Railway Executive (London Midland Region) as occupiers and inserting the figure of £10,000 as the net annual and rateable value. Objection on behalf of the Railway Executive was taken to this and also to similar entries in a supplemental valuation list which was made later. The objections were duly heard by the assessment committee, who decided against the Railway Executive. The decision as to the provisional list is conveyed by letter of July 30, 1948, in which it is stated that " they decided to make no alteration in the figures proposed in the list." The decision as to the supplemental list, 1948, was that " they decided to disallow the objection and to confirm the proposals of the rating authority " (letter of Nov. 4, 1948). These decisions were followed by demands for rates for two half-yearly periods amounting to £4,166 13*s.* 4*d.* and £4,052 10*s.* 3*d.* respectively. The Railway Executive succeeded before the Divisional Court in obtaining an order of certiorari to quash the determination of the assessment committee. The assessment committee appeals to this court and asks that the judgment of the Divisional Court be set aside and that the order of the assessment committee be restored. There is nothing in the documents before the court to show what figures were in the valuation list before the occupation by the Crown. At that time the value would be an apportioned part of the net annual value of the railway undertaking arrived at by reference to the net annual receipts.

There arises a question of some difficulty under the Local Government Act, 1948, and, in particular, under ss. 85-90 of that Act. These sections are in pt. V of the Act, which Part, so far as is material, came into operation on Apr. 1, 1948, that is, before the provisional list was made. The Act of 1948 brings about a complete change in rating practice generally, and, by pt. V, a departure from the system of rating of transport and electricity authorities which has prevailed for some little time. Railways were acquired by the State as from Jan. 1, 1948, and one of the main purposes of pt. V of the Act was to free them from rateability, the State making payments for the benefit of local authorities in lieu of rates, and the sums so paid are to be distributed by the Minister of Health among rating authorities in England and Wales in proportion to the rateable values for their respective areas for the year. The freedom from rating is given by these words in s. 85 (1) :

> " Save as is otherwise provided in this Part of this Act, no premises which are or form part of (*a*) a railway . . . hereditament (as defined for the purposes of this Part of this Act) . . . shall be liable to be rated or included in any valuation list or in any rate . . ."

Section 86 contains the definition of " railway hereditament ", and it is admitted that the words of the definition cover the hereditament in question. Accordingly, the claim of the Railway Executive is that these premises, being a railway hereditament, are not liable to be rated and ought not to be included in the valuation list or in any rate. The case for the assessment committee is based on s. 89 of the Act, a section which gives rise to some difficulties of construction. It provides in sub-s. (1) that this Part of the Act, so far as is material, is to come into force on Apr. 1, 1948 (the Act had received the Royal Assent on Mar. 24). The remaining sub-sections contain provisions which are mainly transitional. Part III of the Act set up a new scheme of valuation for rating purposes under which valuation lists are to be prepared and amended by officers of the Inland Revenue Commissioners, thus bringing about a different system both within and without the metropolis. Part III, with certain exceptions, comes into operation on Feb. 1, 1950 : see s. 72 (1) and the Local Government Act, 1948 (Appointed Days) Order, 1949 (S.I. 1949, No. 434).

Section 89 (2) provides that the quinquennial railway and London transport valuation rolls in course of preparation are not to be completed, and that any part which had been completed shall be deemed never to have come into force, and further that alterations be made in valuation lists to bring them into line. The result of this was to keep in operation the old valuation rolls and to ensure that entries in valuation lists were in accordance with the entries in the old valuation rolls. By sub-s. (3) it is provided :

> " Until other provision is made under Part III . . . the hereditaments . . . which, on Mar. 31, 1948, are shown in the valuation lists as railway hereditaments . . . shall . . . be deemed to be railway . . . hereditaments for the purposes of this Part of this Act "

(with a proviso as to s. 90). By sub-s. (4) the hereditaments which under sub-s. (3) are to be deemed railway hereditaments are to be omitted from valuation lists, and it is the duty of all assessment committees to cause the necessary alterations to be made with effect as from Apr. 1, 1948.

LORD GODDARD, C.J., appears to have formed the view that the result of sub-s. (3) is to set up another class of hereditaments which are to be deemed to be railway hereditaments, but which are not occupied by or for the purposes of the British Transport Commission. It is a little difficult to see why they should be deemed to be railway hereditaments if they were not occupied for railway purposes and occupied by the Transport Commission. Moreover, s. 90 is expressly designed to secure that a hereditament appearing in the list as a railway hereditament and which, on Mar. 31, 1948, is in the occupation of some person other than the Transport Commission shall cease so to appear. My impression is that the object of, or behind, s. 89 was to lighten the task of those who had to work the scheme during the transitional period. It was not necessary, the framers of the section considered, for them to go into the precise user of every hereditament claimed to be a railway hereditament. If a hereditament was on the old valuation roll, and, consequently, on the valuation list (as corrected), as a railway hereditament, it was to be deemed to be one and it was to be dealt with under sub-s. (4). It may be that the object was to make the entries in the valuation lists exclusive during the transitional period, as counsel for the assessment committee submitted. There is, however, nothing in the Act which so provides, nothing which says that only those hereditaments which are to be deemed to be railway hereditaments shall be treated as such for the purposes of s. 85.

The strongest argument put forward on behalf of the assessment committee is based on s. 89 (5) :

> " Save as provided . . . no alteration shall be made in any valuation list (*a*) so far as it relates to any hereditament . . . which is by virtue of sub-s. (3) of this section to be deemed to be a railway . . . hereditament; or (*b*) for the purpose of securing that any other hereditament . . . is treated as or as part of a railway . . . hereditament."

It is said, and said with force, that this hereditament was not on the old valuation roll, and, consequently, not on the existing valuation list, as a railway hereditament, and that to take it off the valuation list altogether would be to offend against sub-s. (5) (*b*) in that it would be done for the purpose of securing that " any other hereditament is treated as a railway hereditament." It was argued that you could not have a kind of floating hereditament and that this one must appear somewhere, and that, as there was no other way provided, it was the duty of the rating authority and of the assessment committee to include it in the manner in which it appears in the provisional and supplemental lists, once it was seen that government occupation had ceased. It may well be said that s. 89 (5) (*b*) conflicts with s. 85 (1) (*a*), for, if a hereditament is a railway hereditament under the latter, it is not liable to be rated, and it ought not to be included in any valuation list, yet, if, perchance, it is on the list and if it does not fall within s. 89 (5) (*a*), the provision in s. 89 (5) (*b*) operates to prevent its being taken off for the purpose of securing that it is treated as a railway hereditament.

It seems to me that the answer to the problem can be put in one of two ways, possibly in both. (i) The desire of the Railway Executive is to avoid paying rates in respect of their occupation of this railway hereditament. They are entitled to say : " We do not mind what you do with your valuation list, but Parliament has declared by ss. 85 and 86 that this hereditament is not liable to be rated. We wish to establish that and to show that the demands made on us are unwarranted." (ii) It is not a case of seeking to get something done or some alteration made under s. 89 (5) (*b*) for the purpose of securing that " any other hereditament is treated as a railway hereditament." If an alteration is made in the valuation list, it will be made to bring it in accord with the facts and not to secure any particular treatment. By reason of s. 85 it is freed from rates. In other words, this is not a hereditament which is to be deemed to be a railway hereditament under s. 89 (3). Everyone agrees that it is a railway hereditament as defined by s. 86, and there is no need for reference to hereditaments which are to be deemed to be railway hereditaments.

It is necessary, of course, to bear in mind the words at the commencement of s. 85 : " Save as is otherwise provided in this Part of this Act." I do not think that this can be read as meaning that only hereditaments which are to be deemed to be railway hereditaments under s. 89 can be said to be railway hereditaments. If that had been intended, words to that effect would have appeared somewhere. They do not. On the other hand, pt. V commences with s. 85, which gives freedom from rating to a railway hereditament as defined by s. 86, and ss. 87 and 90 show sufficient reason for the commencing words of s. 85. I would dismiss the appeal. I find nothing in pt. V of the Act to take this hereditament out of the status given to it by s. 85 and, that being so, the occupiers are entitled to succeed in their contention that it is not liable to be rated. I confess to a feeling of doubt as to the appropriate form of order, but no question has been raised as to this, and I am satisfied that the figures in both provisional and supplemental valuation lists should be struck out.

Appeal dismissed with costs.

Solicitors : *R. C. E. Austin,* town clerk, St. Pancras (for the assessment committee) ; *R. P. Humphrys,* The Solicitor, London Midland Region (for the Railway Executive).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

ELCOCK AND ANOTHER *v.* THOMSON.

[King's Bench Division (Morris, J.), May 18, 19, 23, 24, July 1, 1949.]

Insurance—Fire insurance—Amount recoverable—Basis of calculation—Mansion partly destroyed by fire—Agreed value in excess of actual value.

By a Lloyd's policy, dated Nov. 22, 1940, a mansion was insured against loss or damage by fire and the underwriters agreed to pay or make good to the assured a stated fraction of all loss or damage to the property insured caused by perils insured against. The agreed value of the mansion was £106,850, and a clause in the policy stated that that sum " has been accepted by the underwriters and the assured as being the true value of the property insured and in the event of loss the said property will be assumed to be of such value and will be assessed accordingly." On May 16, 1947, part of the mansion was destroyed by fire, the cubic content of the portion burnt being just over 21 per cent. of the whole. The actual value of the mansion before the fire was £18,000, and its value after the fire was £12,600. In an action for the amount due on the policy :

Held : the agreement as to value applied in the event of partial destruction as well as in the event of total destruction ; the depreciation could not properly be determined by having regard merely to the proportion to the whole structure of the part burnt out ; and the sum due to the assured should be arrived at by applying to the agreed value of £106,850 the percentage of actual depreciation resulting from the fire. As the value of the mansion had fallen, as a result of the fire, from £18,000 to £12,600, there was a depreciation of £5,400, or thirty per cent., and the underwriters were liable to pay an amount representing thirty per cent. of £106,850 (namely, £32,055).

[As to the Amount Recoverable under a Fire Insurance Policy, see HALSBURY, Hailsham Edn., Vol. 18, pp. 496-498, paras. 759-763 ; and for Cases, see DIGEST, Vol. 29, pp. 336-338, Nos. *2716-2728*.]

Cases referred to :

(1) *Lewis* v. *Rucker,* (1761), 2 Burr. 1167; 29 Digest 123, *760.*

(2) *City Tailors, Ltd.* v. *Evans,* (1921), 91 L.J.K.B. 379 ; 126 L.T. 439 ; 29 Digest 336, *2721.*

(3) *North of England Iron Steamship Insurance Assocn.* v. *Armstrong,* (1870), L.R. 5 Q.B. 244 ; 39 L.J.Q.B. 81 ; 21 L.T. 822 ; 29 Digest 122, *748.*

(4) *Irving* v. *Manning*, (1847), 1 H.L. Cas. 287 ; 6 C.B. 391 ; 6 L.T. 108 ; 10 L.T. 877 ; 29 Digest 270, *2176*.

(5) *Castellain* v. *Preston*, (1883), 11 Q.B.D. 380 ; 52 L.J.Q.B. 366 ; 49 L.T. 29 ; 29 Digest 310, *2562*.

(6 *Pitman* v. *Universal Marine Insurance Co.*, (1882), 9 Q.B.D. 192 ; 51 L.J.Q.B. 561 ; 46 L.T. 863 ; 29 Digest 249, *2013*.

(7) *Balmoral Steamship Co.* v. *Marten*, [1902] A.C. 511 ; 71 L.J.K.B. 819 ; A 87 L.T. 247 ; 29 Digest 232, *1876*.

(8) *The Main*, [1894] P. 320 ; 63 L.J.P. 69 ; 70 L.T. 247 ; 29 Digest 252, *2039*.

Action on a policy of insurance in respect of damage caused by fire.

The plaintiffs had an interest in a Lloyd's fire policy of insurance on a mansion, B which had been partially destroyed by fire. The defendant was one of the underwriters who had subscribed the policy. The value of the mansion was agreed in the policy at £106,850, but the court found that its actual value was £18,000 before the fire and £12,600 after the fire. The cost of constructing after the fire the whole mansion in the form in which it was before the fire would have been £205,000, and reinstatement after the fire in that form, which had C not been undertaken, would have cost £40,252. The defendant admitted liability, but disputed the amount due under the policy. The plaintiffs contended that the amount should be : (*a*) the difference between the agreed value of £106,850 and the value of the mansion after the fire ; or, alternatively, (*b*) a percentage of the agreed value of £106,850 equal to the percentage of the depreciation in value shown by comparing the actual value of the mansion after D the fire with its actual value beforehand ; or, alternatively, (*c*) the cost of reinstatement. The defendant contended that the amount should be (*a*) the actual depreciation in value ; or (*b*) a percentage of the agreed value of £106,850, equal to the percentage which the cost of reinstatement represented of the cost of constructing a new mansion. Morris, J., held that the amount due under the policy should be arrived at by applying the percentage of depreciation in E actual value to the agreed value. The facts appear in the judgment.

Scott Cairns, K.C., and *Mendel* for the plaintiffs.

Havers, K.C., and *Gahan* for the defendant.

Cur. adv. vult.

July 1. **MORRIS, J.**, read the following judgment. In order to adjudicate on the claim presented in this case it is necessary to determine what is the F sum appropriate to be paid under a valued policy of insurance in respect of damage to a mansion caused by fire. The mansion is at Easthampstead Park, near Wokingham, Berkshire, and was formerly the property of the Marquis of Downshire. The defendant and other underwriters subscribed a Lloyd's fire policy by the terms of which the true value of the mansion (together with kitchens and adjoining premises) was agreed as being £106,850. The Lloyd's G fire policy was dated Nov. 22, 1940, and by its terms the marquis was insured against loss or damage to the property described in the policy in respect of certain risks which included that of fire. It was stipulated that the underwriters' liability was "to insure from loss or damage" by fire and lightning, £174,870, being part of £180,440, property described in a schedule attached to the policy. Subject to this partial limitation, the underwriters agreed to pay H or make good to the assured all loss or damage caused by perils insured against that might happen to the subject-matter of the insurance. The property covered by the policy was described by items in the schedule. In addition to the mansion house many other houses and cottages and farm and other buildings were covered. The schedule contains in all 206 items of property, and opposite each item, as described, is set out the sum insured. Item No. 1 was described as :

> "The building, including stained glass window on stairs and a hot water apparatus set in basement therein, for heating said mansion by radiators and a domestic hot water boiler also in basement, both heated by automatic plant by Oilmatic Co. with storage tank for crude oil."

The figure in the column headed "sum insured" is the figure of £100,000. Item No. 2 covers kitchens, scullery, larders, laundry, pump room, and other
A things and fittings, and under the heading "sum insured" the figure was £5,000. Items 3, 4 and 5 covered adjoining premises, really forming part of the mansion house, including a coal house, storehouse, carpenter's shop, bath house, and conservatory. The total of items 1-5 was £106,850. At the end of the schedule are the words:

> "The sum set opposite each item in this specification has been accepted
> B by the underwriters and the assured as being the true value of the property insured and in the event of loss the said property will be assumed to be of such value and will be assessed accordingly."

The fire at the mansion took place on May 16, 1947. The cubic content of the mansion, together with the part of it known as the wing, was 990,260 cubic feet. The mansion had about 75 rooms, 42 of which were bedrooms. The
C cubic content of the portion that was burnt was 209,000 cubic feet. This represented a percentage of just over 21 per cent. of the whole. In mentioning this, it may be convenient here to state that I am satisfied that the measure of the depreciation in value of the mansion which was caused by the fire cannot properly be determined by having regard merely to the proportion to the whole structure of the part that was burnt out. If reinstatement of the damage at a
D date a few months after the fire had been possible, the cost of such reinstatement, excluding architects' and surveyors' fees, would have been £40,252. With the inclusion of such fees the cost would have been £43,252. If, at about that date, the whole building were being erected so as to be in the form in which it was before the fire, the cost would have been £205,000.

The mansion was in the occupation of the marquis at the outbreak of the war in
E 1939. During the war and until Nov. 8, 1946, it was in the occupation of St. Paul's Junior School, though during the war years the marquis retained a few rooms for his personal occupation. By a memorandum dated Mar. 5, 1946, signed, as to one part, by the marquis and, as to the other part, by the plaintiff, Mr. William George Elcock, it was agreed between them that Mr. Elcock was the purchaser from the marquis of the freehold of the mansion, together with
F other property, on the conditions set out in the memorandum, including the National Conditions of Sale (13th ed.). In making the agreement the plaintiff acted as agent and trustee for the plaintiff company, Farming Supplies (Berkshire), Ltd. The property sold included the home farm and also cottages and other lands. The total acreage was 1,306. The purchase price was £40,000. Prior to this purchase the plaintiff, Mr. Elcock, had purchased eleven lots of
G outlying land at Easthampstead for £11,960. The total purchases were, therefore, at a cost of £51,960. Sub-sales took place of some of the property purchased and in connection with these sub-sales direct conveyances were made by the marquis to the sub-purchasers with the consent of the plaintiff, Mr. Elcock. There was a conveyance dated May 23, 1947 (*i.e.*, just a week after the fire), by which the mansion house and other property, including farmhouses, cottages,
H outbuildings, and about 782 acres of land, were conveyed to the plaintiff company. The price recorded in that conveyance was simply the figure remaining owing to the marquis out of the total sum of £51,960. I am satisfied that the figure cannot be regarded as forming any real guide to the value of the mansion at the date of the conveyance. The sub-sales made by the plaintiffs yielded them a profit.

In July, 1946, the underwriters were informed of the interest of the plaintiff in the policy, and later in 1946 the underwriters agreed with the marquis and with the plaintiff, Mr. Elcock, that the policy should be extended until the date of completion of the purchase. There is no doubt that the plaintiff, Mr. Elcock, was interested in the policy as agent and trustee for the plaintiff company, and that in respect of the mansion, the plaintiff, Mr. Elcock, continued to be so interested until after the date of the fire. The defendant does not dispute liability under the policy, but he challenges both the basis on which quantification of the amount of the claim is made and also the valuations asserted by the plaintiffs. The competing submissions as to valuation, both in regard to questions of law and in regard to questions of fact, resulted in the putting forward of various figures involving wide ranges of separation between them. Witnesses who gave evidence as to values recorded opinions which considerably diverged.

[His Lordship reviewed the facts of the case and the evidence of value, and found that the reasonable value before the fire to the plaintiffs of the mansion together with 104 acres was £28,400, and that a reasonable division of this figure was made if £18,000 were allowed for the mansion and £10,400 for the remainder comprising the 104 acres. His Lordship continued :] In my judgment, the value of the mansion with the 104 acres after the fire was £23,000. The appropriate division of this figure is made if £12,600 be allowed for the mansion and £10,400 (the same figure as before) be allowed for the remainder comprising the 104 acres. The result is that, in my judgment, the mansion was of a value of £18,000 before the fire, and of a value of £12,600 after the fire. The mansion should for this purpose be regarded as being the entirety comprising items 1, 2, 3, 4 and 5 of the schedule to the policy of insurance.

Counsel for the plaintiffs presented alternative formulations of claim. In the first place, he submitted that the plaintiffs were entitled to recover the difference between the amount of £106,850 and whatever amount was found by the court to represent the value of the mansion after the fire. Alternatively, he submitted that the actual value of the mansion before the fire should be assessed and also the actual value after the fire, and that the percentage of depreciation should then be applied to the agreed or conventional value of £106,850, so as to produce a resulting figure which would be the amount recoverable. As a further possible method of claiming, he submitted, alternatively, that the plaintiffs were entitled to recover a sum representing the cost of reinstatement of the mansion, but he did not put forward this basis very strongly. The main submission of counsel for the defendant was that the principles which would apply if there were a claim under a valued policy of marine insurance and if a ship which was insured was damaged were principles that could and should be applied in adjudicating on the present claim. He submitted that the interpretation of s. 69 (3) of the Marine Insurance Act, 1906, was that, if a ship covered by a valued policy was damaged but not lost, and if it was not repaired, recovery under the policy should be limited to a sum representing the actual depreciation in value caused by the casualty. As an alternative submission he contended that recovery should be limited to the percentage of the agreed value of £106,850 which the cost of reinstatement represented of the cost at about the date of the fire of the construction of a new mansion. Thus he contended that the cost of reinstatement, *i.e.*, £40,252, represented 19.635 per cent. of £205,000, *i.e.*, the cost at about the date of the fire of the construction of a new mansion similar to the one that existed. This alternative contention, therefore, was that the sum to be awarded should be limited to 19.635 per cent. of £106,850. Counsel for the plaintiffs submitted that there is no reason for taking the analogy of the rules governing a policy on a ship rather than the rules relating to goods, and he referred to the reasoning of Lord Mansfield in *Lewis* v. *Rucker* (1). Alternatively, he submitted that, if, contrary to his contention, s. 69 (3) of the Marine Insurance Act, 1906, could be regarded as directing the way to principles applicable in this case, such section ought not to be regarded without reference also to s. 27 (3) of that Act.

I pass now to consider what is the basis on which the claim should be allowed. When parties have agreed on a valuation, then, in the absence of fraud or of circumstances invalidating their agreement, they have made an arrangement by which, for better or for worse, they are bound. As ATKIN, L.J., said (126 L.T. 444) in *City Tailors, Ltd.* v. *Evans* (2) :

> "... in a valued policy, what is valued is the subject-matter of the insurance, and not the amount of the loss."

He pointed out that in marine insurance the position is made clear by the Marine Insurance Act, 1906, s. 27 (2) and (3), which read :

> " (2) A valued policy is a policy which specifies the agreed value of the subject-matter insured. (3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial."

It was not in dispute between the parties that the policy in this case is properly to be regarded as a valued policy. When losses occur after parties to contracts of insurance have agreed on values, then in some cases advantage may occur to the assured while in others advantage may occur to the insurer : see *North of England Iron Steamship Insurance Assocn.* v. *Armstrong* (3). In *Irving* v. *Manning* (4) in the House of Lords, the assistance of the judges was sought and a question was put to them on which their answer was desired after the arguments addressed at their Lordships' Bar were heard. PATTESON, J., who, in the absence of PARKE and ALDERSON, BB., stated the answer of the judges, said in the course of the opinion (1 H.L. Cas. 305) and in reference to a valued policy on a ship :

> " By the terms of it, the ship, etc., for so much as concerns the assured, by agreement between the assured and assurers, are and shall be rated and valued at £17,500, and the question turns on the meaning of these words. Do they, as contended for by the plaintiff in error, amount to an agreement that for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired ? Or do they mean only, that for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to avoid disputes as to the *quantum* of the assured's interest ? We are all of opinion that the latter is the true meaning ; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies."

At the end of the opinion, PATTESON, J., said (*ibid.*, 307) :

> " A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify."

Counsel for the defendant did not dispute that, if the mansion had been entirely destroyed by fire, the agreed valuation would become the measure of the indemnity to be paid by underwriters, but he argued that, as the mansion was only damaged, the agreed valuation should not enter into the assessment of the amount payable by underwriters. His argument was in the main based on a contention that, under the Marine Insurance Act, 1906, s. 69 (3), the amount payable under a policy of marine insurance, where a ship is damaged and has not been repaired or sold in her damaged state, would be the amount of the depreciation. Section 69 (3) is :

> "Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above."

Counsel for the defendant contrasted this sub-section with s. 71 (3)—in reference to goods—which reads :

> "Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value."

Counsel for the defendant submitted that, as there is no express mention of valued policies in s. 69 (3), the result should follow that, in the case of a partial loss of a ship, payment under a policy of insurance should be made without regard to any agreed valuation. He submitted that a fire policy, being a contract of indemnity closely resembling a marine policy, should be similarly construed and he relied on passages in the judgments of the Court of Appeal in *Castellain* v. *Preston* (5) in support of his contention that the two types of policy should be similarly regarded.

In dealing with these contentions, as counsel for the plaintiffs pointed out, it is first to be observed that the statutory provisions of the Marine Insurance Act, 1906, do not apply to this case, but, if those provisions are to be looked at in order to seek guidance on principle, then I am not prepared to accept the validity of the contentions of counsel for the defendant. Section 69 (3) of the Act uses the words "is entitled to be indemnified for the reasonable depreciation." Those words do not fix the measure of such indemnity. They do not lay it down that the parties' agreed valuation is to be ignored. They certainly do not provide that s. 27 (3) of the Act is to be disregarded. Indemnification for reasonable depreciation must, in my judgment, take into account any agreed valuation. Such agreed valuation is the *corpus* out of which depreciation takes place and by reference to which the depreciation must be measured. Furthermore, in my judgment, there is nothing in s. 69 (3) which is inconsistent with, or which overrides, what was laid down in *Pitman* v. *Universal Marine Insurance Co.* (6) and *Balmoral Steamship Co.* v. *Marten* (7). In *Pitman* v. *Universal Marine Insurance Co.* (6) the view of LINDLEY, J., and of the majority in the Court of Appeal was that, if the owner of a ship which is injured by perils insured against does not repair the ship but sells her during the continuance of the risk, he can recover from underwriters for the depreciation in value of the ship and can arrive at the measure of the underwriters' liability by applying the proportion of depreciation caused by the casualty to the value as agreed in the policy. In his speech in the *Balmoral* case (7) LORD LINDLEY said ([1902] A.C. 521):

> "The notion prevalent at one time, and supported by the high authority of Mr. Benecke, that although the valuation in a policy is conclusive in the case of a total loss, yet that in the case of a partial loss the valuation may be opened, has long been exploded . . ."

After referring to certain textbooks, he continued (*ibid.*) :

> "There are numerous decisions showing this to be the case in valued policies on goods and freight (the most recent being *The Main* (8)), and I am unable to discover any reason for applying to ships a doctrine repudiated as unsound when applied to goods or freight. At the same time, I have not discovered any direct decision on this point. The principle that a valuation in a policy on ships is to be regarded in cases of partial loss was

> assumed to be correct in *Pitman* v. *Universal Marine Insurance Co.* (6), and was not questioned on appeal. The owners, however, contend that the underwriters have no concern with the mode in which the amounts payable for losses insured against are arrived at. The owners say they are fully insured up to a certain limit, and that if that limit is not exceeded all losses insured against must be fully paid. This, my Lords, appears to me to ignore the difference between valued policies, as understood in this country, and open policies, and to be erroneous according to English law."

There appears to be no decided case which affords conclusive authority in regard to the issues raised in this action. Some guidance in principle can, however, be derived from the decisions in cases where insured ships have sustained partial loss. In my judgment, on the facts of the present case the assured are entitled to be indemnified in respect of the depreciation which was caused by the fire, and, in quantifying such depreciation, the insurable value of the mansion as agreed by the parties cannot be set aside and disregarded. I observe that, at the end of the schedule to the policy, in the words by which such agreement as to value is expressed, it is stipulated that in the event of loss the property would be assumed to be of the value recorded and would be assessed accordingly. In the body of the policy the words used are " to insure from loss or damage." I have considered whether any significance is to be attached to the fact of the use only of the word " loss " at the end of the schedule and whether it could be argued that the agreement as to value was only to apply in the event of the destruction or loss of an item as opposed to damage occurring to it. No such point was, however, taken or argued and I cannot imagine that any significance attaches to the use only of the word " loss." It would be strange and unnatural if an agreed value were to apply only in the event of complete destruction and not in the event of partial destruction. The respective words " loss " and " damage," as used in the policy, seem to be synonymous. It would not seem to be the case that the word " loss " in only referable to complete destruction. Apart from this, however, the opening words of the provision, *viz.*, the words " The sum set opposite each item in this specification has been accepted by the underwriters and the assured as being the true value of the property insured," appear to contain agreement as to value irrespective of the meaning of the word " loss " which is later used.

Although in the case of item No. 1 in the schedule to the insurance policy, *viz.*, the mansion, the actual value is shown to have been far less than the agreed value, it must have been the case that the agreed values of other items were far below their actual values in 1947. Thus, without specifying any particular item, a house whose agreed valuation was £2,000 may very well in 1947 have actually been worth £6,000. If such a house had been totally destroyed, underwriters would only have been liable to pay £2,000. If damage by fire resulted in a depreciation in actual value from £6,000 to £2,000, and if actual repairs were not effected, underwriters would, I imagine, have contended that they were only liable to pay two-thirds of £2,000, whereas, on the contention of counsel for the defendant, they would be liable to pay more. If repairs are actually done, and done in a reasonable way and at a reasonable cost, it may be that underwriters are liable to pay the cost of them up to the extent of their liability under the policy. Further, it may be that, if repairs are not done, but could be done at a figure representing less than the underwriters' liability on the basis of depreciation, then underwriters could limit their liability to the lower figure. Thus, if the agreed valuation of a house was £2,000 and its actual value was £1,000, and if it was damaged so that its actual value became £500 but it could be repaired for £500, it may be that the underwriters' liability would be £500. As the questions which I have posed do not call for present determination, I express no final opinion in regard to them, but I have considered it desirable to have them in mind when examining and testing the submissions made to me. It may well be that, if £43,252 had, in fact, been expended in repairing the damage done, underwriters would have been liable to pay this amount, subject only to the application of the fraction prescribed by the policy. It is not, however, necessary to express any concluded view in regard to this.

The result is that, in my judgment, the percentage of actual depreciation resulting from the fire should be applied to the agreed values as set out in the policy so as to arrive at the amount recoverable. On my findings, the mansion was worth £18,000 before the fire and £12,600 after the fire. There was, therefore, a depreciation of £5,400 in £18,000, or a depreciation of 3 in 10. By "the mansion" I mean the entirety described in items 1 to 5 of the schedule, which together had an agreed value of £106,850. The loss or damage which occurred to the plaintiffs was, therefore, 3/10ths of such figure, namely £32,055. Underwriters are, therefore, liable to pay an amount representing the stated fraction of this sum and the defendant will be liable for his proportion. There will be judgment accordingly.

[His Lordship then considered a claim by the plaintiffs for interest and decided not to order the payment of interest.]

Judgment for the plaintiffs with costs.

Solicitors: *Upton, Britton & Lumb* (for the plaintiffs); *Chamberlain & Co.* (for the defendant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Re DUNN (a Bankrupt). *Ex parte* OFFICIAL RECEIVER *v.* DUNN.

[Court of Appeal (Sir Raymond Evershed, M.R., Somervell and Denning, L.JJ.), July 12, 13, 1949.]

Bankruptcy—Adjudication—Debtor's petition—Doubt as to enforceability of creditor's claim—Bankruptcy Act, 1914 (*c.* 59), *s.* 6 (1).

The Bankruptcy Act, 1914, s. 6 (1) provides: "A debtor's petition shall allege that the debtor is unable to pay his debts . . . and the court shall thereupon make a receiving order." By s. 29 (1): "Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication."

A bookmaker claimed from a debtor a sum of £1,610 arising out of gaming transactions. The debtor disputed the claim and agreed that, in consideration of the bookmaker taking no proceedings against him, the dispute should be referred for adjudication to the Northern Bookmakers' Protection Association, by whose decision the debtor agreed to be bound. The association decided that the debtor should pay the sum claimed, and, the debtor having failed to pay, the bookmaker issued a writ for £1,610, contending that the case was not within the ambit of the Gaming Act, 1845, but that, in view of the submission of the dispute to the association and the latter's decision, there was a binding contract to pay. The debtor filed a petition in bankruptcy and was adjudicated bankrupt. There were no other debts. After the making of the receiving order the bookmaker intimated that he would not prove in the bankruptcy, the debt, as a gaming debt, not being provable, but he declined to release the debtor from the alleged liability. The official receiver thereupon applied that the adjudication might be annulled on the ground that the debtor ought not to have been adjudged bankrupt since, when he filed his petition, he was not unable to pay any legally enforceable debt within s. 6 (1).

HELD: (i) in deciding whether the order ought to have been made the court must have regard to the state of affairs existing at the date of the order; in so doing it was entitled to take into account facts which appeared from evidence subsequently filed; but it was not entitled to take into account facts which had occurred since the date of the order.

(ii) as it was not shown that the writ for the sum claimed must have been set aside as disclosing no cause of action, the court was not entitled to say that the order ought not to have been made.

Per DENNING, L.J.: I do not think that the enforceability of the debt is the test. Even if the debt was unenforceable, nevertheless, if the debtor honestly believed on reasonable grounds that he was unable to pay his debts the adjudication was good and should not be annulled *ab initio.*

[AS TO ANNULMENT OF ADJUDICATION ORDER, see HALSBURY, Hailsham Edn., Vol. 2, pp. 127-131, paras. 156-165; and FOR CASES, see DIGEST, Vol. 4, pp. 178-195, Nos. *1658-1795.*]

Cases referred to:

(1) *Whiteman* v. *Newey*, (1912), 28 T.L.R. 240; 25 Digest 402, *64.*

(2) *Ex p. Painter, Re Painter*, [1895] 1 Q.B. 85; 64 L.J.Q.B. 22; 71 L.T. 581; 4 Digest 133, *1223.*

(3) *Hyams* v. *Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 25 Digest 401, *58.*

APPEAL by the official receiver from a decision of the Divisional Court sitting in Bankruptcy (ROMER and JENKINS, JJ.), dated May 9, 1949, refusing an application by the official receiver to annul the bankruptcy of the debtor on the ground that the debtor ought not to have been adjudged bankrupt. The Court of Appeal now dismissed the appeal. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

Aronson, K.C., for the official receiver as trustee in bankruptcy.
Lodge for the debtor.
Maurice Berkeley for the Commissioners of Inland Revenue.

SIR RAYMOND EVERSHED, M.R.: The debtor, Harry Dunn, embarked on some speculative dealings with bookmakers, as a result of which a claim was made against him by one, Pat Clarke, for the sum of £1,610. A letter dated Nov. 26, 1947, which the debtor signed and was addressed to Mr. Clarke, was in these terms:

> "In consideration of your refraining from taking any proceedings against me either in the police court or county court, I the undersigned hereby agree that the dispute between us shall be adjudicated upon by the Bookmakers' Protection Association, and I hereby further agree that I will be bound by their decision. It is further agreed that pending such decision I shall not be posted as a defaulter."

The evidence does not disclose the exact nature of the dispute alluded to in the letter, but it is clear that the Northern Bookmakers' Protection Association did purport to adjudicate between Mr. Clarke and the debtor and the effect of their adjudication was that the debtor should pay Mr. Clarke the sum of £1,610. On Aug. 31, 1948, a writ was issued in the High Court, Middlesbrough District Registry, Mr. Clarke being the plaintiff and the debtor being the defendant. The statement of claim on the writ was as follows:

> "The plaintiff's claim is for £1,610 as being payable under an agreement made by the defendant with him. Particulars. 1. As the result of betting transactions between the plaintiff and defendant the defendant owed to the plaintiff the sum of £1,610. 2. On Nov. 26, 1947, the defendant by letter addressed to the plaintiff and in consideration of the plaintiff refraining from taking any proceedings against him agreed that the matter

> in dispute should be adjudicated upon by the Bookmakers' Protection Association and agreed to be bound by their decision, and it was part of the said agreement that the defendant would not be posted as a defaulter. 3. The Northern Bookmakers' Protection Association, Ltd., adjudicated on the matter in dispute and found that the defendant should pay to the plaintiff the sum of £1,610 and the decision was communicated to the defendant." A

Then it was alleged that the defendant had failed to pay. On Sept. 13, 1948, the debtor, having had that writ served on him, and having assets which consisted of a life policy for £50, and £10 in cash, filed his own petition in bankruptcy pursuant to s. 6 of the Bankruptcy Act, 1914. By s. 6 (1) it is provided that "A debtor's petition shall allege that the debtor is unable to pay his debts," and the petition did so allege in those terms without further particulars, that B being the normal procedure and practice under the section. By the section the effect of the presentation of the petition was that it was deemed an act of bankruptcy, and the sub-section goes on to provide that "the court shall thereupon make a receiving order." The court did so, and adjudicated the debtor a bankrupt on the same day.

The present application, which is by way of appeal from the Divisional C Court in Bankruptcy, is that the court should annul the bankruptcy pursuant to s. 29 of the Act of 1914. Sub-section (1) of that section provides:

> "Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the D application of any person interested, by order annul the adjudication."

It is conceded by counsel for the official receiver, the trustee in bankruptcy, that this case must stand or fall under the first limb of the sub-section, in other words, this is a case in which, as he says, the debtor ought not to have been adjudged bankrupt. It is to be observed that the power of the court in s. 29 (1) is discretionary—"the court may . . . by order annul the adjudication." E The registrar declined to annul it, and the same view was taken by ROMER and JENKINS, JJ., sitting as a Divisional Court. This court in any case would be reluctant to interfere with the exercise of the discretion of two courts below, but it is claimed that the discretion was exercised in misapprehension of the true inferences to be drawn in this case and so resulted in the incorrect application of the principles which should be applied under s. 29. It is said F that, unless it can be shown that when the debtor presented the petition he truly alleged that he was unable to pay his debts, the order should not have been made. I think the official receiver must go so far as to say that the court, in the circumstances of this case, must annul the bankruptcy.

The first point which leaps to the eye is this. Having regard to the circumstances in which Mr. Clarke became an alleged creditor of the debtor, is it G true to say that the debtor was unable to pay his debts since, as appears from the statement which he himself filed of his affairs, the only debt which he owed was this sum of £1,610? The point made by counsel for the official receiver is that the £1,610 was purely a gaming debt and would have been irrecoverable in any court of law. He has, therefore, invited us to say that, since the only debt on the footing of which the order was made was a gaming H debt, and, therefore, not a debt at all, the whole foundation for the exercise of the court's powers under s. 6 is removed, and no order for adjudication should have been made.

I have read the writ issued by Mr. Clarke in full because it has been necessary to consider what on the face of the writ is the claim. If the matter stood as stated in para. 1 of the particulars alone, it would manifestly follow that there was here no legally enforceable debt, but merely that, as a result of betting transactions, the defendant owed £1,610. Paragraph 2, however, introduces into the particulars the letter which I have earlier read. That letter, undoubtedly, purported to create a new and valid consideration for a promise on the part of the debtor to pay what, if anything, the Bookmakers' Protection Association should decide he, the debtor, owed to Mr. Clarke. No doubt, therefore, the view was entertained by Mr. Clarke and his advisers that, as the result of that letter, the case was taken out of the ambit of the Gaming Act, 1845, and the debt became enforceable. That view was expressly stated by them in a letter addressed to the official receiver on Oct. 14, 1948, in which they said : " We contend there is a binding contract to pay the amount of this claim," and referred to *Whiteman* v. *Newey* (1), a decision of the Divisional Court in 1912. Whether or not that contention is right seems to me to be a matter which, at any rate, requires some investigation. It is to be observed that one party to the alleged debt, namely, the creditor, Mr. Clarke, is not now before the court. If it was so clear on the face of the writ that we could say that there is manifestly no debt which is enforceable and the writ is really a piece of waste paper, it might be right for the court to say : " There never was a debt and the order which was made on Sept. 13, 1948, adjudicating the debtor a bankrupt ought not to have been made because the statement that he could not pay his debts has been shown to be inaccurate." That, however, is going much further, as it seems to me, that we are entitled to go. However doubtful the success of Mr. Clarke's claim might be it is a matter requiring some argument. It is understandable that on the issue of the writ the debtor might well have been advised that the case was not within the ambit of the Gaming Act, 1845. He might have been seriously perturbed about what he ought to do. To plead the Gaming Act and fight the action was obviously a matter causing expense beyond the limits of his financial resources.

It seems to me, therefore, that the learned judges in the court below were right in saying that on the face of that writ they could not say that there was here, beyond all doubt, no debt at all. In a passage much relied on in the judgment of ROMER, J., he said this :

> " As far as I can see, the matter really depends on whether, at the date when the receiving order was made and the adjudication was made, it can truly be said that the debtor ought not to have been adjudged bankrupt. It seems to me one has to examine the position as it then appeared to be and ascertain and determine whether that position was one under which a receiving order and adjudication could properly be made or could not properly be made. I do not think one would be very materially assisted in that enquiry by anything that has transpired since. At the time when the debtor filed his petition and the order in bankruptcy was made, the debtor had received the writ—he got it some weeks previously—the creditor showed every intention of pressing his claim, and the debtor knew that he could not pay. I am not clear that on the face of this specially endorsed writ there was no case for the debtor to answer."

He gives some reasons for that and concludes this part of his judgment by saying :

> " All that I think it is necessary to decide in this case is whether or not it was plain at the date when the debtor filed the petition that he was under no present or prospective liability to the plaintiff in this case, and I am unable to say that it is plain that he was not."

I entirely agree with ROMER, J., as did JENKINS, J., that here, to use his words, it was " not clear that on the face of this specially endorsed writ there was no case for the debtor to answer." I think, if I may venture a criticism of the language used, it is, perhaps, not entirely correct to say that the matter ought to be adjudged in the light of the facts as they appeared to be at the date when the receiving order was made, namely, Sept. 13, 1948. I think counsel for the official receiver is right in saying that, in judging whether the order ought to have been made, the court is entitled to have regard to the actual state of affairs at the date of the order, which may appear from evidence subsequently filed, and certainly would not appear from the bare statement on the formal petition which alone was before the court when the order was made. I do not think, however, that one is entitled, in determining whether the order ought to have been made under the first limb of the sub-section, to take into account facts which have occurred after the date of the order. I say that because after the order had been made a communication was received from the solicitors to the bookmaker, Mr. Clarke, to the effect that they did not propose to prove in the bankruptcy. They have even gone so far, according to the evidence, as to intimate that they appreciate it would not be a provable debt, though they have expressly declined to release the debtor from it. The fact that a creditor after adjudication may release the debt could not, I think, *prima facie* affect the question whether the order ought, in the first instance, properly to have been made. I will go a little further and say that I am not satisfied that it must be affirmatively shown that there were at the date of the bankruptcy debts which were enforceable and from which there was no escape. I think on the facts here shown, when the debtor was faced with the claim on the writ for £1,610, and when it is not shown—as I think it is not shown—that that writ must have been set aside as being mere waste paper, then the court is not entitled to say that this order ought not to have been made.

I venture to reinforce that by a short reference to one of the cases cited, namely, *Ex parte Painter, Re Painter* (2). It is unnecessary to refer to the facts, but I think it clearly emerges from that case that the circumstance that the debtor has filed his petition in order to protect himself from evils which he might otherwise suffer and not with any benevolent intention of benefiting his creditors by securing a fair distribution of assets among his creditors is no reason why an order should not be made. It is to be observed that, should this order be annulled, any outstanding claim which existed at the date of the order and which had not been paid off in the meantime would remain alive. It seems to me that nothing has occurred which would prevent Mr. Clarke then proceeding on his writ. Certainly the fact that this court (in Mr. Clarke's absence) took the view that his claim was unenforceable would not prevent him. The debtor might, if he defended the action, raise the appropriate defences and dispose of the claim, but he might have to fight at considerable cost to himself. There is nothing, I think, in the policy of the Act of 1914 which disentitles a debtor to say : " I will go bankrupt and protect myself from these possibilities and get rid, whether or not they be provable debts, of any claims which are made against me." In my view, there is no ground for saying that that attitude amounts to an abuse of the process of the court and no ground for saying that, without amounting to an abuse of the process of the court, it can be treated as sufficient reason for the court exercising its powers under s. 29 and annulling the order. For these reasons, which I have added to what was said in the court below, and with all respect to the forcible argument of counsel for the official receiver, I conclude that this appeal should fail.

SOMERVELL, L.J. : I agree.

DENNING, L.J. : Counsel for the official receiver urged strongly that here there was no debt which was enforceable in the courts, and that on that ground the adjudication should be annulled. He said it would be a misuse of bankruptcy proceedings if they were allowed to be used in cases where there was no enforceable debt. It is probably correct to say that here there was no enforceable debt. If the matter was fully investigated it would probably be found that the bookmaker's claim was not enforceable, for, assuming that *Hyams* v. *Stuart King* (3) is still good law,* there was no fresh and real consideration such as would fall within it. I do not think, however, that the enforceability of the debt is the test. Even if the debt was unenforceable, nevertheless if the debtor honestly believed on reasonable grounds "that he was unable to pay his debts" the adjudication was good and should not be annulled *ab initio*. The debtor was not versed in the nice distinctions that have been drawn about *Hyams* v. *Stuart King* (3), and I do not suppose his solicitor was. Mr. Clarke's solicitor relied on a case which gave considerable colour to the claim, and the proper inference from the evidence is that the debtor honestly believed on reasonable grounds that this debt was enforceable at law, and he knew he could not pay it. In that belief he properly filed his petition and was properly adjudged a bankrupt. In those circumstances it is not a case which falls within s. 29 of the Act of 1914. It cannot be said that he ought not to have been adjudged bankrupt. It now turns out, indeed, that there are no debts, but that only means that the bankruptcy proceedings will have to be wound up. This will have the result that the debtor will get his discharge free from any possibility of a claim by the bookmaker. If the bankruptcy were annulled it would mean that a claim could be still made against him. I agree the appeal should be dismissed.

Appeal dismissed. No order as to costs.

Solicitors: *The Solicitor, Board of Trade* (for the official receiver); *Hyde, Mahon & Pascall*, agents for *J. D. Soden-Bird*, Newcastle-on-Tyne (for the debtor); *The Solicitor, Inland Revenue* (for the Commissioners of Inland Revenue).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

THORPE *v.* FASEY.

[CHANCERY DIVISION (Wynn-Parry, J.), July 6, 7, 8, 1949.]

Sale of Land—Contract—Breach—Damages—Repudiation—Evidence—Rescission—Payment of purchase price by instalments—Conveyance of portion of land as each instalment paid—Failure to pay instalments.

By an agreement dated Aug. 3, 1937, the vendor (representing a syndicate) agreed to sell and the purchaser to buy certain land of an area of 157 acres for £38,000, of which £1,400 was to be paid as a deposit on the signing of the agreement. The agreement provided by cl. 2 that, first, as to the land edged pink on the plan numbered 2 annexed to the agreement the purchaser was to pay the vendor £12,600 as further part of the purchase money on or before Oct. 3, 1937. Secondly, cl. 2 provided that, as to the land edged green on plan No. 2, on or before Oct. 3, 1939, the purchaser should pay the vendor £8,000 as further part of the purchase money. Thirdly, as to the land edged yellow on the said plan, on or before Oct. 3, 1940, a further sum of £8,000 as further part of the purchase money was to be paid; and, fourthly, as to the land edged blue on the same plan, on or before Oct. 3, 1941, a further sum of £8,000 representing the balance of the purchase money should be paid. Each of the plots delineated on the plan was of about 40 acres. It was provided that on each payment of the money at the time appointed the vendor would execute and hand to the purchaser a conveyance of the land in respect of which the payment should be made and would give to the purchaser vacant possession of the land. There was a provision enabling the purchaser to complete his purchase of a portion of the land prior to the date applicable to that portion, and providing for an apportionment of the purchase money. If the purchaser should make default in payment of any of the instalments or in payment of any interest under the agreement for 21 days after it had become due, the whole of the unpaid instalments of the purchase price with the interest thereon was to become immediately due and payable. Clause 4 provided for the payment of interest from Oct. 3, 1937, on such part of the purchase money as was outstanding. Clause 5 provided that if and whenever the purchaser should make default in the payment of the balance of his purchase money or any interest for a further period of 21 days from the date when such balance and interest should have become immediately due and payable under the foregoing provisions, or should fail to perform any other condition or provision of the agreement, then, if the purchaser failed to remedy the breach within 21 days after a notice from the vendor requiring him to do so had been served, the deposit was to be forfeited, and the vendor was to be at liberty (without prejudice to any other remedies which he might have) to re-sell the property and to re-enter and take possession.

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* *Hyams* v. *Stuart King* was overruled by the House of Lords in *Hill* v. *William Hill (Park Lane), Ltd.* (July 29, 1949), reported *post*.

The purchaser paid the deposit of £1,400 and the further sum of £12,600, and the land edged pink on the plan was conveyed to him by a conveyance dated Oct. 27, 1937. He began to develop the land, but, owing to competition and the international situation, he found himself in financial difficulties and was unable to pay the first of the three instalments of £8,000. Owing to the war and restrictions on building, he made no further payment. The vendor brought no pressure to bear on the purchaser during the war, when the property had been occupied, and latterly requisitioned, by the military authorities, but in correspondence between May, 1945, and March, 1947, the vendor pressed for measures towards completion to be taken, although in each letter it was suggested by him that the purchaser should either complete or put forward other proposals, short of completion, acceptable to the vendor, who would treat them as a variation of the contract. Early in 1946 the purchaser received notice that the local authority had applied to the Minister of Town and Country Planning for consent to the revocation of the interim development permission granted to the purchaser in respect of the land. On Mar. 13, 1947, the vendor wrote suggesting a meeting and asking for information as to the purchaser's proposals " for the purpose of effecting an early completion of the purchase." The purchaser replied that he had not yet heard from the Minister the result of the application of the local authority, and that as soon as he did so he would attend a meeting. On July 1, 1947, the vendor notified the purchaser that he had instituted the present proceedings for damages for breach of the agreement of Aug. 3, 1937, and for rescission. In February, 1948, the Minister of Town and Country Planning authorised the revocation of the interim development permission. The vendor claimed damages for breach of contract, or rescission of the contract. A claim by him for specific performance was not pursued.

Held : (i) the correspondence did not disclose an intention on the purchaser's part to abandon the contract, nor did it indicate that any sufficient notice before action brought had been given to the purchaser by the vendor that, if the purchase money were not paid within a certain time, the contract must be considered at an end, and, therefore, there had been no repudiation of the agreement by the purchaser which could be accepted by the vendor, whose claim for damages must, therefore, fail.

Dictum of SIR RICHARD WEBSTER, M.R., in *Cornwall* v. *Henson* ([1900] 2 Ch. 302) *applied.*

(ii) on the true construction of the agreement it was a single contract for the purchase of one lot for a certain sum of money and not a series of contracts for four separate lots, and, therefore, as that part of the agreement which concerned the land edged pink on the plan had been superseded by the conveyance of Oct. 27, 1937, restoration of the *status quo* was impossible, and rescission must be refused.

Hunt v. *Silk* (1804) (5 East 448) and *Sheffield Nickel Co.* v. *Unwin* (1877) (2 Q.B.D. 214), *applied.*

Per cur.: There is no good reason for a distinction, nor does there exist any distinction, between the nature of the repudiation which is required to constitute an anticipatory breach of contract and that which is required where the alleged breach occurs after the time for performance has arisen.

[AS TO RESCISSION OF A CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 181, 186, 187, 202-204, paras. 256, 263, 264, 281-284; and FOR CASES, see DIGEST, Vol. 12, pp. 338-347, Nos. *2830-2890*.]

Cases referred to:

(1) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*, (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 12 Digest 339, *2835*.

(2) *Freeth* v. *Burr*, (1874), L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 12 Digest 340, *2838*.

(3) *Cornwall* v. *Henson*, [1900] 2 Ch. 298; 69 L.J.Ch. 581; 82 L.T. 735; 12 Digest 344, *2872*.

(4) *Harold Wood Brick Co., Ltd.* v. *Ferris*, [1935] 2 K.B. 198; 104 L.J.K.B. 533; 153 L.T. 241; Digest Supp.

(5) *Hunt* v. *Silk*, (1804), 5 East 448; 2 Smith, K.B. 15; 12 Digest 553, *4597*.

(6) *Sheffield Nickel Co.* v. *Unwin*, (1877), 2 Q.B.D. 214; 46 L.J.Q.B. 299; 36 L.T. 246; 9 Digest 599, *3998*.

(7) *Clarke* v. *Dickson*, (1858), E.B. & E. 148; 27 L.J.Q.B. 233; 31 L.T.O.S. 97; 12 Digest 563, *4682*.

(8) *Mussen* v. *Van Diemen's Land Co.*, [1938] 1 All E.R. 210; [1938] Ch. 253; 107 L.J.Ch. 136; 158 L.T. 40; Digest Supp.

ACTION by a vendor for specific performance of an agreement dated Aug. 3, 1937, for the sale of certain freehold property forming part of a property known as Montreal Park, near Sevenoaks. The vendor also claimed damages in addition to specific performance. Alternatively damages for breach of contract were claimed, or, in further alternative, rescission of the agreement.

The purchaser admitted that he could not resist a claim for specific performance, but the vendor decided not to pursue that claim. The remaining claims were dismissed. The terms of the agreement and the facts relating thereto are set out in the headnote, and the remaining facts appear fully in the judgment.

Gray, K.C., and *Elverston* for the vendor.

R. W. Jennings, K.C., and *Hewins* for the purchaser.

WYNN-PARRY, J., stated the facts and continued: I now turn to the law. The action is curious in the respect that at the trial counsel for the vendor stated at an early stage that he did not propose to pursue the claim for a decree of specific performance for the reason that, as I think appears clearly on the correspondence and was affirmed clearly by the purchaser's evidence, any such decree would not bear fruit. On the other hand, counsel for the purchaser admitted that he was not in a position to resist a decree for specific performance and, were the vendor to press for it, he would have nothing to say in opposition. However, that remedy is not pressed for, and I need not say anything more about it.

The vendor has mainly pressed his claim for damages at law on the ground that the purchaser has broken the contract. It is not, of course, every breach of a contract that will give rise to damages, and as regards the damages which are asked for under this head the only breach that will support such a claim is a breach which amounts to a repudiation by the purchaser of the contract, the repudiation being accepted by the vendor. For that purpose I think it must be shown that an essential term of the contract has been broken. The term in question is the failure to complete. In equity that is a failure which is not necessarily fatal to the contract, for equity takes the view that failure to perform the contract on the day fixed is not a failure going to the root of the contract unless the parties have made time of the essence of the contract. At common law the position is somewhat different. In WILLIAMS ON VENDOR AND PURCHASER, 4th ed., vol. 2, p. 994, it is said : A B

> " A breach of contract may be committed, not only by the failure to perform some obligation under the contract at the time when it ought to be fulfilled, but also by the renunciation of performance of the contract ; and this may occur in two ways. If either party absolutely refuses, or if by his own act he makes it impossible for him to carry out his part of the agreement, the other is entitled at his election either to treat such renunciation of performance as a breach of contract, and at once to rescind or sue upon the contract accordingly, or else to treat the agreement as still subsisting, wait till the time is gone by for the renouncing party to perform the acts promised, and then sue him for the breach occasioned by such non-performance." C

I think it is clear from the language used in that passage that the first alternative, " to treat such renunciation of performance as a breach of contract, and at once to rescind or sue upon the contract accordingly" has reference to an anticipatory breach. It was thought to draw a distinction between the nature of the repudiation which is necessary to amount to an anticipatory breach and the nature of the repudiation which it would be sufficient to show in the case of a breach arising after the time for performance has arrived. D E

As regards anticipatory breach, it will be sufficient if I refer to *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1), a case of such a breach. LORD SELBORNE, L.C., there said (9 App. Cas. 438) :

> " Upon the other point, I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by LORD COLERIDGE, C.J., in *Freeth* v. *Burr* (2) which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other ; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part ; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here." F G H

Cornwall v. *Henson* (3) was not a case of anticipatory breach. In that case the defendant, in August, 1892, agreed to sell some land to the plaintiff for £150, of which £40 was paid at the time, and the balance was to be paid by twelve equal quarterly instalments of £9 3*s.* 4*d.* each. In case of default for thirty days in the payment of any instalment, the whole of the unpaid instalments were to become immediately due and payable and the vendor was to be at liberty to re-sell the land, retaining out of the proceeds of sale the unpaid instalments with interest and paying the balance to the purchaser. The purchaser went into possession under the contract, and retained possession for a considerable time, and, though generally in arrear with the instalments, he had by August, 1895, paid them all, except the last. The last instalment became due on Sept. 29, 1895, but it was never paid. Correspondence took place in which the vendor called on the purchaser to pay, but he never gave him notice that, if payment was not made within a specified time, he should treat the contract as abandoned. In October, 1896, the purchaser went away, and the vendor was unable to find him. The vendor resumed possession of the land and endeavoured to sell it, but without success, and in March, 1898, he agreed to let it for three years to a tenant who took possession. In June, 1898, the purchaser re-appeared, and wrote to the vendor that he was prepared to pay the final instalment. In July, 1898, the purchaser commenced an action against the vendor, claiming specific performance of the agreement of August, 1892, and damages in lieu of or in addition to specific performance. It was held that the purchaser's conduct did not amount to a repudiation of his contract and that the vendor was not justified in treating the contract as abandoned, and that, though the purchaser was not entitled to specific performance of his contract, he was entitled to damages, which the court assessed at £125. There was an argument on a particular clause of the contract, and having referred to that, SIR RICHARD WEBSTER, M.R., said ([1900] 2 Ch. 302) :

> "It is not, I think, necessary to decide whether that contention is well founded, for in the view which I take of the facts the vendor was not justified in treating the purchaser as having abandoned his contract. I think it is plain that the vendor never brought to the mind of the purchaser, so long as they were in communication with each other, that if he did not pay the last instalment the vendor would treat the contract as abandoned."

Having reviewed the evidence, the learned MASTER OF THE ROLLS continued :

> "I cannot find any intention on the part of the plaintiff to abandon the contract, or that any sufficient notice was given to him by the vendor that, if the last instalment was not paid within a specified time, the contract must be considered as at an end."

Finally, on this aspect of the matter, I must refer to *Harold Wood Brick Co., Ltd.* v. *Ferris* (4), which did not involve any consideration of an anticipatory breach. It was a case in which the parties had made time of the essence of the contract. It concerned an agreement to purchase certain freehold land and buildings together with the machinery, plant and utensils thereon, and cl. 15, the material clause, provided for completion on Aug. 31, 1933, with an option to the defendant to complete earlier at a less price, and it proceeded :

> "If for any reason the actual completion of the purchase is delayed beyond Aug. 31, 1933, then nevertheless on that date the purchase money . . . shall be placed on deposit . . . but the purchase shall in any event actually be completed not later than Sept. 15, 1933 . . ."

The court treated that clause as making completion of the purchase on Sept. 15, 1933, of the essence of the contract. The court affirmed the judgment of SWIFT, J., and GREER, L.J., said ([1935] 2 K.B. 205) :

> "For these reasons, SWIFT, J., was right in the conclusion he arrived at, and it is not necessary to enter into the question whether if time had not been of the essence of the contract the conduct of the purchaser when pressed to keep himself up to date would have been sufficient to indicate that he would not be able to perform his contract. If one party indicates by his conduct that he is unable or unwilling, whatever time he is given, to perform his contract, that is sufficient to justify an acceptance of the re-

pudiation and to entitle the other party to damages, and I base my judgment on the fact that a term which was of the essence of the contract has been broken by the appellant and therefore he is liable for the damages given against him.

ROCHE, L.J., said (*ibid.*, 208) :

> "... I agree that the purchaser, the defendant, had by Nov. 13 failed to complete the purchase and had made it plain that he was unable or unwilling to do so then or at all."

In my judgment, when one considers these cases there is no good reason for a distinction, nor, in my view, does there exist any distinction, between the nature of the repudiation which is required to constitute an anticipatory breach and that which is required where the alleged breach occurs after the time for performance has arisen. What, then, is the result of that view on the present case ? It is true that in the present case the vendor did not, as he could have done, make time of the essence of the contract. That is not fatal to his case, if he can demonstrate that the evidence discloses that the purchaser is unable or unwilling, whatever time is given, to perform his contract, or, adopting the words of ROCHE, L.J., that he is unable or unwilling to do so at all. Therefore, the matter comes down to the somewhat fine question what is the true view of the relevant letters in the correspondence, read in the light of those authorities. Before the issue of the writ there had been a certain amount of pressure brought by the vendor on the purchaser to complete, but on each occasion there was the alternative presented to the purchaser either to complete or to put forward other proposals which, short of completion, " we shall treat as satisfactory and which if accepted will amount in effect to a variation of the contract." Then come these two letters—that on Mar. 13, 1947, where the vendor's solicitors still ask that there should be a meeting for the purpose of discussing proposals, and the reply stating the willingness of the purchaser and his advisers to arrange a meeting, but desiring to defer that meeting until the decision of the Minister of Town and Country Planning should be known. In those circumstances it appears to me that the words of the MASTER OF THE ROLLS in *Cornwall* v. *Henson* (3) apply and that it is not possible, on a fair reading of this correspondence, to find any intention on the part of the purchaser to abandon the contract or that any sufficient notice before action brought was given to him by the vendor that, if the outstanding purchase money was not paid within a specified time, the contract must be considered at an end. Therefore, I find that there was not a repudiation of the contract by the purchaser and, therefore, no repudiation which could be and was accepted by the plaintiff. In my judgment, therefore, the claim of the vendor for damages at common law fails.

I must then consider the question of the alternative claim for rescission. On this aspect of the matter there is surprisingly little authority. I was referred to *Hunt* v. *Silk* (5), the side-note to which is :

> " A agreed, in consideration of £10 to let a house to B, which A was to repair and execute a lease of within ten days, but B was to have immediate possession, and in consideration of the aforesaid was to execute a counterpart and pay the rent. B took possession and paid the £10 immediately, but A neglected to execute the lease and make the repairs beyond the period of the ten days, notwithstanding which B still continued in possession : *Held*, that B could not, by quitting the house for the default of A rescind the contract and recover back the £10 in an action for money had and received, but could only declare for a breach of the special contract ; for a contract cannot be rescinded by one party for the default of the other, unless both can be put *in statu quo* as before the contract ; and here B had had an intermediate possession of the premises under the agreement."

The case in the court below came before LORD ELLENBOROUGH, C.J., who (5 East 449) "thought that the plaintiff was too late to rescind the contract, and that his only remedy was on the special agreement, and, therefore, directed a nonsuit." The case came before the court on an application for a new trial. LORD ELLENBOROUGH, who presided, then said in the course of his judgment (*ibid.*, 451):

> "Where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account. This objection cannot be gotten rid of: the parties cannot be put *in statu quo*."

As I read that judgment, it contains a statement of what LORD ELLENBOROUGH regarded as a well established general principle that where a contract is to be rescinded it must be rescinded *in toto* and the parties put *in statu quo*, and he follows that general statement with its application to the facts of the particular case, ending with a reiteration of the essential elements that must exist as a condition precedent for the granting of a relief of rescission, namely, that the parties should be capable of being put *in statu quo*.

Sheffield Nickel and Silver Plating Co., Ltd. v. *Unwin* (6) concerned, *inter alia*, the sale by the defendant to the plaintiff company of certain businesses and patents for which the defendant was to receive some fully paid shares and some money payments. He was to guarantee the shareholders a minimum dividend and he paid them the necessary money to make up the minimum dividend at the end of the first year. A resolution was passed by the directors and carried at a general meeting whereby the defendant was released from the guarantee on surrendering his shares and giving up to the company his rights to the patents. He retired from his office as director, giving up his shares and right to the patents, and the company proceeded to sell one of the businesses and one of the patents. The company afterwards claimed to set aside the resolution and enforce the guarantee on the ground that the defendant had fraudulently misdescribed the property sold by him. A Divisional Court consisting of MELLOR and LUSH, JJ., having held that the resolution was not in excess of the powers of the company and was binding on them, proceeded to say that, assuming that the resolution had been passed in consequence of fraudulent misrepresentation on the part of the defendant, his position had been so far changed that it was too late for the company to repudiate their contract. LUSH, J., who delivered the judgment of the court, said (2 Q.B.D. 223):

> "A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*: *Clarke* v. *Dickson* (7). For a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages."

There, again, the language used indicates that the court there intended to pray in aid a well established general principle that a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto* it cannot be rescinded at all, and one reason for not directing rescission is that the parties, or one of them, cannot be restored to their *status quo*. I was also referred to the decision of FARWELL, J., in *Mussen* v. *Van Diemen's Land Co.* (8). That case, as I understand it, cannot be said in any degree to whittle down the generality of the principle which was stated and relied on in the two cases to which I have referred because of the special terms of the bargain made between the parties and, indeed, the learned judge did not have to deal with this aspect of the matter at all, but was concerned whether the retention by the defendant in that case of a sum specified in the contract was or was not in the nature of a penalty. In my view, therefore, that case does not affect the present matter at all.

It is surprising, but that would appear to be the only result of the diligent researches of the four counsel who have been engaged in this case, and I must proceed on the basis of those authorities. I was referred to a passage in Williams on Vendor and Purchaser, 4th ed., vol. 2, p. 1006, which clearly proceeds on the basis of the existence of the general principle which, in my view, emerges from the two cases before me. I must, therefore, applying that principal, refuse rescission in this case unless I can come to the conclusion that the true way of viewing the position is that the contract which must be the subject of rescission is the residue of the agreement of Aug. 3, 1947, remaining after that part of it which concerns the land edged pink has been superseded for all purposes by a conveyance of Oct. 27, 1937. It was argued that, looked at properly, this agreement was for the sale of four plots of land and amounted to this, that the first lot was to be sold for £12,600 (I will leave out of account the deposit) and the remaining three parcels for £8,000 each, there being a separate completion date as regards each parcel of land. Against that, the first clause opens with the words :

> "The vendor shall sell and the purchaser shall purchase at the price of £38,000 whereof the sum of £1,400 shall be paid to the vendor on the signing hereof as a deposit and the balance shall be paid at the times and in the manner hereinafter provided."

Those are the words which indicate, *prima facie* at any rate, that what is being dealt with is a single sale for a single purchase price, the subject-matter of the sale being dealt with in parcels and the purchase price being payable by instalments as each parcel is conveyed. Some colour appears to me to be lent to that by the provision in cl. 2 that the purchaser may complete his purchase of any part of any of the outstanding areas, in which case there is provision for an apportionment of the purchase money. Further, there is the proviso at the end of that clause which says :

> "Provided further that if the purchaser shall make default in payment of any of the said instalments of the purchase price or in the payment of any interest payable hereunder for 21 days after the same shall have become due the whole of the unpaid instalments of the purchase price with the interest thereon shall become immediately due and payable."

That indicates that what the contract is dealing with is a single transaction with a single purchase price, split in the manner provided in cl. 2. Again, in cl. 4, providing for payment of interest, reference is made to payment of interest "and such part of the purchase money as shall for the time being remain owing." Finally, there is the very significant circumstance that whereas the four areas specified on plan No. 2 are all approximately of the same acreage, each about 40 acres, the purchase price is so spread that, apart from the deposit, which was a deposit as a guarantee of the performance of the agreement, the defendant has had to pay as the first instalment £12,600 in respect of the pink edged plot which is only 40 acres.

In my view, on the true construction of this document, it is impossible to say that it is a document containing a series of contracts. It is a document evidencing a contract to buy for a total price of £38,000 157 acres of land, the contract to be worked out by the splitting of the land into four equal areas and the attribution of an unequal sum to one area and the attribution of three equal smaller sums to the other three areas. Therefore, it is not possible to say that when the conveyance of the pink land was carried out there remained a contract which could stand by itself, so far as the relief of rescission was concerned. Taking that view of the contract, which I feel bound to take on its true construction, and having such guidance as I have in the authorities, in my judgment, the relief of rescission is not open to the vendor in this case. For those reasons I must refuse the vendor relief under both heads which he claims, and dismiss the action with costs.

Action dismissed with costs.

Solicitors: *Elvy Robb & Co.* (for the vendor); *Payne & Co.* (for the purchaser).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re GILLIGAN (*deceased*).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), June 29, July 13, 1949.]

Will—Revocation—Revocation by marriage—Will made in exercise of power of appointment granted by settlement—Settlement providing that in default of appointment property to pass to those entitled on intestacy had the testator died without being married—"Person entitled as . . . next of kin under Statute of Distributions"—Testator's widow—Wills Act, 1837 (c. 3), *s.* 18.

The Wills Act, 1837, s. 18, provides: "Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions)."

On Nov. 29, 1890, the testator, H.G., executed a settlement in contemplation of marriage which provided that, in the event of there being no children of the marriage, he should have a general power of appointment in a moiety of the trust fund to be exercised by will, and that, in default of the exercise of this power, such moiety should be held "in trust for such person or persons as would have been entitled thereto under the statutes for distribution of the personal estates of intestates on the death of the said H.G. had he died possessed thereof intestate and without having been married." In 1902 the testator's wife died, there having been no children of the marriage. By a will dated Nov. 23, 1910, the testator exercised the power of appointment as to £500 in favour of his executors, so that such sum should form part of his personal estate, and as to the remainder in favour of his nephews and nieces. In 1912 the testator married again and in 1916 he died. In 1946 his second wife died. On a motion of a surviving niece and the personal representatives of other nephews and nieces of the testator for a grant to the surviving niece of letters of administration with the unrevoked portion of the will annexed, it was contended that, on a true construction of s. 18 of the Wills Act, 1837, that portion of the will exercising the power of appointment remained unrevoked by the second marriage.

HELD: (i) the words "next of kin under the Statute of Distributions" in s. 18 were intended to include the widow of the testator, the intention of the section being that a will exercising a power of appointment should only be wholly revoked by the subsequent marriage of the testator in those cases in which the instrument creating the power provided that in default of appointment the fund should devolve as on an intestacy, in which event the widow of the testator would take her portion of the fund.

In the Goods of Russell ((1890), 15 P.D. 111), *applied.*

(ii) since, by the terms of the settlement, the widow was excluded from the portion of the fund to which she would have been entitled on intestacy, the estate would not pass to the next of kin in accordance with s. 18 and the material portion of the will, therefore, was not revoked by the testator's subsequent marriage. A

[AS TO REVOCATION OF WILL BY MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 73, 74, paras. 100-103 ; and FOR CASES, see DIGEST, Vol. 44, pp. 318-320, Nos. *1516-1531.*]

Cases referred to :

(1) *Garrick* v. *Camden* (*Lord*), *Patton* v. *Jones*, (1807), 14 Ves. 372 ; 44 Digest 876, *7325.* B

(2) *In the Goods of Russell*, (1890), 15 P.D. 111 ; 59 L.J.P. 80 ; 62 L.T. 644 ; 44 Digest 320, *1530.*

MOTION for a grant of letters of administration with the unrevoked portion of a will annexed.

It was contended by the appointees under the testator's will, by which he exercised a power of appointment granted him by a settlement, that the material portion of the will was unrevoked by the testator's subsequent marriage, since by the terms of the settlement the property did not pass, in default of appointment, to the persons entitled as the testator's next of kin within the meaning of s. 18 of the Wills Act, 1837. PILCHER, J., upheld this contention and ordered a grant of administration. The facts appear in the judgment. C D

R. T. Barnard and *J. F. Bowyer* for nephews and nieces of the testator, appointees under the will.

Lindsay Jopling and *Blackett-Ord* for the next of kin.

Cockle for Barclays Bank Ltd., executors of the testator's second wife.

Cur. adv. vult. E

July 13. **PILCHER, J.**, read the following judgment. This matter comes before the court on the motion of one surviving niece and the personal representatives of a deceased niece and two deceased nephews of the testator, the late Mr. Harry Gilligan, for a grant to the surviving nieces of letters of administration with the unrevoked portion of a will made by the testator, dated Nov. 23, 1910, annexed. F

The facts of the case, which are complicated, are very fully set out in the Case on Motion. I will endeavour to summarise them here as shortly as possible. On Nov. 29, 1890, the testator made a settlement of certain funds in contemplation of his marriage. The settlement provided for the usual life interests for the testator and his wife with trusts over for any children of the marriage. It further provided that, in the event of there being no children of the marriage, the testator should have a general power of appointment over one moiety of the trust fund to be exercised by will, and that, in default of the exercise of this power, such moiety of the trust funds should be held " upon the trusts hereinafter declared concerning the other equal moiety " namely : G

> " In trust for such person or persons as would have been entitled thereto under the statutes for the distribution of the personal estates of intestates on the death of the said Harry Gilligan had he died possessed thereof intestate and without having been married." H

There were no children of the marriage, and on Feb. 28, 1902, the testator's wife died. On Nov. 23, 1910, the testator made his last will, by which he exercised the power of appointment over the first moiety of the fund granted to him under the settlement of Nov. 29, 1890, in favour of his nephews and nieces, and, as to £500 thereof, in favour of his executors, so that such sum should form part of his personal estate. In 1912 the testator married again. He made a second settlement in contemplation of this marriage. There were no children of this second marriage, and on Mar. 11, 1916, he died. By the second settlement he had granted to his second wife a life interest in the settled fund, but he never made any will after his second marriage. His second wife survived him for thirty years, dying on Feb. 1, 1946. On the death of the testator's second wife, the trust fund became divisible in accordance with the provisions of the settlement of Nov. 29, 1890, and, accordingly, the question whether the said will of the deceased was altogether revoked by his subsequent marriage, or whether the appointment therein made pursuant to the first settlement was, by reason of the saving provisions of s. 18 of the Wills Act, 1837, unrevoked became an immediate question.

The successors of the appointees under the testator's will and the successors of the second wife contend that, on a true construction of s. 18 of the Act of 1837, that portion of the testator's will by which he exercised powers of appointment granted to him by the first settlement remains unrevoked by his second marriage and that the first moiety of the trust fund passes to them under his will. On the other hand, the successors of those entitled to any part of the estate of the deceased of which he died intestate (other than the second wife) contend that the will was altogether revoked and that the first moiety accrued and is held on the trusts declared in the said settlement concerning the second moiety.

The question was first raised shortly after the death of the testator and an application was made to the Principal Probate Registry on Sept. 11, 1917, by Mr. George Gilligan (who was then one of the trustees of the first settlement) that the will should be brought into the registry in order that he and his co-trustee (or one of the said appointees) might apply for a grant of letters of administration with the said will annexed. The will was, in fact, pursuant to an order of the registrar made on Sept. 11, 1917, brought into and remains deposited in the Principal Probate Registry.

The Wills Act, 1837, s. 18, is in the following terms :

> "Every will made by a man or woman shall be revoked by his or her marriage (except a will made in the exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions)."

As I understand it, the meaning of s. 18, so far as I need consider its terms for the purposes of the present case, is that the only exception to the rule that a will is wholly revoked by subsequent marriage is in so far as such will exercises a power of appointment, and then only when the instrument conferring on the testator the power of appointment provides that, in default of the exercise of the power by him, the fund which is the subject-matter of the power shall devolve other than to the next of kin of the testator under the Statute of Distributions, 1670.

The power of appointment which the testator purported to exercise by his will was conferred on him by the settlement of Nov. 29, 1890. The material terms of the settlement provided, in effect, that, in default of the exercise by the testator of the power of appointment granted to him, the trust fund should pass to the person or persons who would on his death have been entitled to it under the statutes for the distribution of the personal estate of intestates had he died intestate *and without having been married.* These last five words make it clear that, in default of the exercise of the power of appointment granted to him, the parties to the deed did not intend any widow of the testator to take the share to which she would otherwise have been entitled under the statutes of distribution. To this extent, therefore, the provisions of the settlement make it clear that, in default of appointment, the widow shall be excluded from the portion of the fund to which she would have been entitled on an intestacy. It would seem, therefore, that the words in the settlement " and without having been married " necessarily involve that the estate will not, to use the words of s. 18 of the Wills Act, " in default of such appointment pass to . . . the person entitled as his . . . next of kin under the Statute of Distributions " provided that a widow can be properly called a " next of kin under the Statute of Distributions."

In *Garrick* v. *Lord Camden* (1), the testator, David Garrick, by the residuary clause in his will, provided that the residue of his estate was " to be divided amongst my next of kin as if I had died intestate." It was held that the testator's widow was not one of his " next of kin " in the ordinary sense or in the sense in which the testator must be taken to have used the words. In that case LORD ELDON, L.C., said (14 Ves. 382) :

> " . . . it is competent to, and required from, the court to look through the whole will ; and to see, whether from the whole an intention is manifested to include the wife among those, who are to be taken more strictly as next of kin : a description *prima facie* excluding her."

Having reviewed the position of the widow under the other provisions of the will, LORD ELDON arrived at the conclusion that, in all the circumstances, it would be wrong to conclude that the testator had intended his widow to take any part of the residue, and that, as a widow is not " of kin " to a deceased husband, Mrs. Garrick was not entitled to any share of the residue.

I was informed that there was no reported decision as to the meaning to be given to the words " next of kin under the Statute of Distributions " in s. 18 of the Wills Act, 1837. Looking at the Statute of Distributions, 1670, the words " next of kindred " are used several times. Section 1* provides for orders being made for the distribution of estates, after payment of debts, etc. :

> " . . . amongst the wife and children, or children's children if any such be or otherwise to the next of kindred to the dead person in equal degree . . ."

Section 3, after providing for the distribution of the estate to the wife and children, concludes :

> " . . . and in case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree and those who legally represent them."

Section 4 of the Act contains a further passage in which a clear distinction is drawn between the wife and the " next of kindred " of the intestate. Looking, therefore, at the wording of the Statute of Distributions, it would not be unreasonable to assume that in using the words " next of kin under the Statute of Distributions," the framers of the Wills Act, 1837, intended that a will exercising a power of appointment should be wholly revoked by a subsequent marriage if the instrument conferring on the testator the power of appointment provided, as did the settlement of Nov. 28, 1890, that, in default of appointment, the fund should pass to those who would have been entitled to it under the statutes for the distribution of the personal estate of intestates had the testator not been married or died a widower—that is, to his true next of kin to the exclusion of his widow.

While it is not strictly material for my purpose, it is interesting to observe that the Administration of Estates Act, 1925, which repeals the Statute of Distributions, 1670, provides by s. 50 (1) as follows :—

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* The sectional numbering of the Statute of Distributions, 1670, is as given in HALSBURY'S STATUTES, vol. 5, pp. 115, 116.

> " References to any Statutes of Distribution is an instrument *inter vivos* made or in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act ; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act."

It would seem, therefore, that in documents to which this section applies references to statutory next of kin will now be construed as including widows.

I was referred to *In the Goods of Russell* (2). In that case, on facts somewhat similar to those which I have had to consider in the present case, BUTT, J., granted administration with the will annexed to the widow of a testator who had before marriage exercised by will a power of appointment where the instrument creating the power provided that in default of appointment the fund should be divided amongst the testators' brothers and sisters who were, in fact, his true next of kin. It appears to have been assumed in that case that the words in s. 18 of the Wills Act, " next of kin under the Statute of Distributions ", included the widow, and on this basis BUTT, J., decided the case as he did. The point that the widow was not " next of kin " under the Statute of Distributions was not argued, or, apparently, considered, but the court without argument accepted the proposition that the words of s. 18 of the Wills Act, 1837, " next of kin under the Statute of Distributions " are not confined to persons who are strictly " of kin " to the testator, but include a widow who is entitled to her portion on an intestacy.

Although no argument was addressed to the point, I am naturally influenced by the fact that BUTT, J., has accepted the proposition in question without query. In the circumstances I may, perhaps, be permitted to consider shortly the purpose and effect of s. 18 of the Wills Act. The section provides that wills shall be revoked by subsequent marriage except in so far as they exercise powers of appointment where the instrument creating the power provides that in default of appointment the fund subject to the power does not pass to the heir at law or " next of kin under the Statute of Distributions." If these last words are ambiguous, and it seems to me that they may be, it is right that consideration should be given to the whole purposes of the section and such interpretation given to the potentially ambiguous words as shall carry out the intentions of the legislature if these can be ascertained. The event which the section contemplates is the re-marriage of a person who has made a will, and the circumstances in which a will so made shall be revoked by such subsequent marriage. If the instrument creating the power of appointment provides that, in default of appointment the fund shall pass to named persons or, as in the present case, that a widow shall be excluded from all share in the fund, this manifests an intention by the settlor and grantor of the power that the fund shall not in default of appointment pass as on an intestacy. If, on the other hand, the instrument creating the power provides in terms that in default of appointment the fund shall pass as on an intestacy, the settlor has not thereby manifested any intention actively to control the ultimate destination of the fund. It is the marriage of the testator which revokes his previously made will, so that if after marriage he dies without making another will his widow will take her portion on an intestacy under the Statute of Distributions. In so far as the exercise by will of powers of appointment are concerned, there would seem logically to be no reason why a will exercising such powers should not be revoked by marriage where in default of the exercise of the power the after-taken wife is entitled to her widow's portion. Where, however, the settlor under the instrument creating the power has provided that in default of appointment no wife of the appointee shall take any portion of the fund, it seems not unreasonable to adopt a construction of the words in the Act which will give effect to the wish of the settlor, and will preserve such portion of the will as exercises the power of appointment.

I have, accordingly, come to the conclusion that the meaning of the words in s. 18 of the Wills Act "next of kin under the Statute of Distributions" were intended to include a widow. The intention of the section was that a will exercising a power of appointment should only be wholly revoked by the subsequent marriage of the testator in those cases in which the instrument creating the power provides that in default of appointment the fund shall devolve as on an intestacy, in which event the widow of the testator will take her portion of the fund. This construction gives to the material words in s. 18 the meaning which has been assigned to them by Butt, J., in *In the Goods of Russell* (2). It is also the meaning which they necessarily have since 1925 in documents to which s. 50 (1) of the Administration of Estates Act, 1925, applies. I, accordingly, order a grant of administration to the applicant with that part of the will which remains unrevoked annexed.

Solicitors: *Holmes, Son & Pott* (for nephews and nieces of the testator); *Johnson, Weatherall & Co.*, agents for *Hewett & Pim*, Reading (for the next of kin); *Evelyn Jones & Co.*, agents for *Easterbrook & Co.*, Paignton (for Barclays Bank).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

R. *v.* KRITZ.

[Court of Criminal Appeal (Lord Goddard, C.J., Oliver and Stable, JJ.), July 13, 1949.]

Criminal Law—False pretences—Direction to jury—Intent to defraud—Onus of proof.

The appellant obtained a sum of £70,000 from a bank by drawing large sums against uncleared accommodation cheques which he knew to be worthless. He falsely represented to the manager that he was engaged in whisky transactions on a large scale and showed him cases of whisky. It was contended at the trial that the bank manager was "in the business from the start" with the appellant, and that two cheques mentioned in the indictment had actually been paid into a bank on which some worthless cheques had been drawn, and, therefore, there was no intent to defraud. In directing the jury on intent to defraud, the trial judge said: "If a false statement, false to the knowledge of the person making it, is made and by this means money is obtained . . . the fact that the man may, and undoubtedly would if he got the chance, repay the money is immaterial . . . It is immaterial what he intended to do with the money if he obtained it by means of pretences that are false, with intent to defraud." By that direction, it was argued, the question of intent to defraud was withdrawn from the jury. It was further contended for the appellant that the trial judge, in directing the jury on the onus of proof, did not use the phrase that they must be "satisfied beyond reasonable doubt."

Held: (i) the direction given by the trial judge on intent to defraud conformed with the direction given by Channell, J., in *R.* v. *Carpenter* (1911) (25 Cox, C.C. 618), which, in the opinion of the court, was the *locus classicus* on the point and should always be given to juries in cases of intent to defraud.

R. v. *Pickup* (1931) (22 Cr. App. Rep. 186), *distinguished.*

(ii) when directing a jury on the onus of proof resting on the prosecution, no particular form of wording need be used and any direction which has the effect of conveying to a jury what is their duty is sufficient.

(iii) the summing-up at the trial of the appellant being satisfactory and correct, the appeal must be dismissed.

[AS TO OBTAINING PROPERTY BY FRAUD, see HALSBURY, Hailsham Edn., Vol. 9, pp. 562-575, paras. 953-963 ; and FOR CASES, see DIGEST, Vol. 15, pp. 1004-1006, Nos. *11260-11284.*]

Cases referred to :

(1) *R.* v. *Carpenter,* (1911), 76 J.P. 158 ; 22 Cox, C.C. 618 ; 14 Digest 436, *4595.*

(2) *R.* v. *Parker and Bulteel,* (1916), 25 Cox, C.C. 145 ; 80 J.P. 271 ; 14 Digest 436, *4597.*

(3) *R.* v. *Pickup,* (1931), 22 Cr. App. Rep. 186 ; Digest Supp.

(4) *R.* v. *Hunt,* (1918), 13 Cr. App. Rep. 155 ; 14 Digest 538, *6083.*

(5) *R.* v. *Secombe,* (1917), 12 Cr. App. Rep. 275 ; 14 Digest 527, *5936.*

(6) *R.* v. *Thompson,* (1921), 16 Cr. App. Rep. 6 ; 14 Digest 529, *5964.*

(7) *R.* v. *Davidson,* (1927), 20 Cr. App. Rep. 66 ; Digest Supp.

(8) *Woolmington* v. *Public Prosecutions Director,* [1935] A.C. 462 ; 104 L.J.K.B. 433 ; 153 L.T. 232 ; Digest Supp.

(9) *Mancini* v. *Public Prosecutions Director,* [1941] 3 All E.R. 272 ; [1942] A.C. 1 ; 111 L.J.K.B. 84 ; 165 L.T. 353 ; 2nd Digest Supp.

APPEAL against conviction.

The appellant was convicted before the Common Serjeant at the Central Criminal Court on a charge of obtaining money by false pretences, and was sentenced to four years' penal servitude. His appeal was now dismissed. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

Leon for the appellant.

T. Christmas Humphreys and *Bass* for the Crown.

LORD GODDARD, C.J. : The appellant was convicted before the learned Common Serjeant of fraud on the Midland Bank involving something like £70,000, although he protested that all the bank lost was about £52,000. The appellant, who, apparently, carried on the business of a bookmaker, wanted to conduct some other businesses or obtain finance for himself at the expense of the bank. He embarked on a series of transactions (in which there was nothing very novel except the skill with which he carried them out), commonly called—I use the slang expression because it is very well known—"kite-flying," that is to say, dealing with what are sometimes more forensically called accommodation cheques. He got hold of a number of people, all people of straw, who had small sums in a bank and cheque books. He persuaded them to write cheques for sums which, I suppose, in their wildest dreams they never expected to possess. He paid these worthless documents into the Midland Bank so that the bank might let him draw against them before they were cleared.

Drawing against uncleared cheques is one of the oldest forms of fraud. Generally, bank managers are too much on their guard to let it go on, but in this case, because of the specious lies which the appellant told to the bank manager and of the fact that the bank manager did not have that degree of suspicion which bank managers ought to have, the appellant managed to defraud the bank to a very considerable extent. The appellant represented to the bank manager that he was carrying on enormous deals in whisky. In fact, he was not doing so, but he said he would show the manager the whisky he was supposed to be dealing with and he showed him a lot of cases. He said that the manager was willing to allow him to obtain this large amount of money because he promised him (the manager) a case of whisky. For one case of whisky to cost £70,000 seems to me, even at present prices, to be very extravagant, but so the matter went on, and when finally it came to an end, the bank were the losers to the extent of something like £70,000.

We have had a discussion on the meaning of the words " intent to defraud " and cases on false pretences and other kindred offences, such as fraudulent conversion have been cited, because it was argued by counsel for the appellant that the question of the intent to defraud was withdrawn from the jury. The Common Serjeant directed the jury as follows:

> " . . . this is the ruling that I must give you in law. If a false statement, false to the knowledge of the person making it, is made, and by this means money or credit is obtained, and the person who gives that money or credit does so in reliance on the false statements that have been made—that is sufficient and you need not go any further. The fact that the man may, and, undoubtedly, would if he got the chance, repay the money is, to my mind, quite immaterial, if, in fact, it can be said in this case that he ever did repay the money, because we know of the net results of all this unfortunate business, and that the bank has lost something between—well, take the accused man's figure if you like, £58,000—between £58,000 and £80,000. It is immaterial what he intended to do with the money if he obtained it by means of pretences that are false, with intent to defraud. And to defraud, as I say, means by deceit to get other people to take a certain course of action that is harmful to them."

Before I deal further with that passage I ought to say that the point which was very much impressed on the court was this. The two cheques with which the substance of the indictment was concerned were obtained on a certain day. Those cheques, it was said, the appellant intended to pay, and did pay into another bank on which these worthless cheques were drawn so that there would be funds to meet them. It was said he paid in some other money as well. No doubt, that was good news for the bank, but it does not seem to have made much difference. It was an essential part of the snowball that he should pay in money from time to time because, if he had not done so, the bank would have stopped this course of business much earlier than they did. By meeting those cheques he was not paying back to the bank the money he had borrowed that day. He was simply paying money to enable those cheques to be cashed, so that they would go in reduction *pro tanto* of the whole overdraft. That was all that was done in this case. The appellant endeavoured to satisfy the jury that there was no intent to defraud mainly by saying that the bank manager was in the business from the beginning, and he knew all about it. The bank manager denied that, and there is no reason for saying that the jury did not accept his denial because the Common Serjeant told them that, if they thought the bank manager was in the business, to use a neutral expression, then, of course, there was no intent to defraud.

This court desires to lay down in the clearest possible terms that they approve of the direction given to the jury by CHANNELL, J., in *R.* v. *Carpenter* (1). This is the *locus classicus* on this point. It was a case that arose out of the failure of the Charing Cross Bank, and CHANNELL, J., told counsel appearing in the case what he was going to say and got their assent to the direction he was going to give. It is not unimportant to see that the learned counsel were *Sir John Simon, S.-G.*, for the Crown and *Sir Henry Dickens, K.C.*, afterwards Common Serjeant of the City of London, for the defendants. CHANNELL, J., said (22 Cox, C.C., p. 624) :

> " If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him

> money which he knew they would not deposit but for their belief in the truth of his statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statements that he intended to use it, then, gentlemen, we have the intent to defraud, although he may have intended to repay the money if he could, and although he may have honestly believed, and may even have had good reason to believe, that he would be able to repay it. You see it is the fraud in the mode of getting the money, because you may by fraud get hold of money, even if you mean to repay it, and thoroughly believe that you can repay it—you are still defrauding the depositor."

Now mark the next passage :

> " You are not defrauding him of the money if you eventually do repay it, but you are defrauding the man because you are giving him something altogether different from what he thinks he is getting, and you are getting his money by your false statement. In such a case as that the false statement would not be honestly made, and this question as to the intent to defraud substantially comes to this : whether or not the statements were honestly made."

That is a statement of the law by one of the most eminent judges before whom I ever had the good fortune to practise. It has been universally regarded by judges and by counsel as the *locus classicus* on the point. Those words were expressly repeated (25 Cox C.C. 160) to a jury by AVORY, J., in *R.* v. *Parker and Bulteel* (2) where AVORY, J., read to the jury the direction of CHANNELL, J., and told them that that was the law on the subject.

It is argued now that later cases are in conflict with that decision. Whatever rule of law may be laid down or whatever guidance given to a jury may be approved, there must always be exceptional cases in which the general rule may not be wholly applicable. It is impossible to lay down in a direction to a jury or in a judgment a rule which can be universally applied without regard to the particular facts of each case. That is illustrated in the case on which counsel for the appellant most relied—*R.* v. *Pickup* (3). That was a case in which the appellant had acquired a motor car under a hire-purchase agreement with the Ebor Trading Company. Under the agreement the car was to remain the property of the company until all the instalments had been paid. The appellant owed £50 for arrears on instalments and a further sum of £70 was due for future instalments when he sold the car to a Mr. Nutter for £150 plus another motor car. It was found that after he had received the £150 and before he received the car from Mr. Nutter, the appellant paid off all arrears due to the Ebor Trading Company and later paid other sums in discharge of his debt to them, and before the police court hearing Mr. Nutter agreed to accept certain property of the appellant in discharge of the liabilities which had been transferred to him by the Ebor Trading Company.

In that case the learned recorder told the jury that, as the appellant had said the car was his, there was an end of the case, and they need not consider anything else. That shows what I have already said, that there may often be cases which on their particular facts cannot be brought within the general principles laid down by the judges from time to time on some particular matter. Pickup was probably an honest man. Many people may honestly think when they have a car on hire-purchase on which they have paid a number of nstalments : " This is my car, and I will sell it to you." That is the sort of question to be left to the jury : Was the man honest ? It is really an application of what CHANNELL, J., said in the direction I have read, namely, that n such a case as that with which he was dealing the false statement would not be honestly made, and the " question as to the intent to defraud substantially comes to this : whether or not the statements were honestly made ? " The court quashed the conviction in *Pickup's* (3) case because the recorder had withdrawn from the jury any chance of their saying that the statements were honestly made in the circumstances of the case. How could that question possibly have been left to the jury in the present case ? The appellant's defence was that the bank manager was " in this all the time." It is true he said : " I had no intent to defraud," and bolstered that up by adding : " I was going to pay the money to the bank." That was not the point. The point was that this was not an isolated transaction as there was in *Pickup's* case (3) or *Hunt's* case (4), which depended on the dialogue which took place between the learned judge and the foreman of the jury when the charge was given. This was one of a series of transactions all of which had one common object, to defraud the bank.

Therefore, in our opinion, there is nothing in the argument that the Common Serjeant did not leave the question of intent to defraud properly to the jury. In our view, he did not give any wrong direction. This court has not the least intention of departing from the classical direction on this question, namely, that in *R.* v. *Carpenter* (1). We say that in order that there may be no further doubt in anybody's mind as to what is the law with regard to intent to defraud or the direction which should be given to the jury.

The only other point seriously argued is this. It is argued that because the Common Serjeant told the jury that they must be reasonably satisfied, and did not use the words " satisfied beyond reasonable doubt " he was not stating sufficiently on which side lay the onus of proof. It would be a great misfortune, in criminal cases especially, if the accuracy or not of a summing-up was to depend on whether or not the judge or the chairman had used a particular formula of words. It is not the particular formula of words that matter. It is the effect of the summing-up. If the jury are made to understand whether in one set of words or in another, that they must not return a verdict against a defendant unless they feel sure of his guilt and that the onus all the time is on the prosecution and not on the defence, then, whether the judge uses one form of language or whether he uses another is neither here nor there.

In our opinion, there was a perfectly fair and proper summing-up by the Common Serjeant in this case. We do not think any jury could have been left in doubt as to what was their duty. Juries are not such fools as they are often thought to be. They know when they get into the jury box and certainly after they have been there a short time that it is the duty of the prosecution to prove the case and that they have to be fully and thoroughly satisfied of the prisoner's guilt before they can convict him. Juries very seldom want guidance on that point, but it is right that they should have it. It is right that they should be reminded that the onus is on the prosecution all the way through the case. It is right that they should be reminded that they must be fully satisfied of the guilt of the accused and should not find a verdict against him unless they feel sure. That is the direction which I myself constantly give to juries when I am at assizes. By using the words " reasonable doubt " and trying to explain what is a reasonable doubt and what is not, judges are more likely to confuse juries than if they told them in plain language : " It is the duty of the prosecution to satisfy you of the man's guilt." I am not saying that the learned Common Serjeant used that formula of words nor am I saying that it is to be preferred before all others, but what I am saying—and I am sure I say it with the full assent of my brethren—is that it is not the actual formula which is used which is vital. It is the effect of the summing-up which is important, and, if the effect of the summing-up is to convey to the jury what is their duty, that is enough. We do not find that anything substantial which could really have affected the minds of the jury was omitted from this summing-up. For these reasons, in the opinion of the court, this appeal must be dismissed.

Appeal dismissed.

After the judgment LORD GODDARD, C.J., said that the court was inclined to make an order against the appellant for the expense to the country of transcribing the shorthand note of the trial. Being informed by counsel that the appellant was bankrupt and undischarged and that in consequence any order to pay costs could only be recovered as a preferential debt, his lordship said in that circumstance no order would be made.

Solicitors: *Sylvester, Amiel & Co.* (for the appellant); *T. MacD. Baker*, Solicitor to the Metropolitan Police (for the Crown).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law*.]

Distinguished. COMBE *v.* COMBE. [1950] 2 All E.R. 1115.

Applied. COMBE *v.* COMBE. [1951] 1 All E.R. 767.

GAISBERG *v.* STORR.

[COURT OF APPEAL (Bucknill, Cohen and Asquith, L.JJ.), July 18, 1949.]

Alimony—Undertaking before decree nisi to pay wife "£3 *per week alimony as from the date of the decree nisi*"*—Effect of undertaking.*

On Nov. 15, 1945, a husband and a wife entered into a separation agreement in the usual form under which the husband undertook to pay to the wife an allowance of £2 10*s*. per week during their joint lives, provided that if, with mutual consent, they should cohabit as man and wife for a continuous period of not less than three months the allowance and all provisions of the agreement should determine. On Feb. 11, 1947, the wife filed a petition for dissolution of the marriage on the ground of the husband's adultery and claiming alimony *pendente lite*. On Mar. 27, 1947, the husband visited the wife's solicitor and signed a document of that date which provided: "I . . . hereby agree and undertake to pay to my wife Muriel Nellie Storr the sum of £3 per week alimony as from the date of the decree *nisi* being pronounced." On Aug. 8, 1947, a decree *nisi* was pronounced, and on Oct. 25, 1947, it was made absolute. The husband paid the wife £2 10*s*. per week until the pronouncement of the decree *nisi*, and thereafter until September, 1948, he paid her £3 per week. In September, 1948, the wife re-married, and the husband made her no further payments. The wife now claimed under the document of Mar. 27, 1947, arrears of the payments of £3 per week since Oct. 1, 1948.

HELD: (i) the existence of the document of Mar. 27, 1947, did not preclude the wife from claiming alimony *pendente lite* after the petition had been filed or permanent maintenance after the decree was made absolute, and, as the giving up of her claims to alimony and maintenance was the only possible consideration for the husband's undertaking, the document was a *nudum pactum* and not enforceable.

Hyman v. *Hyman* ([1929] A.C. 601), *applied.*

(ii) as the word "alimony" was never applied to payments made after the decree absolute, on its proper construction the document covered only payments after the decree *nisi* up to the date of the decree absolute.

Observations by COHEN, L.J., *on the proper application of Watcham* v. *A.-G. of East Africa Protectorate* ([1919] A.C. 533).

[AS TO EFFECT OF UNDERTAKING BY A WIFE NOT TO SUE FOR ALIMONY OR MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 793, para. 1257; and FOR CASES, see DIGEST, Vol. 27, p. 326, No. *3044*, and DIGEST Supp.]

Cases referred to:

(1) *Hyman* v. *Hyman*, [1929] A.C. 601 ; 98 L.J.P. 81 ; 141 L.T. 329 ; 93 J.P. 209 ; Digest Supp.

(2) *Watcham* v. *A.-G. of East Africa Protectorate*, [1919] A.C. 533 ; 87 L.J.P.C. 150 ; 120 L.T. 258 ; 17 Digest 279, *923*.

APPEAL by the husband from an order of His Honour JUDGE DONE, at Watford County Court, dated Feb. 23, 1949.

The county court judge held that a written undertaking by a husband to pay his wife " the sum of £3 per week alimony as from the date of the decree *nisi* being pronounced " was binding after the wife's re-marriage. The Court of Appeal now allowed the appeal, holding that the undertaking was unsupported by consideration, and that, as the term " alimony " was only appropriate when applied to payments made between the date of the decree *nisi* and that of the decree absolute, the undertaking would not in any case extend beyond the latter date. The facts appear in the judgment of BUCKNILL, L.J.

M. Hoare for the husband.

N. King for the wife.

BUCKNILL, L.J. : The plaintiff is the wife of Erwin von Gaisberg, and she claimed in the county court a sum of money from her former husband, George Leonard Storr, under a document which is described in the particulars of claim as an agreement in writing. The document is written on the note-paper of Nelson L. Mitchell, solicitor, 50, Alexandra Street, Southend-on-Sea, is dated Mar. 27, 1947, and is in the following terms :

> " Storr v. Storr. I, George Leonard Storr, 63, Tintern Avenue, Westcliff-on-Sea, in the county of Essex, hereby agree and undertake to pay to my wife Muriel Nellie Storr the sum of £3 per week alimony as from the date of the decree *nisi* being pronounced in these proceedings. Dated the 27th March, 1947."

The claim goes on to allege facts which are not in dispute, namely, that the decree *nisi* was pronounced on Aug. 8, 1947, and that the defendant failed to pay alimony after Oct. 1, 1948. It is in respect of that failure to pay that the claim is made. The answer in the defence was that this alimony was only legally payable to the date of the decree absolute, and any payment after that date was a voluntary one.

The parties were married in July, 1925. There is one child of the marriage, born in 1930. On Nov. 15, 1945, the parties entered into a separation agreement. It was in the usual form, setting out that " unhappy differences have arisen between the spouses by reason whereof they have agreed to live separate and apart from each other "; and it goes on to state that " the husband has agreed to pay such allowance to the wife as hereinafter appears in manner and for the purposes and subject to the conditions hereinafter provided." In the body of the agreement the husband agrees with the wife that she may live free from his control and authority as if she were unmarried, that during the joint lives of the spouses he will pay to her £2 10*s*. 0*d*. per week, that he will not molest, annoy, disturb or interfere with her in her business or manner of life, and that he will have the custody of the child. At the end there is this provision:

> " Provided always and it is hereby agreed between and by the spouses that if they shall with their mutual consent again cohabit as man and wife for the continuous period of not less than three months the allowance shall thereupon determine and cease to be payable and all agreements and provisions hereinbefore contained shall become void."

It seems to me that that agreement was clearly intended to deal only with the state of things which existed so long as the husband and wife remained married and was not intended in any way to deal with the situation which would arise if a divorce came about.

The husband regularly paid the allowance under the deed, and on Feb. 11, 1947, the wife filed a petition for dissolution of her marriage on the ground of her husband's adultery and also for alimony *pendente lite* and costs. It appears that the husband, who did not file an answer to the petition, had an interview with the clerk of the solicitor acting for the wife and he signed the document of Mar. 27, 1947, which I have read. Up to the date of the decree *nisi*, Aug. 8, 1947, the husband continued his payments of £2 10*s.* 0*d.* a week. On Oct. 25, 1947, the decree was made absolute. After the date of the decree *nisi* the husband paid £3 a week until the end of September, 1948, when the wife re-married. He then ceased all further payments.

The only witness called in the county court was the wife. She produced the agreement, proved the payments to which I have referred, and then said:

> "I took no steps to get a court order for maintenance. I took it for granted the solicitor was looking after my interests and I left everything to him. The agreement dated Mar. 27, 1947, was in my possession. Defendant was assistant welfare officer employed by borough of Southend 25 years."

In cross-examination she said :

> "The agreement was sent to me by my solicitors. I was expecting it. I gave no undertaking in return for it and did nothing in return for it. I regarded it as permanently regulating the position. I did not understand about alimony proceedings. I did not really bother my head about the question. I did not know how defendant interpreted the agreement. I was living at Southend. Mitchell was my solicitor. I saw him about the divorce, *i.e.*, instructed him to issue petition. No answer filed. I was expecting agreement because I had consulted solicitor as to finance. I asked how I stood because I did not want to be left high and dry and did not know much about it."

Counsel for the husband called no evidence, and then the learned county court judge gave judgment for the wife. I need not read his judgment except the essential part in which he is dealing with the construction of the document. He says:

> "The effect of the document is that the wife by her solicitor agreed with her husband that the question of her support should be settled between themselves without further resort to the court, and the wife's rights and husband's obligations as to maintenance were settled between them. It may be that the wife was giving up something—that is uncertain —but she did agree to accept £3 and that was the consideration. I think there is no ambiguity, but, if there is, I should hold, from the fact that the wife accepted payments at the rate provided by the document and the husband paid them from decree *nisi* and continued after decree absolute, and that it was not until ten months later that he stopped them and then, not on the ground that the agreement was to apply only up to decree absolute, but on the irrelevant ground that the wife had re-married, that the same construction must apply. The husband's acts support the view that the agreement was to pay for their joint lives."

In my view, there was no legal consideration for this so-called agreement. It is quite clear from the decision of the House of Lords in *Hyman* v. *Hyman* (1) that:

> "A wife who covenants by a deed of separation not to take proceedings against her husband to allow her alimony or maintenance beyond the provision made for her by the deed, and thereafter obtains a decree for

> dissolution of the marriage on the ground of her husband's adultery, is not precluded by her covenant from petitioning the court for permanent maintenance."

Lord Hailsham, L.C., said ([1929] A.C. 608):

> "In 1857 the legislature for the first time gave to the courts the power to dissolve the marriage tie by a decree of divorce. Such a decree does A not merely affect the relationship of the husband and the wife one to another, but it also changes the status of each of them . . . Such a provision is not made solely in the interests of the wife, but also in the interests of third parties who may deal with the wife or who may, as in the case of Poor Law Guardians, become responsible for her sustenance. If this be the proper inference from the language of the statute, I am prepared to hold B that the parties cannot validly make an agreement either (1) not to invoke the jurisdiction of the court, or (2) to control the powers of the court when its jurisdiction is invoked."

That being the law, it seems to me that this document which was signed by the husband did not in any way preclude the wife from claiming alimony at any time after the petition had been filed or from claiming maintenance after C the decree absolute was made. If it did not so preclude her, I cannot see what consideration there can be for the undertaking of the husband. I think it was merely a statement by the husband of what he intended to do after the decree *nisi* had been granted. He intended to pay the £2 10*s*. 0*d*. a week until the decree *nisi* was made, and after that he intended to pay £3 a week. That being so, I think that the document of Mar. 27, 1947, was really a *nudum pactum* D and is not enforceable at law.

There is a second ground on which also, I think, the claim fails. The agreement as it stands—if it is an agreement—is merely to pay alimony as from the date of the decree *nisi*. Alimony is a word which is never used in the Divorce Division to cover payments by a husband to the wife after the decree absolute. It may be used as "permanent alimony" where the marriage tie subsists and E there is merely a decree of judicial separation, or it may be used as "alimony pending suit," which covers the period from the filing of the petition until the grant of the decree absolute. If one reads this document strictly, it seems to me to cover only that period of time which would elapse from the decree *nisi* to the decree absolute. How long that would be nobody could tell. There might be an intervention by the King's Proctor or a failure by the wife to ask F for a decree absolute until her costs had been paid. Many slips may arise between decree *nisi* and decree absolute. It seems to me that that is what the document means and nothing more. It is said, however, that it must mean something more than that because there must have been an intention to deal with the period after the decree absolute. That may be, but, if one is to interpret this document in the light of reason and common-sense, it seems to me impossible G to suppose that the husband ever intended to bind himself to pay £3 a week to his wife if she married again, perhaps to a man who was far more able to support her than he himself. She might marry two or three times, but, according to the construction which the wife would put on this document, the husband would have to continue paying her £3 a week. I do not know whether it is suggested that the contract is to bind his executors and to make them liable to pay £3 H a week until the wife dies or whether it is suggested that it ends with his death. It is rather significant, I think, that while the separation agreement did deal with the phrase "joint lives," no such phrase appears in this document of Mar. 27, 1947. I think, therefore, that, reading the document in a reasonable way, even if there is a contract there, it cannot be said to bind the husband to pay this sum after the wife had married again. For both these reasons, in my judgment, the appeal should be allowed.

COHEN, L.J.: I am of the same opinion and I only desire to add a few observations on one point. The learned county court judge relied on the decision in *Watcham* v. *A.-G. of East Africa Protectorate* (2), where LORD ATKINSON, in giving the reasons of the Privy Council, said ([1919] A.C. 540), referring to cases he had cited:

> "These cases, their Lordships think, establish the principle that even in the case of a modern instrument in which there is a latent ambiguity, evidence may be given of user under it to show the sense in which the parties to it used the language they have employed, and their intention in executing the instrument as revealed by their language interpreted in this sense."

The learned judge in the present case came to the conclusion that the defendant's acts supported the view that the defendant was to pay alimony for the joint lives of himself and his wife. In my view, the *Watcham* case (2) requires to be applied with care, and certainly before it can be applied in such a case as the present it must be shown (i) that there is an agreement, and (ii) that the acts which are relied on unequivocally support the construction which the court is invited by counsel relying on them to adopt. In the present case it is by no means clear that there is an agreement. I need not go further into that point. Suffice to say that I agree with the observations on it made by BUCKNILL, L.J. In the second place, even if there was an agreement, the acts relied on are as consistent with the agreement coming to an end on the re-marriage of the wife as with its continuing during the joint lives of the husband and the wife. In those circumstances the *Watcham* case (2) does not appear to me to support the conclusion which the learned county court judge reached. I agree that the appeal should be allowed.

ASQUITH, L.J.: Counsel for the wife, in the course of an ingenious argument, has described the document as clear, simple, unambiguous and intelligible. With great respect, I cannot agree. The document specifies the date on which the payments are to begin, but not for how long they shall continue or in what event, if any, they should cease. The husband agrees to pay the money, but it is doubtful whether he agrees to do so only so long as the wife remains his wife or longer. He agrees to pay, leaving it uncertain whether this means something corresponding to alimony *pendente lite*, or something corresponding to permanent maintenance, or, as seems probable, something corresponding to neither. That is neither clear nor simple, but it is clear that nowhere on the face of this document is any consideration specified or even indicated by implication. The evidence, moreover, given by the wife, who was the only witness called, was to the effect that she undertook nothing and did nothing in return for this letter. The only consideration which can be deduced by inference from the circumstances would be an undertaking by the wife, in exchange for the husband's undertaking, not to apply to the court for alimony *pendente lite* or permanent maintenance, but any promise given by her to refrain from so applying would have been void and unenforceable on the principle laid down in *Hyman* v. *Hyman* (1). In those circumstances I think that there is no evidence of any consideration moving from the wife to the husband and that the agreement in the document is not a binding contract. I agree that the appeal should be allowed.

Appeal allowed with costs in both courts.

Solicitors: *Michael Abrahams, Sons & Co.* (for the husband); *Penman, Johnson & Ewins*, Watford (for the wife).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CARRIMORE SIX WHEELERS, LTD. *v.* ARNOLD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver a

Applied. JAMES *v.* DAVIES. [19
2 All E.R. 758.

18, 1949.]

Street Traffic—Mechanically-propelled vehicle—Licence—Limited trade licence—Tractor towing loaded trailer—Road Vehicles (Registration and Licensing) Regulations, 1941 (*S.R. & O.,* 1941, *No.* 1149), *reg.* 30, *art. B* (1), *provisos* (*b*), (i).

By the Roads Act, 1920, s. 9 (1), manufacturers of and dealers in mechanically-propelled vehicles were enabled, subject to certain conditions, to take out a general licence in respect of vehicles used by them in lieu of separate licences for each such vehicle. By the Finance Act, 1922, s. 15 (2), the Minister of Transport was empowered to make two sets of regulations under s. 9 of the Roads Act, 1920, and para. (*a*) of the subsection provided that the annual rate of duty in the case of a limited trade licence was to be £5 as compared with £25 for a general trade licence. By proviso (*b*) to reg. 30, art. B (1), of the Road Vehicles (Registration and Licensing) Regulations, 1941 (made under the Acts of 1920 and 1922): "No vehicle which is being used upon a public road under a limited trade licence shall carry or convey any goods or load whatsoever except such load as it may be necessary to carry for the purpose of testing the vehicle. Any such load shall consist solely of some ordinary form of ballast such as sand gravel scrap iron or the like . . ." By proviso (i) at the end of reg. 30, art. B (1), it was provided that "for the duration of the present war it shall not be an infringement of this regulation for a new vehicle used under a limited trade licence in the course of its delivery to a purchaser or to a port for export to carry any load so long as that load is not carried for hire or reward."

On Oct. 25, 1948, the appellants, who were the holders of a limited trade licence, used a motor tractor to draw through the streets a trailer on which another trailer was loaded. Both the trailers were new and were to be delivered at the docks for export, but the motor tractor was not new. The appellants were charged with an offence against proviso (*b*) to reg. 30, art. B (1), of the regulations of 1941, in that they "did carry goods not being the ordinary form of ballast for a purpose other than that of testing the vehicle." It was contended by the appellants (*a*) that the trailer should be regarded as part of the vehicle; (*b*) that no goods had been "carried" by the tractor; and (*c*) that proviso (i) to reg. 30, art. B (1), applied in that the trailers were in course of delivery to a port for export.

HELD: (i) it was the tractor only, and not the trailer, that was licensed, and the trailer could not be regarded as part of the vehicle, and, therefore, as the tractor was being used under a limited trade licence to carry goods, it was being used in breach of proviso (*b*) to reg. 30, art. B (1).

(ii) the words "convey" and "carry" in reg. 30 were interchangeable, and, therefore, it was immaterial that the word "carry," and not the word "convey," had been used in the information.

(iii) assuming that the country was still in a state of war, proviso (i) to reg. 30, art. B (1), did not apply because the tractor was not a new vehicle.

[FOR THE ROAD VEHICLES (REGISTRATION AND LICENSING) REGULATIONS, 1941, reg. 30, see HALSBURY'S STATUTES, Vol. 34, pp. 417-419.]

CASE STATED by a metropolitan police magistrate.

An information was preferred at Old Street Magistrate's Court, London, against the appellants charging them with an offence against the Roads Act, 1920, and the Road Vehicles (Registration and Licensing) Regulations, 1941, in that, on Oct. 25, 1948, being the holders of a limited trade licence, they used a motor tractor on a public road under that licence and failed to observe proviso (*b*) to reg. 30, art. B (1), of the regulations, in that they "did carry goods . . . for a purpose other than that of testing the said vehicle." The appellants, who were the owners of the motor tractor, had used it to tow a new trailer on which was loaded another new trailer, both of the trailers being intended for delivery at the docks for export. The appellants contended that no offence had been committed because (*a*) the facts did not disclose that any goods whatever had been carried by the tractor; (*b*) if the facts amounted to the carrying of any goods, the trailers were in the course of delivery to a port for export within proviso (i) to reg. 30, art. B (1). The magistrate, who heard the information on Jan. 3 and 11, 1949, held that the facts amounted to a carrying of one or both of the trailers and that proviso (i) to reg. 30, art. B (1), had no application to the facts of the case, and he, therefore, held that the offence had been proved. The appeal from his decision was now dismissed by the Divisional Court.

Charles Lawson for the appellants.
Vernon Gattie for the respondent.

LORD GODDARD, C.J.: This is a Case stated by a metropolitan magistrate before whom the appellants were charged under the Roads Act, 1920, and the Road Vehicles (Registration and Licensing) Regulations, 1941, in that they

> " . . . being the holders of a limited trade licence did use a vehicle, *viz.*, a motor tractor, on a public road under that licence and did fail to observe and fulfil proviso (*b*) contained in reg. 30, art. B (1), of the said regulations, *viz.*, did carry goods not being the ordinary form of ballast for a purpose other than that of testing the vehicle, contrary to reg. 30, art. B (2), of the said regulations."

The magistrate convicted the appellants, and imposed a fine of £10. The facts show that on Oct. 25, 1948, a mechanically-propelled vehicle of the class that is known as a tractor was towing through the streets a trailer. The trailer was not superimposed on the tractor. The trailer, which was new, was loaded with another new trailer, and we are told that both trailers were intended for shipment. The magistrate held that the fact that the tractor was towing these trailers amounted to an offence.

By the Roads Act, 1920, s. 9, provision was made as to the licence duty which was chargeable in the case of manufacturers of or dealers in mechanically-propelled vehicles, and the appellants come within that description. The section provides that, in lieu of taking out a licence in respect of each vehicle kept by him, a manufacturer or dealer may take out a general licence in respect of all vehicles used by him, subject to certain conditions. That section was amended by the Finance Act, 1922, and s. 15 (2) provides:

> "It shall be lawful for the Minister of Transport to make two sets of regulations under the said s. 9 prescribing the conditions subject to which general licences are to be issued and prescribing the purposes for which the holder of a general licence may use it . . ."

Section 15 (2) (*a*) and (*b*) provide that, where one set of regulations applies, the yearly rate of duty is £25, and, where the other set of regulations applies, *i.e.*, for a limited trade licence, it is only £5. It is, therefore, obvious that the legislature intended the holder of a limited trade licence to be pretty severely circumscribed. He was not to act as a haulier or transporter because he was only paying a duty of £5. The Road Vehicles (Registration and Licensing) Regulations, 1941, were made by the Minister of Transport under *inter alia* the Roads Act, 1920, and the Finance Act, 1922, s. 15, and reg. 30 provides that the regulations which follow shall apply to limited trade licences. There follows a variety of provisions stating what the holder of a limited trade licence may do, and proviso (*b*) to reg. 30, art. B (1), is :

> " No vehicle which is being used upon a public road under a limited trade licence shall carry or convey any goods or load whatsoever except such load as it may be necessary to carry for the purpose of testing the vehicle."

The proviso then sets out the articles that may be put into the vehicle in the form of ballast. By reg. 30, art. B (2) :

> " No vehicle shall be used upon a public road under a limited trade licence for any purpose other than a purpose for which the vehicle is authorised by para. (1) of this article to be used under such licence."

With all respect to the argument of counsel for the appellants, it seems to me clear that what is licensed in the present case is not the trailer but the tractor. It is the mechanical horse, as it is sometimes called, that is licensed, and, if that licensed vehicle is being used under a limited trade licence, it must not carry or convey any goods or load " except such load as it may be necessary to carry for the purpose of testing the vehicle." The vehicle in this case was being used to carry a loaded trailer, *i.e.*, a trailer which was loaded with goods, *viz.*, another trailer, which was being taken to the docks for the purpose of shipment. It seems to me impossible to say that the load which the vehicle was carrying was necessary for the purpose of testing the vehicle, and, indeed, it is not argued that it was. What is said, as I understand it, is that the trailer must be regarded as part of the vehicle. Why the two trailers must be regarded as part of the vehicle I do not know, but I am clearly of opinion that this vehicle was being used in breach of proviso (*b*) to reg. 30, art. B (1). Whether the words used in the information should have been " convey " rather than " carry " I do not think is a matter with which we need take up any time. I think it is clear from the wording of the regulation as a whole that the words " convey " or " carry ", as used therein, are interchangeable.

There is only one other point I need mention. At the end of reg. 30, art. B (1), there is a proviso:

> " Provided further that for the duration of the present war it shall not be an infringement of this regulation (i) for a new vehicle used under a limited trade licence in the course of its delivery to a purchaser or to a port for export to carry any load so long as that load is not carried for hire or reward . . . "

Assuming that the country is still in a state of war with some of the belligerents, because no definitive peace treaty as yet been made with Germany, this proviso, as the magistrate found, does not apply in this case, because the tractor was not a new vehicle. It is obvious that this proviso means that, if a new vehicle is being driven to the docks for export, it may have some goods in it. In my opinion, the magistrate was right, and this appeal fails and must be dismissed with costs.

OLIVER, J. : I agree.

STABLE, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Tyrrell Lewis & Co.* (for the appellants) ; *Solicitor, Metropolitan Police* (for the respondent).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Re VISCOUNT GALWAY'S WILL TRUSTS. LOWTHER *v.* VISCOUNT GALWAY AND OTHERS.

[Chancery Division (Harman, J.) June 24, 27, July 13, 1949.]

Ademption—Devise of land "including mines and minerals thereunder"—Vesting of coal and coal mines in Coal Commission—Re-publication—Confirmation of devise by codicil—Inclusion in gift of compensation moneys.

By his will dated June 24, 1922, a testator devised and bequeathed his residuary estate on trusts which he revoked by a codicil dated Nov. 2, 1927. By that codicil the testator devised and bequeathed all his real and personal estate to trustees (*a*) as to his unsettled estate in Nottinghamshire and Yorkshire including the mines and minerals thereunder, subject to an annuity, for his eldest son for life with remainders in tail and remainders over, under which the testator's widow and daughters were, or might be, interested, (*b*) as to his N.M. Colliery shares on certain trusts, and (*c*) as to his residuary personal estate to his said eldest son on his attaining 21. A second codicil, which was undated, revoked an annuity given by the first codicil, but in other respects confirmed the will and first codicil. On Aug. 16, 1941, the testator made a third codicil, revoking a specific bequest and replacing it by another, but otherwise confirming his will as varied by his first two codicils which he also confirmed. Under the Coal Act, 1938, all coal and mines of coal were held during the period from Jan. 1, 1939, to July 1, 1942, as if all the existing owners thereof had entered into a contract on Jan. 1, 1939, for the sale of the coal to the Coal Commission at a price to be ascertained by valuation, and on July 1, 1942, by s. 3 (3) all coal and mines of coal vested in the commission. On Mar. 27, 1943, the testator died possessed of extensive freehold estates in Nottinghamshire and Yorkshire under which were large coal deposits.

Held: as at the date of his death the testator owned no coal or coal mines but only an interest in compensation not then assessed, the gift of mines and minerals, so far as it related thereto, was adeemed, and re-publication of the will by the codicil dated Aug. 16, 1941, did not cause the gift to include the compensation moneys payable in respect of the appropriation of the coal and coal mines.

Drinkwater v. *Falconer* (1755) (2 Ves. Sen. 623) and *Powys* v. *Mansfield* (1837) (3 My. & Cr. 359), *applied.*

Re Warren ([1932] 1 Ch. 42) and *Re Harvey* ([1947] 1 All E.R. 349), *distinguished.*

[As to Effect of Re-publication, see HALSBURY, Hailsham Edn., Vol. 34, pp. 96, 97, para. 134; and for Cases, see DIGEST, Vol. 44, pp. 375-382, Nos. *2093-2167.*]

Cases referred to:

(1) *Drinkwater* v. *Falconer*, (1755), 2 Ves. Sen. 623; 44 Digest 378, *2131.*
(2) *Powys* v. *Mansfield*, (1837), 3 My. & Cr. 359; 7 L.J.Ch. 9; 44 Digest 379, *2133.*
(3) *Watts* v. *Watts*, (1873), L.R. 17 Eq. 217; 43 L.J.Ch. 77; 29 L.T. 671; 44 Digest 407, *2390.*
(4) *Re Price*, [1928] Ch. 579; 97 L.J.Ch. 423; 139 L.T. 339; Digest Supp.
(5) *Re Warren*, [1932] 1 Ch. 42; 101 L.J.Ch. 85; 146 L.T. 224; Digest Supp.
(6) *Re Harvey*, [1947] 1 All E.R. 349; [1947] Ch. 285; [1947] L.J.R. 1015; 177 L.T. 133; 2nd Digest Supp.
(7) *Re Hatfield*, (1944), 198 L.T.Jo. 55.

Adjourned Summons to determine whether on the true construction of the first and third codicils to the testator's will the compensation to which the testator was entitled under the Coal Act, 1938, was included in the gift in the first codicil of " all my unsettled estates in Nottinghamshire and Yorkshire including the mines and minerals thereunder " or in the gift in the same codicil of the testator's residuary personal estate. HARMAN, J., held that it passed under the latter gift. The facts appear in the judgment and are summarised in the headnote.

Wilfrid M. Hunt for the plaintiff, the executor and one of the Settled Land Act trustees.

R. W. Goff for the first defendant, the testator's only son.

Methven for the remaining defendants, the testator's daughters and widow (who were, or might be, interested in remainder in the devise of the testator's estate in Nottinghamshire and Yorkshire) and for the second Settled Land Act trustee.

Cur. adv. vult.

July 13. **HARMAN, J.,** read the following judgment. The late Viscount Galway, the testator in this case, by his will of June 24, 1922, appointed his brother-in-law (who predeceased him) and the plaintiff to be executors and trustees both for general and Settled Land Act purposes, and by cl. 7 devised and bequeathed his residue in terms which he revoked by cl. 3 of his first codicil. By the said cl. 3 of this latter instrument, which was dated Nov. 2, 1927, the testator gave, devised and bequeathed all his real and personal estate to his trustees on the following trusts: (*a*) " as to all my unsettled estate in Nottinghamshire and Yorkshire including the mines and minerals thereunder subject to an annuity " to the use of his eldest son, the first defendant, for life with remainders in tail and divers remainders over under which the second, third, fourth and fifth defendants are or may be interested, (*b*) " as to my New Monckton Colliery shares " as there mentioned, (*c*) " as to all the remainder of my personal estate not hereby otherwise disposed of " for the first defendant absolutely contingently on his attaining 21 years with remainders over if he failed to attain that age. The testator made a second codicil which was undated and which, after reciting cl. 3 of the first codicil, revoked an annuity thereby given and in other respects confirmed the will and first codicil. He made a third codicil on Aug. 16, 1941, revoking a specific bequest to his wife and substituting another specific bequest, and, subject as aforesaid, he confirmed his will except so far as revoked or varied by his first and second codicils which he thereby confirmed.

The testator died on Mar. 27, 1943, and his will was proved by the plaintiff on Nov. 5, 1943. The plaintiff remains its sole trustee for general purposes, but he has appointed the last defendant to act with him as Settled Land Act trustee. The first defendant is the testator's only son and is an infant, and the second, third and fourth defendants are the testator's daughters. The fifth defendant is his widow. The testator was absolutely entitled to extensive freehold estates in the counties of Nottingham and York settled by his will, and these included large amounts of coal under the surface. The testator's rights in this coal were entirely altered by the Coal Act, 1938. By s. 3 (1) of that Act the Coal Commission constituted under the Act was directed to acquire the fee simple in all coal and mines of coal which were directed by s. 3 (2) to be held during the period between Jan. 1, 1939 (the valuation date), and July 1, 1942 (the vesting date) as if all the existing owners had entered into a contract on the valuation date for the sale of the coal to the commission at a price to be ascertained by valuation with provisions for completion of the contract on the vesting date. By s. 3 (3) on the vesting date all coal and mines of coal as existing at that date were to vest in the commission for a title comprising all interests then subsisting in any such coal or mine other than retained interests, with which I am not here concerned. By s. 6 (1) the commission was directed to pay as compensation to existing owners for the acquisition of their interests sums ascertained as the Act provides in respect of all coal and mines of coal directed to vest in the commission. Section 6 (3) shows the aggregate amount payable for the whole of Great Britain, and s. 6 (4) divides this into regions. Section 7 of the Act provides how compensation is to be ascertained and how between the several regions it is to be distributed.

It results from the foregoing review of the Act that on Jan. 1, 1939, the testator was put into the position of a man who had contracted to sell the whole of his coal interests to the Coal Commission at a price to be ascertained by valuation, and that on July 1, 1942, that contract was to be deemed completed, and the legal interest of the testator in the coal vested in the commission as the equitable interest had done at the valuation date. It seems, therefore, that when he died in March, 1943, the testator had no interest in the coal under his properties. His only interest was in the compensation not then yet assessed. This was, in fact, fixed in or about the month of March, 1944, and received somewhat later, and, after payment of certain encumbrances, there remains in the hands of the plaintiff a sum of about £46,000 of compensation money. The question in this case is whether the devise in strict settlement contained in cl. 3 of the first codicil of the testator's estate including the mines and minerals thereunder operates on this compensation money, or whether the devise was adeemed by the events which happened and the compensation money passes under the testator's residuary bequest. At first sight the answer looks plain enough. The testator at the date of his death, from which for this purpose his will speaks, had no coal nor mines of coal nor minerals, and there is a clear case of ademption. It is, however, suggested on behalf of the testator's widow and daughters that by re-publishing his will by a codicil dated after the valuation the testator must be held to have intended that the compensation money should pass under the devise of mines and minerals and to have sufficiently expressed that intention. I cannot accept this contention. It is old law, at least as old as the days of LORD HARDWICKE, L.C., that a re-publication cannot operate to make good a legacy once adeemed: see the judgment in *Drinkwater* v. *Falconer* (1) (2 Ves. Sen. 626) and also the decision of LORD COTTENHAM, L.C., in *Powys* v. *Mansfield* (2) (3 My. & Cr. 375, 376). The cases, indeed, show that even a contract to sell will work an ademption: see the decision of SIR CHARLES HALL, V.-C., in *Watts* v. *Watts* (3). Much more so, therefore, will a contract which has been brought to completion as this one was in the testator's lifetime. It is said, however, that there is a modern line of authority which prevents me coming to this conclusion, and my attention was drawn to a number of cases connected with the subject of the conversion into personal property by the Law of Property Act, 1925, of an undivided share in real estate. The earlier cases, and, in particular, the decision of CLAUSON, J., in *Re Price* (4), seem to have accepted the conversion worked by the Act of 1925 at its full value, but it seems to me that this was seen to defeat the intention of testators, and the more recent cases, in particular *Re Warren* (5) and *Re Harvey* (6), have emphasised the fact that the owner of an undivided share in real estate still has an interest in the real estate under the statutory trusts for sale, which are after all only a conveyancing device for avoiding the complication of partition actions, and it has, therefore, been held that a confirmatory codicil after 1926 may save from ademption by the legislation of 1925 an undivided share in real property. Those cases seem to me to have very little to do with the present. Here there was no conveyancing device leaving a man substantially in the same position as before, but a real statutory disappropriation of the proprietor in favour of the State, subject to the payment of statutory compensation. I ought, perhaps, to add that a question akin to this appears to have been decided by EVERSHED, J., in *Re Hatfield* (7). In the upshot, I hold that, on the true construction of the testator's will and codicil, the compensation to which the testator was entitled at his death under the Coal Act passed under the gift of the testator's residuary personal estate.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the residuary estate.

Solicitors: *Bell, Broderick & Gray*, agents for *Jones, Smith & Pearson*, East Retford (for all parties).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

Applied. SOLLE *v.* BUTCHER. *post* p. 1107. *Reversed.* H.L. [1950] 2 All E.R. 1079.

LANGFORD PROPERTY CO., LTD. *v.* BATTEN.

[COURT OF APPEAL (Bucknill, Cohen and Asquith, L.JJ.), July 20, 21, 1949.]

Rent Restriction—Standard rent—Premises let with dwelling-house—House let on Sept. 1, 1939*—Subsequent letting of house and separate garage—Treatment of garage as part of dwelling-house—Rent and Mortgage Interest Restrictions Act*, 1939 (*c.* 71), *s.* 3 (3).

On Sept. 1, 1939, a flat, which came within the Rent and Mortgage Interest Restrictions Act, 1939, was let at a rent of £135 per annum, the landlord paying rates, and a garage in the vicinity of the flat, but not contiguous thereto, was let to a different tenant at 5*s*. a week. In 1946 the flat and the garage were let by a single lease to a tenant at a rent of £175 per annum, the tenant paying rates, and the lease provided that the premises let were entire and indivisible. In proceedings to determine the standard rent of the premises,

HELD: under the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3), the garage fell to be treated as part of the dwelling-house, and, accordingly, the standard rent of the dwelling-house comprising the flat and the garage was £135 per annum, the rent at which the flat alone was let on Sept. 1, 1939.

Hemns v. *Wheeler* ([1948] K.B. 61), *applied*.

Vaughan v. *Shaw* ([1945] 2 All E.R. 52), *explained*.

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369, 370; and FOR CASES, see DIGEST, Vol. 31, pp. 559-561, 563-565, Nos. *7068-7084*, *7111-7127*.]

Cases referred to:

(1) *Hemns* v. *Wheeler*, [1948] 2 K.B. 61; [1948] L.J.R. 1024.

(2) *Haldane* v. *Sinclair*, [1927] S.C. 562; Digest Supp.

(3) *Vaughan* v. *Shaw*, [1945] 2 All E.R. 52; [1945] K.B. 400; 114 L.J.K.B. 350; 173 L.T. 6; 2nd Digest Supp.

(4) *R. & P. Properties, Ltd.* v. *Baldwin*, [1938] 4 All E.R. 845; [1939] 1 K.B. 461; 108 L.J.K.B. 463; 160 L.T. 445; Digest Supp.

(5) *Langford Property Co., Ltd.* v. *Sommerfield*, (1948), 206 L.T.Jo. 38; [1948] W.N. 287.

APPEAL by the landlords from a decision of His Honour JUDGE SIR GERALD HURST, K.C., sitting at Croydon County Court, on Mar. 4, 1949, whereby he determined the standard rent of premises comprising flat No. 2, The Woodlands, Upper Norwood, and garage No. 7 thereat to be the rent at which the flat alone was let on Sept. 1, 1939. The Court of Appeal dismissed the landlords' appeal.

Beney, K.C., and *Heathcote-Williams, K.C.*, for the landlords.

Lloyd-Jones, K.C., and *Vester* for the tenant.

COHEN, L.J.: The question in this case concerns the standard rent of premises at The Woodlands, Beulah Hill, Upper Norwood, which are admitted to be within the protection of the Rent and Mortgage Interest Restrictions Acts by virtue of the Rent and Mortgage Interest Restrictions Act, 1939. The premises consist of Flat No. 2 on the ground floor of The Woodlands and garage No. 7, the garage being in the vicinity of, but not contiguous to, the flat and there being no track, so to speak, from the one to the other. This is a test case. There are five other flats similarly let with garages, and appeals in the five cases relating to those flats are pending the decision of this appeal.

On Sept. 1, 1939—which is the material date in considering the effect of the Act of 1939—the flat and the garage were let separately. The flat was let to one Price at a rent of £135 per annum, the landlords paying the rates, and the garage was let at 5*s.* a week to a Mrs. Crutch. Mrs. Crutch gave up the garage in October, 1939, and the flat fell into the possession of the landlords at the conclusion of the three years' tenancy to Mr. Price. On Jan. 16, 1946, a lease of the flat with the garage was granted to the tenant, Wing-Commander Batten, for a term of three years commencing from Feb. 1, 1946, the rent being fixed for the first two years at £175 per annum and for the third year at £185 per annum, the tenant in each case paying the rates. The lease to the tenant contained cl. 13 in the following terms:

> "It is hereby mutually agreed by and between the parties hereto that the said premises are entire and indivisible and in the event of the tenancy hereby created being continued after the expiration of the term or of the tenant remaining in possession by virtue of the Rent and Mortgage Interest Restrictions Acts or other statutory power any such extension shall be on the terms and condition that the said premises are entire and indivisible."

There can be no doubt that this clause was a device, but not a device which connotes anything illegal or immoral, and the question is whether the device has justified the end to which it was directed. In due course the tenant began these proceedings with a view to determining the standard rent of the premises comprised in the lease to him. On his behalf it was contended that under s. 3 (3) of the Act of 1939 the garage was to be deemed part of the dwelling-house consisting of the flat which had been let to Mr. Price on Sept. 1, 1939, and that, accordingly, the standard rent was £135 per annum. The landlord contended that there was a new letting of a new dwelling-house consisting of the flat plus the garage on Feb. 1, 1946; that this was the first letting of that dwelling-house; and that, accordingly, the standard rent was £185 per annum. The learned judge decided the point in favour of the tenant.

Before referring to the reasons which he gave for his conclusion, it would be convenient to consider s. 3 of the Act of 1939. Sub-section (1) provides:

> "Without prejudice to the operation of the two preceding sections in relation to any dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the principal Acts . . . shall, subject to the provisions of this section, apply to every other dwelling-house of which the rateable value on the appropriate day did not exceed—(*a*) in the metropolitan police district or the city of London, £100 . . . and in relation to any such dwelling-house as aforesaid, not being a dwelling-house to which the principal Acts applied immediately before the commencement of this Act, the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1933, set out in the first column of sched. I to this Act shall have effect as if there were made in those provisions the modifications respectively prescribed by that schedule."

It is to be observed that the provisions of the earlier Acts remained in force as regards any dwelling-house which was subject to the Acts before the coming into force of the 1939 Act, but that certain of the provisions were modified as regards the 1939 Act houses. Among the provisions which were thus modified were those of s. 12 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and it was provided, among other things, that sub-s. (2) of that section should not apply to what have become known as " 1939 houses." Section 12 (2) of the Act of 1920, after defining the houses to which that Act was to apply, contained three provisos. The first provided that the Act shall not apply to a dwelling-house *bona fide* let at a rent which includes payment in respect of board, attendance, or use of furniture. The second provided:

> " . . . the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes,"

and the third—which, from our point of view, is the most important—provided:

> " . . . for the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house."

Those provisions still govern what I call pre-1939 Act houses, but they did not govern such a dwelling-house as the flat in the present case which is subject to restriction only by virtue of the Act of 1939. The gap thus created was, however, filled by s. 3 (3) of the Act of 1939 which provided:

> " Subject to the provisions of para. (*a*) of the last preceding sub-section [providing that the principal Acts should not apply to any dwelling-house consisting of, or comprising, premises licensed for the sale of intoxicating liquor for consumption on the premises] the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes ; and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house ; but, save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house."

That, it should be observed, took the place of the third proviso to section 12 (2) of the Act of 1920, but with an alteration of the conditions under which land or premises let together with a house were to be treated as part of the dwelling-house. The first part of that sub-section may refer to all houses, though, so far as pre-1939 Act houses are concerned, it seems to be unnecessary in view of the second proviso to s. 12 (2) of the Act of 1920. The second part of the sub-section, I think, applies only to 1939 houses. That would seem to be the effect of the use of the words " the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section " instead of " the purposes of the application of the principal Acts." It appears to be necessary to construe s. 3 (3) of the Act of 1939 as applying only to 1939 houses, for, having regard to the wording of s. 3 (1) of the Act of 1939, s. 12 (2), proviso (iii), of the Act of 1920 seems still to apply to pre-1939 Act houses.

The question we have to decide depends on the view we take of the effect of the second part of s. 3 (3) of the Act of 1939. Is its effect to make the additional land or premises part of the dwelling-house consisting of the flat only so that the standard rent would be that of the flat, namely, £135, or is it, as counsel for the landlords contends, merely to make it part of a new dwelling-house consisting of the garage and flat ? I agree with the learned judge that,

taking the language of sub-s. (3) literally, the words must be construed in the former sense. The learned judge considered that he was bound in law so to hold by the decision of this court in *Hemns* v. *Wheeler* (1). Counsel for the landlords criticised this part of the learned judge's judgment, saying that in *Hemns* v. *Wheeler* (1) the court was concerned with s. 12 (2) of the Act of 1920, whereas we are concerned with a different sub-section, namely, s. 3 (3) of the
A Act of 1939, and that a decision on the one sub-section could not bind us in considering a different sub-section. I do not think, however, that the learned county court judge overlooked this point. I think he merely meant that the reasoning of TUCKER, L.J., in *Hemns* v. *Wheeler* (1) led him to decide the present case in favour of the tenant, applying the principle which TUCKER, L.J., applied in considering the relevant section of the earlier Act. With that
B conclusion I entirely agree. Section 3 (3) does not, in my view, make a radical change of law. It merely enlarges the effect of proviso (iii) to s. 12 (2) of the Act of 1920 by increasing the extent of the land or premises which are to be treated as part of the dwelling-house. If I may borrow the language (1927 S.C. 567) of the LORD PRESIDENT (LORD CLYDE) in *Haldane* v. *Sinclair* (2):

> "This [the new section] is not so much a new conception, as a new
> C test for applying the old conception."

While I am referring to that case I ought, perhaps, to refer to an argument addressed to us by counsel for the landlords to the effect that it was really a decision in his favour. He said that it supported the view that the addition of the garage to the flat constituted a change of identity which created a new dwelling-house, and he relied on various passages from the judgments of the
D learned Lords of the Court of Session in that case. I think I should be sufficiently summarising the effect of those passages if I take the closing sentence of LORD BLACKBURN's judgment, where he said (*ibid.*, 570):

> " . . . I do not think we should construe the sub-section as applying to a dwelling-house which, by conjunction with lands, has changed its identity from a dwelling-house to which the Act applies . . ."

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With the decision in that case I respectfully agree. One must have regard to the facts and must bear in mind that under the finding of the sheriff substitute the rateable value of the land or premises let separately would have been more than one quarter of the rateable value of the house so that the Court of Session was not bound in that case to treat the land as part of the dwelling-house, and,
F indeed, I think it is plain that, in the circumstances there existing, the combination of the two created a dwelling-house outside the ambit of the Acts.

Hemns v. *Wheeler* (1) arose under the Act of 1920 and concerned s. 12 (2). The house in question had been damaged by bombs. It had been re-constructed, £97 being spent on repairing bomb damage and £100 on alterations and improvements, and a small area of land had been added. The only structural addition
G was some paving and an outside lavatory. The re-constructed house was first let after the Act of 1939 came into force, and the question which the court had to decide was whether the standard rent was 4*s*. 6*d*. a week under the Act of 1920, that being the rent at which it had been let before the bomb damage was done, or 15*s*. a week under the Act of 1939, as being the rent at which it was first let after Sept. 1, 1939. The county court judge decided, and this
H court held that there was evidence on which he was justified in so deciding, that there had been no change sufficient to make the house a new dwelling-house, but another point had been raised with which TUCKER, L.J., dealt. He says ([1948] 2 K.B. 66):

> "It may be stated as follows: The letting in October, 1942, was a complex letting of house plus added piece of land with yard and w.c. upon it. Can the standard rent of this complex unit be the same as that of the house by itself before the addition of this piece of land? This argument

> has certain attractions, but in my view it cannot prevail. There is no doubt that the premises let in 1942 differed from those let in 1914 by reason of this added area of land, and, if we were concerned merely with the identity of the premises, it would, I think, be difficult to hold that the premises were the same ; but the Rent Restrictions Acts deal with dwelling-houses as distinct from premises. [His Lordship read proviso (iii) to s. 12 (2) of the Act of 1920 and continued:] Note the words A ' treated as part of the house.' This results in a notional dwelling-house consisting of bricks and mortar plus land. I think that the policy of the Acts is, in effect, to ignore the existence of these small plots of land and added premises in ascertaining what is the dwelling-house. No doubt, where the rateable value of the added area exceeds one quarter of the rateable value of the house, the resulting premises will be excluded from B the Acts, but any addition of less rateable value not only keeps the house within the Acts but is ' treated as part of the house.' In the present case we have a dwelling-house, No. 25, Plymouth Street, let as a separate dwelling in August, 1914. In 1942 a piece of land, which has to be ' treated as part of the house,' is added. The dwelling-house remains the same, and it is, in my view, erroneous to say that this dwelling-house was not C let in August, 1914, merely because a piece of land has been added. Looked at in this way, *Vaughan* v. *Shaw* (3) and *R. & P. Properties, Ltd.* v. *Baldwin* (4) cited by Mr. *Blundell* do not, I think, really afford us any assistance. For these reasons I think that this appeal fails ; but, in so deciding, I desire to make it plain that I am not saying that the addition of a piece of land in connection with structural alterations and improve- D ments is not a relevant matter to be taken into consideration, as I think it was by the county court judge in the present case, on the issue of fact as to the identity of the dwelling-house."

Counsel for the landlords relied on the concluding sentence, but, in my opinion, Tucker, L.J., was limiting the purpose for which the additional land might be taken into account to the determination of the question which really only E arises, I think, where some such thing as structural alterations or improvements have been made, namely : Is the existing house the old house improved on in substance or is it a new house ? He had previously made plain his view that, if nothing had been done but to add land or premises, the addition must be ignored in ascertaining what is the dwelling-house.

Counsel for the landlords attempted to frighten us with the difficulties and F consequences he said would arise if we affirmed the decision of the learned county court judge. He gave us one illustration—the case of a house with three floors all of which were separately let on Sept. 1, 1939—the first at a rent of £50, the second at a rent of £60, and the third at £70. Later, the whole house was let at £180. The standard rent, he said, would be £50, £60 or £70, and no one could tell which. This was in substance the question which G arose for decision in this court under the Act of 1939 in *Vaughan* v. *Shaw* (3), the facts in which were that on Sept. 1, 1939, the house had been let in two parts to two separate tenants, there being no structural separation between the parts. In January, 1941, the house was let as a whole to the defendant. On an application by the landlord to fix the standard rent, the county court judge held that the standard rent was 32*s*. 6*d*., being an aggregate of the former H rents, but this court reversed the decision and held that the standard rent was the rent at which the house was first let as a whole after Sept. 1, 1939. Counsel very fairly admitted that the point we are now considering was not argued in that case, but he said—and I think he was right in saying—that the decision could have been supported on the ground that there was a new dwelling-house created by the conjoint letting. It seems to me, however, that the judgment can be supported, and that case reconciled, as Tucker, L.J., plainly thought it could be, with the decision in *Hemns* v. *Wheeler* (1), on the ground that when s. 3 (3) of the Act of 1939 speaks of " land or premises let together with a dwelling-house " it connotes the idea of something which is not capable of being itself a dwelling, and, therefore, where the land or premises consist of that which was, when last let, itself a dwelling-house, the sub-section has no applicability and the court can properly treat the new letting as the letting of a new dwelling-house and decide the question whether protection arises under the Act solely in relation to the rateable value of the conjoint premises.

For these reasons I think, as TUCKER, L.J., thought, that there is no inconsistency between the decision of *Hemns* v. *Wheeler* (1) and the decision of the county court judge in this case and the decision of this court in *Vaughan* v. *Shaw* (3) and subsequent cases founded on it. In this connection I should, perhaps, refer to *Langford Property Co., Ltd.* v. *Somerfeld* (5) where the property had been subjected to violent bomb damage and a much reduced flat re-constructed out of the remains. The reduced flat was then let with a garage to a new tenant and a question arose similar to that with which we are now concerned but with the difference that, undoubtedly, the premises had been re-constructed. The learned county court judge in the present case said that he was now persuaded that his decision in that case was wrong in so far as it related to the supposed want of identity between a flat and a flat and garage, but that part of the case was not considered in the Court of Appeal according to the note of the case in [1948] W.N. 287, and I do not think that the learned judge's error on that particular point would have affected the decision which really turned on the question of re-construction. The other terror which counsel held over our heads was that, if this land were let with a factory on it, it might be of great value, but, if the learned county court judge's judgment stood, the tenant would be entitled to use the factory at the rent previously paid for the dwelling-house alone. I think the answer is that which the learned county court judge gave, namely, that the normal landlord would make his factory the subject-matter of a separate, independent demise. For these reasons, I would dismiss the appeal.

ASQUITH, L.J.: I agree that the appeal should be dismissed.

BUCKNILL, L.J.: I have had considerable difficulty in reconciling *Vaughan* v. *Shaw* (3) with *Hemns* v. *Wheeler* (1), but this court is entitled to follow either, and I prefer to follow *Hemns* v. *Wheeler* (1). Accordingly, I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Stikeman & Co.* (for the landlords); *R. Elder & Co.* (for the tenants).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

WHEATLEY *v.* WHEATLEY.

[King's Bench Division (Lord Goddard, C.J., Oliver and Stable, JJ.), July 19, 20, 1949.]

Maintenance—Enforcement of order—Wife "residing with" husband—Parties living under same roof—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), *s.* 1 (4), *s.* 2 (2).

A wife who had obtained a separation order on the ground of desertion made a complaint against her husband for failing to pay maintenance to her under the order. The husband pleaded that the order was not enforceable because the wife was residing with him within the meaning of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, during the period for which maintenance was claimed. The justices found that the parties were residing under the same roof and expressed the opinion that the case was covered by *Evans* v. *Evans* ([1947] 2 All E.R. 656), but, having regard to the criticism of that decision by Denning, L.J., in *Hopes* v. *Hopes* ([1948] 2 All E.R. 920), they declined to follow it and directed the husband to pay the arrears of maintenance. On appeal,

Held : *Evans* v. *Evans* had not been overruled ; it was the duty of the justices to follow that decision ; and, therefore, the maintenance order was not enforceable against the husband.

[For the Summary Jurisdiction (Separation and Maintenance) Act, 1925 s. 1 (4), s. 2 (2), see HALSBURY'S STATUTES, Vol. 9, p. 415.]

Cases referred to:

(1) *Evans* v. *Evans*, [1947] 2 All E.R. 656 ; [1948] 1 K.B. 175 ; [1948] L.J.R. 276 ; 112 J.P. 23 ; 2nd Digest Supp.

(2) *Hopes* v. *Hopes*, [1948] 2 All E.R. 920 ; [1949] P. 227 ; [1949] L.J.R. 104 ; 113 J.P. 10.

(3) *Thomas* v. *Thomas*, [1948] 2 All E.R. 98 ; [1948] 2 K.B. 294 ; [1948] L.J.R. 1943 ; 112 J.P. 345.

(4) *Jackson* v. *Jackson*, [1924] P. 19 ; 27 Digest 308, *2852*.

(5) *Hadley* v. *Perks*, (1866), L.R. 1 Q.B. 444 ; 7 B. & S. 375 ; 42 Digest 665, *754*.

Case Stated by Essex justices.

A complaint was preferred by the wife before a court of summary jurisdiction sitting at Chelmsford alleging that the husband, who had been ordered to pay her £2 weekly for her maintenance under a separation order, had failed to comply with the order. At all material times the wife was residing with the husband, but they occupied separate bedrooms, and, while both used the kitchen, the wife did no cooking for the husband. They spoke to one another when they met in the house, but did not come into contact with each other every day. The husband never used the sitting room. On behalf of the husband it was contended that the complaint ought to be dismissed on the authority of *Evans* v. *Evans* (1), but the justices ordered the husband to pay the arrears. The husband appealed and the Divisional Court now allowed his appeal.

Jellinek for the husband.
The wife did not appear.

LORD GODDARD, C.J. : This is a Case stated by justices for the county of Essex before whom the husband was summoned by his wife for having made default in the payment of sums of money which he had been ordered to pay to her under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. The point which arises is exactly the same as that which arose in this court in *Evans* v. *Evans* (1). When the present case was before the justices their attention was called to that case and also to the criticisms which DENNING, L.J., in *Hopes* v. *Hopes* (2) had directed to the decision in it. The justices came to the conclusion that they ought to follow the *dicta* of DENNING, L.J., and, in view of his criticisms, not to follow *Evans* v. *Evans* (1). While, however, I can well understand the justices taking that view, I have to point out to them that *Evans* v. *Evans* (1) has not been overruled by the Court of Appeal, and that the part of the judgment of DENNING, L.J., in which he criticises the decision in *Evans* v. *Evans* (1) was entirely *obiter*. Reference to *Evans* v. *Evans* (1) was unnecessary for the decision in *Hopes* v. *Hopes* (2) and the other two members of the court, BUCKNILL, L.J., and HARMAN, J., did not mention the case.

The decision in *Hopes* v. *Hopes* (2) was that

> " . . . while *de facto* separation, which with *animus deserendi* is an essential element of desertion, can exist even while the parties are under the same roof, there can be no such separation until husband and wife cease to share one household and set up two households."

On the facts in that case the court held that there had been no *de facto* separation and, therefore, there was no desertion by the husband of the wife. In *Evans* v. *Evans* (1) the court had to construe s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. That Act amended the law, as I have explained both in *Evans* v. *Evans* (1) and *Thomas* v. *Thomas* (3), in this respect. Before that Act was passed a married woman could not obtain a maintenance order against her husband or apply to justices for a separation order unless she had left him. That was thought to be a hardship because it might often happen that a married woman could not afford to quit the home where she was living with her husband until she had a maintenance order against him. Therefore, this amendment was made which enabled a woman to apply for a maintenance order although she had not been forced to leave her husband and live separately and apart from him. The words of s. 1 of the Act are :

> " (1) An application by a married woman for an order . . . under the Summary Jurisdiction (Married Women) Act, 1895 . . . may be made notwithstanding that the cruelty or neglect complained of has not caused her to leave and live separately and apart from [her husband], and accordingly the words ' and shall by such cruelty or neglect have caused her to leave and live separately and apart from him ' in s. 4 of that Act are hereby repealed."

When the Act of 1925 was passed the only case in which this matter had been mooted was one to which DENNING, L.J., called attention in *Hopes* v. *Hopes* (2), *viz.*, *Jackson* v. *Jackson* (4). There HILL, J., had thrown out a very guarded expression when he said ([1924] P. 26):

> " There may be desertion though the husband continues to live under the same roof . . . but in such case the facts must be very strong."

He did not decide the point whether there had been desertion or not. Therefore, when the Bill was before Parliament in 1925 this part of the law had only formed the subject of debate in the courts to a very limited extent, and it was in that state of affairs that Parliament passed this Act.

Section 1 (4) of the Act of 1925 provides :

> " No order made under the [Summary Jurisdiction (Married Women) Act, 1895] shall be enforceable and no liability shall accrue under any such order while the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband."

To the court that decided *Evans* v. *Evans* (1) it seemed that the reason why Parliament included that provision was that it was an undesirable state of affairs if a married woman went before justices and obtained an order against her husband to maintain her and at the same time continued to live in the same house as he. Apart from the fact that by so doing she would be getting a benefit twice over, because the money that was given to her was intended to be for her board and lodging when she was living separately and she would be getting her lodging by still remaining with her husband, it would seem generally most undesirable that spouses should be living in the same house in those circumstances. I can think of nothing more likely to lead to general unhappiness and, perhaps, actual personal violence. That view is reinforced, in my view, by s. 2 (2) which provides :

> " Where a married woman with respect to whom an order has been made under the principal Act resumes cohabitation with her husband after living apart from him, or where she has before the date of the commencement of this Act so resumed cohabitation, and is at that date cohabiting with him, the order shall cease to have effect on the resumption of such cohabitation or at the commencement of this Act, as the case may be."

There the Act uses the expression " cohabitation," and it does not require a lawyer to understand the difference between " cohabitation " and " residence." The cohabitation of two people as husband and wife means that they are living together as husband and wife, the wife rendering wifely services to her husband and the husband rendering husbandlike services to his wife. They are living together, not merely as two people living in one house, but as husband and wife. I cannot believe that the draftsman of the Act who in s. 1 (4) has used the words " resides with " meant the same thing when in s. 2 (2) he used the word " cohabitation."

Denning, L.J., also referred to *Hadley* v. *Perks* (5), in which it is true that Blackburn, J., said (L.R. 1 Q.B. 457):

> " It has been a general rule for drawing deeds and other legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning, and it would be as well if those who are engaged in the preparation of Acts of Parliament would bear in mind that that is the real principle of construction. But in drawing Acts of Parliament, the legislature, as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change them ; and accordingly in s. 24 [of the Metropolitan Police Courts Act, 1839] we have ' having in *possession* or conveying in any manner anything,' whereas the words in s. 66 of the [Metropolitan Police Act, 1839] were ' having or conveying.' I think, however, that the two expressions were intended to mean the same thing. ' Having in his possession ' may perhaps have been introduced to meet the case of the person who arrested the man when he came to offer the goods for sale or pledge. But ' having or conveying ' I think must be limited, making the one co-extensive with the other, and confining it to ' having ' *ejusdem generis* with ' conveying '."

With great respect, I do not think that what that very learned judge was saying in that case as to what may result when Parliament uses different words in the same enactment can be applied to a case such as the present where one section of an Act of Parliament talks of a wife residing with her husband and the next section speaks of her cohabiting with her husband—a word which as between husband and wife has a very well-known meaning and one far in advance of the mere expression " reside with." Section 2 (2) obviously contemplates a wife going back to her husband in view of a reconciliation, because, unless there is a reconciliation, how can there be cohabitation ? If the wife, having obtained her order and having left her husband so that the order became effective, is taken back by her husband so that the cohabitation between the spouses is resumed, a very different state of affairs comes about and it is provided that the order shall come to an end.

A It was suggested by DENNING, L.J., that the effect of *Evans* v. *Evans* (1) if the decision was right, would be that a woman, having obtained an order, would only have to leave the house for a day or two, and then come back. He says ([1948] 2 All E.R. 925):

> " If Mrs. Evans, instead of getting back straight through the window, had stayed away a few nights so as to be able to say she had been ' living
> B apart ' from her husband, she would, apparently, have been able to enforce her order just as Mrs. Thomas [in *Thomas* v. *Thomas* (3)] did : but, because she had nowhere else to go she could not. It is impossible to suppose that the legislature intended such a result."

With respect, I will deal with that case when it arises. Under s. 1 (4), Parliament meant to deal with the case where the husband and wife were physically living
C under the same roof and in s. 2 (2) with the case where the husband and wife were cohabiting as husband and wife.

Evans v. *Evans* (1) has not been overruled, and it is, therefore, the duty of the justices to follow that decision unless and until it is overruled. This appeal, therefore, must be allowed.

D **OLIVER, J.** : I entirely agree.

STABLE, J. : I agree, but, with deference to the decision of the justices, I should like to add a few words. From experience I know that justices sometimes regard it as a reflection on themselves when this court reverses their decision, but, so far from that being so in the present case, I am struck by the very great care and attention the justices gave to this matter and the intelligent
E appreciation they gave to the reported cases that were brought to their notice. It can hardly be wondered at that the justices were led into error inasmuch as in *Hopes* v. *Hopes* (2), speaking entirely *obiter*, DENNING, L.J., said ([1948] 2 All E.R. 926) : " Faced with this choice, I am of opinion that *Evans* v. *Evans* (1) was wrongly decided." Then he goes on : " Relieved of . . . *Evans* v. *Evans* (1), the law becomes consistent throughout this subject." It
F may be that the law is not always wholly logical, but neither is human behaviour, and the law is much more closely concerned with human behaviour than it is with logic. If human behaviour ceases to be logical, then the law has to keep pace with human behaviour, such as it is, and not as in a logical world it always would be. So far as *Evans* v. *Evans* (1) is concerned, I find it impossible to take the view that " resumes conhabitation " and " resides with "
G mean one and the same thing, and for the reason that, whereas the consequence of resumption of cohabitation is that the order immediately ceases to be of any effect and permanently expires, the effect of the wife residing with her husband is only to suspend the operation of the order during the period of residence. It is only if that residence lasts for three months that the order expires, and, in my opinion, that shows beyond any discussion that the two
H phrases bear a totally different meaning. With that in mind, if I may respectfully say so, not only is the decision in *Evans* v. *Evans* (1) binding on this court, but I agree with it.

Appeal allowed. No order as to costs.

Solicitors : *Robbins, Olivey & Lake,* agents for *Hill & Abbott,* Chelmsford (for the husband).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WIMBUSH *v.* CIBULIA AND ANOTHER. SAME *v.* LEVINSKI.

[Court of Appeal (Sir Raymond Evershed, M.R., Singleton and Jenkins, L.JJ.), June 1, 2, July 20, 1949.]

Rent Restriction—"Separate dwelling"—Additional accommodation in same house—Separate tenancy agreements—Intention of parties—Treatment of both tenancies as one letting—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12 (2).

In 1925 the tenant, C., took a weekly tenancy of two first floor rooms in a house as a separate dwelling and used the rooms as such until 1933. In that year he was granted the tenancy of two rooms on the ground floor and two rooms in the basement of the same house. The two tenancies were distinct, and separate rent books were used in respect of them. After obtaining the second tenancy the tenant used the two first floor rooms as bedrooms, the ground floor rooms as a living room and kitchen and a workroom, one basement room being used as a larder. In 1948 the landlord claimed possession of the rooms on the ground floor and in the basement on the ground that they were not let as a "separate dwelling" within the Increase of Rent & Mortgage Interest (Restrictions) Act, 1920, s. 12 (2).

In 1916 L. became tenant of the ground floor and basement of a house. In 1946, by a separate tenancy agreement, he went into occupation of two rooms on the first floor of the same house. One of the first floor rooms was then used as a kitchen and the other as a living room, one ground floor room was used as a bedroom and the other as a workshop, and the basement rooms were used for storing coal and as a scullery. The landlord claimed possession of the ground floor and basement rooms on the ground that they were not let as a "separate dwelling" within s. 12 (2) of the Act of 1920.

Held: applying the principles laid down by the Court of Appeal in *Curl* v. *Angelo* ([1948] 2 All E.R. 189) and *Wright* v. *Howell* (1947) (204 L.T.Jo. 299), it was impossible to hold that the rooms comprised in the second tenancy in the first case and in the first tenancy in the second case constituted the separate dwelling of the tenant since one of the essential operations of living, namely, in the first case sleeping and in the second case cooking and the occupation of the living room, was carried on in premises other than those claimed, but the circumstances in which and the purposes for which the second tenancy in each case was granted strongly indicated, although the second tenancy was in form a separate transaction, that the true intention of the parties was to treat both tenancies as one letting, or, at all events, so interdependent that neither could be determined without the other, and the cases must be remitted to the county court to decide whether the second letting in each case was separate and distinct from the first or whether the real agreement to be imputed to the parties involved such a consolidation between the lettings as to make a single tenancy extending over the whole of the premises.

[As to Separate Dwellings, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369; and for Cases, see DIGEST, Vol. 31, p. 557, Nos. *7044-7046* and Second Supplement, Vol. 30 and 31, Nos. *7045a-7046b.*

Cases referred to:

(1) *Curl* v. *Angelo*, [1948] 2 All E.R. 189; [1948] L.J.R. 1756.
(2) *Wright* v. *Howell*, (1947), 204 L.T.Jo. 299; 2nd Digest Supp.
(3) *Mann* v. *Merrill*, [1945] 1 All E.R. 708; 114 L.J.K.B. 406; 173 L.T. 2; 2nd Digest Supp.
(4) *Lewis* v. *Purvis*, (1947), 177 L.T. 267; 2nd Digest Supp.

Appeals from decisions of His Honour Judge Drucquer, sitting at Westminster County Court on Feb. 17, 1949.

The landlord of two houses situate at 5 and 6 Newburgh Street, Soho, London, applied for possession of parts of both houses on the ground that the parts in question did not constitute "separate dwellings" within the Rent Restrictions Acts and so were not protected by the Acts. It was not disputed that each tenant was protected as regards other parts of the house. Both applications were dismissed. The Court of Appeal remitted both cases to the county court to determine the question whether the second letting in each case was truly A a separate and distinct letting, or whether the real agreement involved a consolidation of the two lettings, and ordered the appeals to stand over generally and to be restored to the list for further argument after the county court had given its decision.

WIMBUSH *v.* CIBULIA.

B *Marnham* for the landlord.
Gorst for the tenant.

Cur. adv. vult.

July 20. **JENKINS, L.J.,** read the following judgment of the court. This is an appeal from a judgment of the Westminster County Court dated Feb. 17, 1949, on a claim by the landlord (Mrs. Violet Lilian Wimbush) against C the tenant (Mr. Harry Cibulia) and his sub-tenant (a company called Dental Supplies and Services, Ltd.) for possession of the two ground floor and two basement rooms in No. 6 Newburgh Street, Soho, which was allowed in the county court only as regards the front room in the basement, being the part of the premises occupied by the sub-tenant. In addition to the four rooms already mentioned, the premises with which the case is concerned comprise two rooms D on the first floor of No. 6 Newburgh Street, of which possession is not claimed.

In 1925 the tenant took from the landlord's predecessor in title a weekly tenancy of the two first floor rooms at a weekly rent of 15*s.*, since increased to 16*s.* 8*d.* These two rooms were, undoubtedly, let to, and, in fact, used by, the tenant as a separate dwelling until 1933, his family who lived with him there consisting for the first three years or thereabouts of his wife and one E daughter. The front room was used as a bedroom and the back room as a kitchen, where cooking was done on a gas stove. In 1928 a son was born to the tenant, who asked the then landlord for further accommodation. The landlord advised him to wait a little while for accommodation in the same house. It seems that, in fact, he had to wait a matter of five years, but ultimately in 1933 the ground floor and basement fell vacant through the departure F of the former tenant (Mrs. Skell), and on July 21, 1933, the tenant was granted a weekly tenancy of this part of the house at a weekly rent of £1 1*s.* 6*d.*, since increased to £1 2*s.* 3*d.* This letting of additional accommodation was not effected, as one might have expected, by a simple substitution for the existing tenancy of a new tenancy comprising first floor, ground floor and basement at one entire rent. In point of form, according to the evidence of the rent G books, the transaction was carried out by keeping on foot the existing tenancy of the two first floor rooms and granting a separate tenancy at a distinct weekly rent in respect of the ground floor and basement. A new rent book was opened in respect of the ground floor and basement, and thereafter two separate rent books, one for each set of rooms, were consistently kept.

On becoming tenant of the ground floor and basement, the tenant reorganised H his accommodation, turning the first floor room formerly used as a kitchen into a second bedroom and using the back ground floor room as a kitchen and living room, the front ground floor room as a workroom for the purposes of his work as a jobbing tailor (which he had previously done away from home), and the back basement room as a larder. This reorganisation seems to have been carried out with the knowledge and approval of the landlord as the tenant, before he took the tenancy of the ground floor and basement rooms, told the landlord he would require the front ground floor room as a work room and the back ground floor room as a kitchen, and the landlord gave his consent to the installation of water in the back ground floor room. In 1935 (with the landlord's consent) the tenant let the front basement room (which was unsuitable as a living room) at 9*s.* per week to an electrical engineer for business purposes. This sub-tenant, after a period of absence during the war, assigned his sub-tenancy to the company already mentioned, which was a defendant in the action but has not appealed against the order for possession of the front basement room. In granting this sub-tenancy the tenant reserved to himself a right of way to the front coal cellar.

The mode of user of the various parts of the premises has continued as I have described down to the present time. Thus, although the tenant undoubtedly now occupies the first floor, ground floor and back basement room as one entire separate dwelling in which he carries on all the essential activities and concerns of life, he holds the first floor, on the one hand, and the ground floor and back basement room, on the other hand, under what in point of form appear to be two distinct contractual titles, and it is this circumstance that gives rise to the difficulty in the case.

In 1948 the landlord, having recently become the owner of No. 6 Newburgh Street subject to the tenant's occupation, served a notice to quit expiring on Sept. 20, 1948, in respect of the ground floor and the basement, and on its expiration she sued the tenant and the defendant company in the Westminster County Court for possession of the ground floor and basement and mesne profits. The particulars of claim alleged that the ground floor and basement were let and used for business purposes only and were not within the protection of the Rent Restrictions Acts, while the two rooms on the first floor were let and used as a residence and were within such protection, but (except as regards the room let to the defendant company) the argument actully advanced in support of the claim to possession was to the effect that the ground floor and basement were not let as a separate dwelling within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2). It appears that the county court judge did not consider the possibility that, notwithstanding the formally separate character of the two lettings, the true intention of the parties may have been to create the equivalent of one tenancy comprising the whole of the premises which after the additional letting constituted in their entirety the tenant's home. The judge, however, found it possible to hold that the ground floor and basement (other than the room sub-let to the defendant company) were nevertheless protected by the Acts. His reasons for so holding are thus stated in his note of his judgment :

> "It is true that the family do not sleep on the premises although they could do so if they so chose. The former tenant, Mrs. Skell, used the workroom both as a workroom and as a bedroom for her daughter and there is nothing in the tenancy of Cibulia which prevents him from using the front room in the same manner if he chose to put up a bed, say, for his son. But be that as it may, in my opinion, the ground floor and basement is the true home of Cibulia. There he and his family meet, live and eat, howbeit they sleep upstairs. The food which the family eats and the coal which the family uses is kept in the basement. In my opinion, the tenancy is protected by the Rent Restrictions Acts."

We find ourselves unable to agree with the learned county court judge's conclusion. Applying the principles laid down by this court in such cases as *Curl* v. *Angelo* (1) and *Wright* v. *Howell* (2), we find it impossible to hold that the ground floor and basement of No. 6 Newburgh Street by themselves ever in point of user constituted the separate dwelling of the tenant apart from the first floor rooms originally let to him since at all times after the letting of the ground floor and basement to the tenant in 1933 one of the essential operations of living, namely sleeping, was carried on in the two first floor rooms. The circumstances in which and purposes for which the additional tenancy was granted do, however, seem to us to provide a fairly strong indication that, although the additional letting was in form a separate transaction, the true intention of the parties may well have been that the two tenancies should be treated as one " letting " or at all events should be interdependent, so that the later in date was supplemental to the earlier and the one could not be determined without the other. If that was the true position, in fact, then we think the result would be that the tenant could claim protection in respect of the whole of the premises consisting of first floor, ground floor, and back basement room in the same way as if they had all been comprised in a single tenancy agreement.

On the facts so far found, we would not feel justified in dismissing the appeal on this ground, while, on the other hand, in all the circumstances of the case we are not content without further investigation to accept at its face value the formally separate character of the two tenancies, with consequences fatal, as it seems to us, to the tenant's case. We are loath to put the parties to the trouble and expense of a further hearing in the county court, but matters of evidence and fact under the Rent Acts are pre-eminently matters for the county court, and we think, therefore, that the proper course in the circumstances will be to remit the case to the county court for a further hearing directed to the question whether the additional letting was truly separate and distinct from the original letting, or the real agreement to be imputed to the parties (conformably with the actual facts as to user) involved such a consolidation of or interdependence between the two lettings as to make them in effect equivalent to a single tenancy agreement extending to the whole of the premises.

The appeal should in the meantime stand over generally and be restored to the list for further argument when the question above stated has been dealt with in the county court. In considering this question the county court judge will bear in mind that the language of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which speaks of a house or part of a house " let as a separate dwelling," does not in terms require that the letting should be by virtue of a single instrument or contract. Proviso (iii) to that sub-section and sub-s. (3) of s. 3 of the Rent and Mortgage Interest Restrictions Act, 1939, which relate to cases where land or premises have been " let with " a dwelling-house, seem to us clearly to contemplate the possibility of separate contracts or separate transactions, and cases under sub-s. (3) of s. 3 of the 1939 Act such as *Merrill* v. *Mann* (3) and *Lewis* v. *Purvis* (4) show that in such circumstances it is a question of fact whether or not the subject of each contract should be treated as intended to be and being separate and distinct from the other.

WIMBUSH *v.* LEVINSKI.

Marnham for the appellant (landlord).
Norman Black for the respondent (tenant).

Cur. adv. vult.

July 20. **JENKINS, L.J.,** read the following judgment of the court. This appeal (which in a sense is the converse of Cibulia's case) is from a judgment of the Westminster County Court dated Feb. 17, 1949, in so far as it dismissed a claim by the landlord (again Mrs. Violet Lilian Wimbush) against the tenant (Mr. S. Levinski) for possession of the ground floor and basement of No. 5 Newburgh Street, Soho.

The present rateable value of the whole house is £47. The tenant has been the occupying tenant of the ground floor and basement in question (each consisting of two rooms) ever since the year 1916 when they were let to him at the weekly rent of 15*s.* From the commencement of his tenancy down to the year 1918 the tenant used the front ground floor room as a workshop for the purposes of his business as a jobbing tailor, the back ground floor room as a bedroom for himself and his wife, the front basement room for the combined purposes of a bedroom for his two daughters and a living room for the family, and the back basement room as a kitchen. In 1918 the tenant took a further room on the second floor of the same house, paying the increased weekly rent of £1 11*s*. 6*d*. for all five rooms. The second floor room was used as a bedroom for the two daughters who had formerly slept in the living room, but otherwise the user of the four ground floor and basement rooms remained as above described.

In 1940 one of the daughters left home on getting married and the other went into the country to avoid the air raids. The bedroom on the second floor thus became superfluous and the tenant relinquished it, reverting (at a weekly rent which now stands at £1 1*s*. 2*d*.) to his original tenancy of the four ground floor and basement rooms, the user of which remained the same as before down to January, 1946. So far it is plain that the ground floor and basement from 1916 to 1918 and from 1940 onwards, and between 1918 and 1940 those four rooms plus the bedroom on the second floor, had constituted part of a house let to the tenant as a separate dwelling within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), and that in January, 1946, his tenancy of the four ground floor and basement rooms was within the protection afforded by the Rent Restrictions Acts. In January, 1946, however, the tenant took from the same person as was then his landlord in respect of the ground floor and basement a weekly tenancy of additional accommodation in the same house, consisting of two rooms on the first floor. As in Cibulia's case, this letting of additional accommodation was effected, in point of form at all events, by keeping the existing tenancy on foot in respect of the ground floor and basement and granting a separate tenancy at a distinct weekly rent (apparently of 17*s*. per week, since increased to 17*s*. 11*d*.) in respect of the first floor. As in Cibulia's case, a new rent book was opened in respect of the additional rooms, and thereafter two separate rent books, one for each set of rooms, were consistently kept.

On obtaining these additional two first floor rooms the tenant reorganised his accommodation and thereafter used and is still using one of the first floor rooms as a kitchen, the other as a living room, the ground floor front and back rooms as a workshop and bedroom respectively as before, the front basement room for storing coal and the back one (which has apparently been condemned for use as a kitchen) as a scullery for washing clothes. The case thus affords a precise parallel to Cibulia's case in that the respondent occupies as one entire separate dwelling premises held under what in point of form at all events are two distinct contractual titles, but it is the converse of Cibulia's case in that the premises of which possession is here sought are those comprised in the original, and not (as in Cibulia's case) the additional letting. In 1948 the landlord, who had recently become the owner of No. 5 Newburgh Street subject to the tenant's occupation, served a notice to quit expiring on Sept. 13 of that year in respect of the ground floor and basement, and on its expiration sued the tenant in the Westminster County Court for possession of the ground floor and basement, arrears of rent amounting to £53 16*s*. 0*d*. down to Sept. 13, 1948, and mesne profits at the rate of £1 1*s*. 2*d*. per week from that date. No question arises in this appeal as to the claim for arrears of rent, which was admitted, the sum claimed being paid into court by the tenant and paid out to the landlord under the judgment.

By her particulars of claim the landlord alleged that the tenant held two parts of the premises (that is, the two first floor rooms, on the one hand, and the ground floor and basement, on the other hand) on two separate and distinct tenancies, and that the ground floor and basement were let to the tenant for business purposes only and were used by him for the purposes of his trade or business as a tailor (an allegation which, if made good, would exclude them from the protection of the Rent Restrictions Acts), but admitted that the two first floor rooms (possession of which was not claimed) were let to and used by the tenant for residential purposes and were within the protection afforded by the Rent Restrictions Acts. Before the county court judge and in this court the claim to possession of the ground floor and basement was supported on grounds different from those pleaded. The contention urged on the part of the landlord A was that as from the date of the letting to the tenant of the two first floor rooms and his consequential reorganisation of the accommodation at his disposal the ground floor and basement ceased to be let as a separate dwelling within the meaning of s. 12 (2) of the Act of 1920, and, consequently, ceased to qualify for protection under the Acts. As in Cibulia's case, the county court judge appears to have addressed himself solely to the question whether the B ground floor and basement rooms, considered by themselves and apart from the two first floor rooms, were let as a separate dwelling within the meaning of s. 12 (2) of the Act of 1920. He, nevertheless, found himself able, as in Cibulia's case, to hold that the ground floor and basement were protected by the Acts, for reasons thus expressed in his note of his judgment :

> C " In my opinion, the tenancy consisting of the ground floor and basement is still protected by the Rent Restriction Acts. It is the same dwelling-house as the defendant occupied from 1916 to 1918 and from 1940 to 1946, and the only difference in user is that instead of using the basement as a living room and kitchen, he uses them as a storage for coal for domestic purposes and as a scullery for washing clothes for domestic purposes. In D my opinion, the fact that for greater ease and comfort he has taken two rooms on the first floor on a separate tenancy for a living room and the kitchen does not affect the question."

On the footing that the two lettings are to be treated as truly distinct and independent, this conclusion is open to objections similar to those we have stated in Cibulia's case. The essential activities here carried on in the first floor E rooms and not in the ground floor and basement being cooking and the activities normally carried on in a living room. There is, however, a not unimportant distinction in favour of the tenant in the present case (as opposed to Cibulia's case) in that here the ground floor and basement were the subject of the original letting and were undeniably let to the tenant in the first instance as a separate dwelling and used and occupied by him as such for many years. We prefer F to express no opinion at this stage as to the sufficiency of this distinction as a ground for upholding the decision in favour of the tenant even on the facts as at present found, but we think, for the same reasons as we have given in Cibulia's case, the right course in the circumstances will be to make the same order as in that case, that is to say, to remit the case to the county court for further hearing on the same question which we have stated in Cibulia's case, G the appeal in the meantime to stand over generally and be restored to the list for further argument when that question has been dealt with in the county court.

Order in the terms of the judgment : appeals adjourned generally.

Solicitors : *Taylor and Humbert* (for the appellant) ; *Seifert, Sedley & Co.* (for the respondent Cibulia) ; *C. V. Young and Cowper and Whitton* (for the respondent Levinski).

H [*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Distinguished. R. *v.* FURLONG. [1950] 1 All E.R. 636.

R. *v.* NEAL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Oliver and Stable, JJ.), July 14, 25, 1949.]

Criminal Law—Trial—Retirement of jury—Separation after being given in charge of bailiff—Permission by recorder to leave court and take luncheon together—Power to order new trial—Duty of counsel to bring irregularity to notice of court. A

The appellant was charged at quarter sessions on an indictment containing counts for both felony and misdemeanour. He was acquitted on all charges of felony, but was convicted on eight charges of misdemeanour and was sentenced. After the summing-up had been concluded and the jury had been given in charge of the bailiff, the recorder gave them permission to leave the court to have luncheon together, and they did so. B

HELD: (i) the permission given to the jury to leave the court and the custody of the bailiff after they had been charged was so serious an irregularity and departure from recognised legal procedure that the appellant's conviction must be quashed.

R. v. *Ketteridge* ([1915] 1 K.B. 467), *applied.* C

(ii) the irregularity did not result in the trial being a nullity, and, therefore, the court had no power to order a new trial.

R. v. *Ketteridge* (*supra*), *disapproved on this point.*

Semble: if other offences are taken into consideration when passing sentence in such a case, the accused can be tried afterwards for those offences. D

Per curiam: If some irregularity comes to the knowledge of counsel before the verdict is returned he should bring it to the attention of the court at the earliest possible moment so that the presiding judge may consider whether or not to discharge the jury without giving a verdict. Matters of this sort ought not to be held in reserve with a view to taking them before this court when it may be, as here, too late to remedy the mistake. E We desire to emphasise that, if an irregularity arises in a trial which can be cured and it is not brought timeously to the attention of the court of trial, it does not by any means follow that this court will allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction.

F

[AS TO CONDUCT OF JURY DURING HEARING, see HALSBURY, Hailsham Edn., Vol. 19, pp. 311-315, paras. 649-655; and FOR CASES, see DIGEST, Vol. 30, pp. 234-240, Nos. *296-385*.]

Cases referred to:

(1) *Crane* v. *Public Prosecutions Director*, [1921] 2 A.C. 299; 90 L.J.K.B. 1160; 125 L.T. 642; 85 J.P. 245; 14 Digest 245, *2365*. G

(2) *Winsor* v. *R.*, (1866), L.R. 1 Q.B. 390; 7 B. & S. 490; 35 L.J.M.C. 161; 14 L.T. 567; 30 J.P. 374; 14 Digest 329, *3442*.

(3) *R.* v. *Ketteridge*, [1915] 1 K.B. 467; 84 L.J.K.B. 352; 112 L.T. 783; 79 J.P. 216; 14 Digest 307, *3232*.

(4) *Stirland* v. *Public Prosecutions Director*, [1944] 2 All E.R. 13; [1944] A.C. 315; 113 L.J.K.B. 394; 171 L.T. 78; 109 J.P. 1; 2nd Digest Supp. H

(5) *R.* v. *Murphy*, (1869), L.R. 2 P.C. 535; 6 Moo. P.C.C.N.S. 177; 38 L.J.P.C. 53; *sub nom., A.-G. for New South Wales* v. *Murphy*, 21 L.T. 598; 14 Digest 307, *3234*.

(6) *R.* v. *Bertrand*, (1867), L.R. 1 P.C. 520; 16 L.T. 752; 31 J.P. 531; *sub nom., A.-G. of New South Wales* v. *Bertrand*, 4 Moo. P.C.C.N.S. 460; 36 L.J.P.C. 51; 14 Digest 309, *3261*.

(7) *R.* v. *Cronin*, [1940] 1 All E.R. 618 ; 162 L.T. 423 ; 104 J.P. 216 ; 2nd Digest Supp.

(8) *R.* v. *Nicholson*, [1947] 2 All E.R. 535 ; 32 Cr. App. Rep. 98, 127 ; 2nd Digest Supp.

(9) *R.* v. *Twiss*, [1918] 2 K.B. 853 ; 88 L.J.K.B. 20 ; 119 L.T. 680 ; 83 J.P. 23 ; 14 Digest 403, *4232*.

A (10) *R.* v. *Yeadon and Birch*, (1861), Le. & Ca. 81 ; 31 L.J.M.C. 70 ; 5 L.T. 329 ; 26 J.P. 148 ; 9 Cox C.C. 91 ; 14 Digest 320, *3360*.

APPEAL against conviction at Nottingham Quarter Sessions.

The appellant having been convicted and sentenced on charges of misdemeanour, it was contended on his behalf that the dispersal of the jury, with the leave of the recorder, after they had been charged but before verdict, B was such an irregularity that the convictions could not stand. The Court of Criminal Appeal allowed the appeal. The facts appear from the judgment of the court delivered by LORD GODDARD, C.J.

Cowley for the appellant.

Nigel Robinson for the Crown.

Cur. adv. vult.

C July 25. **LORD GODDARD, C.J.**, read the following judgment of the court. The court has already intimated that this appeal is allowed and the conviction quashed, and we now proceed to give our reasons. The appellant was charged before the recorder of Nottingham on an indictment containing 26 counts, two of which were withdrawn from the jury. Of the remaining counts some were for larceny of monies and others for fraudulent conversion. D The jury acquitted on all charges of larceny and convicted on eight charges of the misdemeanour of fraudulent conversion. The appeal is not brought on any ground of misdirection or misreception of evidence. In fact the merits of the case do not enter into consideration at all, but it appears that after the summing-up was concluded and the jury given in charge of the bailiff they sent a message to the learned recorder asking that they might be allowed to E leave the court for the purpose of getting luncheon. The learned recorder has reported to this court that what happened was that, after the jury had been absent for about half an hour they sent a message asking if they might have lunch together during the mid-day adjournment and leave the court for that purpose. He gave them permission to do so after referring to ARCHBOLD'S PLEADING, EVIDENCE AND PRACTICE, 31st ed., p. 194, where it is stated that the F jury must not leave the place appointed for their deliberations after they have retired without the special permission of the court. He appears to have treated that as meaning that he could give them permission to leave the court, and, accordingly, he did so. After the jury had given their verdict, counsel for the defence mentioned the matter to the recorder who said : " I understand they did disperse—I do not know what the period was—for the luncheon interval." G The recorder then heard evidence of character and proceeded to judgment.

The point that is now taken on behalf of the appellant is that the dispersal of the jury after they had retired to consider their verdict was an irregularity which was contrary to law, and that, consequently, the conviction must be quashed. There is no doubt that to deprive an accused person of the protection given by essential steps in criminal procedure amounts to a miscarriage of justice H and leaves the court no option but to quash the conviction : per LORD SUMNER in *Crane* v. *Director of Public Prosecutions* (1), and the question is whether or not this was an essential departure from well established rules of criminal procedure. Certainly no member of this court has ever heard of a jury being allowed to leave the building or to depart from the custody of the bailiff once they have been enclosed for the purpose of considering their verdict. It is well known that to avoid juries being kept locked up without refreshment it is a common practice for the presiding judge to break off his summing-up to allow the jury to obtain their luncheon or other refreshment and afterwards to complete his charge. There is no case to be found in the books where a jury, once given in charge of the bailiff, have been allowed to leave the building for any purpose whatever. It is laid down in Coke on Littleton, 19th ed., p. 227b, that a jury must not, until they are agreed, separate or leave the place appointed for their deliberations, though that must now be read in conjunction with cases which have decided that it is within the discretion of the court to discharge a jury who are unable to arrive at a verdict. Reference need only be made for this purpose to *Winsor* v. *R.* (2). In Blackstone's Commentaries (1876 ed. (Kerr)), vol. 4, p. 374, it is stated that " the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict . . . "

The matter was considered by this court in *R.* v. *Ketteridge* (3), where the court decided that, if a juror, after the judge has summed-up in any criminal trial, separates himself from his colleagues, and, not being under the control of the court, converses or is in a position to converse with other persons, it is an irregularity which, in the opinion of the court, renders the whole proceedings abortive. We can see no reason why, if this is the case where a single juror goes out so as not to be under the control of the court and is in a position to converse with other persons, it can make any difference if the whole of the jury leaves the court unattended. Indeed, it would appear to be an *a fortiori* case. It is unnecessary to consider what might be the position if the court permitted them to go to some place for refreshment under the charge of the bailiff. It may be that in such a case the position would be no different from that which obtained in murder cases until the recent legislation which permits a jury to separate for the night because it is well known that when the court rose for the day the jury were taken in the custody of the bailiff or bailiffs to an hotel where they stayed for the night and were brought back in the same custody to the court the next day. This might still happen if the court in its discretion refused to allow them to separate.

In truth, the statement in Archbold is too wide and should be qualified by some such words as " to be given only in cases of evident necessity." No doubt, if a juror is taken ill or wishes to relieve himself, the court can permit the bailiff to take him from the jury room for the purpose of medical attention or of going to the water closet, but he must remain in the charge of the bailiff. If the illness is not a mere passing indisposition, the judge could, no doubt, discharge the juryman as he could if he was taken ill in the box, and, under the provisions of the recent statute, could take a verdict provided the jury were not reduced below ten. Before that statute, if any one or more of the jury were taken ill and could not continue their deliberations without danger, the duty of the judge was to discharge the jury without giving a verdict and to order the trial to take place again. This is clear from the judgment of Blackburn, J., in *Winsor* v. *R.* (2). In our opinion, when the recorder allowed the jury to leave the court and go into the town after they had been charged, and thereby to leave the custody of the bailiff who had been sworn to keep them in some private and convenient place, there was so serious an irregularity and departure from the procedure recognised by law that we have no option but to quash the conviction, as was done in *Ketteridge's* case (3).

It may also be observed that s. 35 (4) of the Criminal Justice Act, 1948, reinforces the view which we have expressed because it is provided by that section that on the trial of any person for an offence on indictment the court may, if it thinks fit, at any time before the jury consider their verdict, permit them to separate. It may be said in this case that there was no evidence before the court that the jury did separate. They had asked if they might leave and have luncheon together, but whether they sat at one table or more than one, whether they went to the same place for luncheon or to different ones, they ceased to be under the control of the court and were out of the custody of the bailiff, and that, in our opinion, constitutes the irregularity.

Before leaving this part of the case we desire to make an observation for the guidance of counsel, should a similar case arise in the future. If some irregularity comes to the knowledge of counsel before the verdict is returned he should bring it to the attention of the court at the earliest possible moment
A so that the presiding judge may consider whether or not to discharge the jury without giving a verdict. Matters of this sort ought not to be held in reserve with a view to taking them before this court when it may be, as here, too late to remedy the mistake. In this connection we call attention to the concluding passages of LORD SIMON's speech in *Stirland* v. *Director of Public Prosecutions* (4). In the present case the irregularity should have been mentioned to the recorder
B before the jury returned their verdict, but it seems clear that, had this been done, the result would have been the same. The recorder believed, after his reference to ARCHBOLD, that he had power to give permission to the jury to leave the court, and counsel had not, nor could it be expected that he would have, the authorities at hand to deal with such an exceptional situation. Accordingly, there is no reason to suppose that, had he mentioned it before
C verdict, the recorder would have acted otherwise than he did. In these peculiar circumstances we are attaching no blame to counsel who was faced with a situation which might well have disconcerted the most experienced practitioner. We desire, however, to emphasise that, if an irregularity arises in a trial which can be cured and it is not brought timeously to the attention of the court of trial, it does not by any means follow that this court will allow advantage
D to be taken of it when it is too late to remedy it except by quashing the conviction.

The point now arises whether the court, having quashed the conviction, should order an acquittal or make some other order under the special provisions of the Criminal Appeal Act, 1907, as was done in *Crane's* case (1). The question is, then : Has the court power to order a further trial by awarding
E a *venire de novo*. At first, when this matter was discussed, the court inclined to the view that they could set aside the verdict and order a *venire de novo*. In *R.* v. *Ketteridge* (3) ([1915] 1 K.B. 470) LUSH, J., giving the judgment of the court, said that the only course open to the court was to discharge the jury and to commence the proceedings afresh, and a few lines further down he said : "It is, of course, open to the Crown to re-commence
F the proceedings." It will, however, be observed that the question whether the court had power to order a re-trial had not been argued. No doubt, if it is brought to the attention of the court, before the verdict is given, that the jury have separated, the court should at once discharge them from giving a verdict and order the proceedings to begin *de novo*, but both in *R.* v. *Ketteridge* (3) and in the present case the verdict was delivered and recorded
G and judgment was given.

In our opinion, if it transpires that there has been a mis-trial, then, whether the offence amounts to a felony or to a misdemeanour, the court can order the case to be re-tried, but in order that it may be said that it is a mis-trial the circumstances must be such as render the trial a nullity from the outset. In *R.* v. *Crane* (1), which was one of felony, the appellant was indicted for the
H offence of receiving stolen goods. There was a separate indictment against the thief. No doubt, by some oversight the two prisoners were given in charge of the same jury and were tried together, and both were convicted and sentenced. It seems that the clerk of the peace at the Leicester City Sessions, having the two indictments before him, arraigned the prisoners as though they were jointly indicted, and the fact that there were separate indictments was not brought to the attention of the recorder or of the counsel in the case. The House of Lords held that the trial was a nullity and that there must be

a fresh trial, and other cases can be found in the books in which this course has been taken in cases both of felony and of misdemeanour. Most of them will be found collected in the judgment of BLACKBURN, J., in *Winsor* v. *R.* (2) (L.R. 1 Q.B. 318), from which it is clear that, if there has been such an irregularity as would make the trial a nullity or if the jury return a wholly imperfect verdict, the court can direct a *venire de novo* even in the case of a felony. The law was much considered in *R.* v. *Murphy* (5), following on *R.* v. A *Bertrand* (6), and SIR WILLIAM ERLE, in stating the advice which the Judicial Committee would tender to Her Majesty, in *R.* v. *Murphy* (5), said (L.R. 2 P.C. 548):

> "The cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded have not been classified in the Digests; there are cases of defect of jurisdiction in respect of time, place, B or person—cases of verdicts so insufficiently expressed, or so ambiguous, that a judgment could not be founded thereon; but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of felony delivered by a competent jury before a competent tribunal in due form of law to be a nullity by reason of some conduct on the part of the jury which the court considers unsatisfactory." C

We think that this applies, not only to a charge of felony, but also to one of misdemeanour. Moreover, whereas in this case the indictment charges both felonies and misdemeanours as it can do under the Indictments Act, 1915, but could not do before, it is quite clear that if a *venire de novo* were awarded the whole indictment would have to be tried over again, and so the charges of felony of which the prisoner was acquitted would have to be re-tried as D well as the misdemeanours of which he was convicted. But that, in the opinion of the court, is not the governing consideration. This trial cannot in any sense be said to have been a nullity because of an irregularity on the part of either judge or jury after all the evidence had been heard and the summing-up had taken place. Down to that point everything was regular and in order. We think a test of what would amount to a mis-trial sufficient to render the E trial abortive and void would be whether the irregularity would be patent on the record if it were drawn up. If, for instance, the record in *Crane's* case (1) had been drawn up it would have appeared that there were two indictments and not a joint indictment. Both indictments would have had to be set out, and yet one verdict was returned and one judgment delivered. So too, if an indictment were preferred at quarter sessions which quarter sessions had no F jurisdiction to try, there would be a patent defect at once apparent on the record. The prisoner would never have been in peril of a lawful sentence being passed on him, and there would have been no trial. Or, again, it might appear that only eleven jurors were empanelled, for when the record was drawn up in former days the names of all the jurors sworn appeared thereon. In *R.* v. *Cronin* (7) the recorder of a borough was unable to be present and had G appointed a deputy to sit in his place and it afterwards appeared that the deputy had not the necessary qualification. The conviction, therefore, was *coram non judice* and the conviction was quashed and a *venire de novo* directed. That is an instance where the irregularity would not appear on the record. There are also several cases, most of which will be found referred to in *Winsor's* case (2), of verdicts so defective or ambiguous H that no judgment could be founded thereon. In all this class of case the trial has been and could only be treated as a nullity, but it is impossible to hold that the reasoning on which those cases depend applies to the circumstances of the present. We think we are entitled to treat what the court said in *R.* v. *Ketteridge* (3) as merely *obiter*. It will be observed that the court there did not order a *venire de novo*, and, as we have already said, they expressed an opinion on a matter which had never been argued.

We are, therefore, of opinion that we have no power to order a re-trial in this case and that all we can do is to quash the conviction. We point out that after verdict the appellant asked that a large number of similar cases should be taken into consideration. It is, therefore, open to the Crown still to proceed against him, if so advised, in respect of those cases, because, since the decision of this court in *R.* v. *Nicholson* (8), it is clear that *autrefois convict* cannot be
A pleaded where cases have been taken into consideration but the substantive conviction has afterwards been set aside. It was there pointed out that taking offences into consideration was in no sense a conviction on them. They were merely taken into consideration so as to prevent the prisoner being re-arrested and charged when he came out of prison from serving the sentence passed on the indictment. It may be that the court increases the sentence, but it still
B has to be one which the offence charged in the indictment would carry. It has been held in this court that a prisoner charged with the misdemeanour of attempting to break and enter, who asked for other offences, whether of breaking and entering or attempting to do so, should be taken into account, could not receive a sentence in excess of two years because the sentence must be one justified by the indictment on which judgment was passed. It is not for us to
C say whether the Crown should proceed. We only point out that they can do so if they choose.

Conviction quashed.

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-law.*]

D

LEDERER *v.* PARKER.

E [COURT OF APPEAL (Bucknill and Asquith, L.JJ., and Hodson, J.), July 13, 25, 1949.]

Rent Restriction—Furnished letting—Recovery of excess rent—Exclusion from Rent Restrictions Acts of furnished houses—Rent including payment for attendance as well as payment for furniture—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 9 (1) (*as amended by the Rent*
F *and Mortgage Interest Restrictions Act,* 1939 (*c.* 71), *sched. I*) *and s.* 12 (2) (i) (*as amended by the Rent and Mortgage Interest Restrictions Act,* 1923 (*c.* 32), *s.* 10 (1).

At all material times the tenants occupied a flat, the rateable value of which was within the limits prescribed by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), which was let to them by the landlords
G at a rent of which a substantial portion was fairly attributable to the use of furniture in the flat and a small part to attendance provided by the landlords. On a claim by the tenants under s. 9 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as amended by sched. I to the Act of 1939), which provides for the limitation of the rent of houses let furnished and for the repayment to tenants by landlords of the
H amount of rent paid by the tenants in excess of that which would yield to the landlords a "normal profit" within s. 9 (2) of the Act,

HELD: (i) s. 9 (1) by its terms applied to any dwelling-house to which the Rent Restrictions Acts applied; s. 12 (2), proviso (i), of the Act of 1920 (as amended by s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923) excepted from the Acts houses let at a rent which included payments in respect of attendance or the use of furniture which formed a substantial portion of the whole rent, but only "save as otherwise expressly provided" ; for the purpose of effecting a limitation of rent s. 9 (1) was an express provision "otherwise" ; and, therefore, the flat was within the Rent Restrictions Acts and the tenants could avail themselves of the provisions of s. 9 (1).

(ii) s. 9 (1) applied although the rent paid by the tenants included payment for attendance as well as for the use of furniture.

[As to Dwelling-houses let at Rent including Use of Furniture, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370 ; and for Cases, see DIGEST, Vol. 31, pp. 560, 561, Nos. *7078-7084*.] A

Cases referred to:

(1) *Roppel* v. *Bennett*, [1948] 2 All E.R. 627 ; [1949] 1 K.B. 115 ; [1948] L.J.R. 1929.

(2) *Riordan* v. *Minchin*, [1948] 2 All E.R. 633 ; [1949] 1 K.B. 137 ; [1948] L.J.R. 1939. B

Appeal by the landlords from a decision of His Honour Judge Bensley Wells at Marylebone County Court awarding the tenants, under s. 9 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, £14 10*s*. 0*d*. as payment made by them to the landlords in respect of rent for a furnished flat yielding to the landlords a profit in excess of the normal profit as defined by s. 9 (2). The facts appear in the judgment of Asquith, L.J. the Court of Appeal dismissed the appeal. C

Norman King for the landlords.

F. A. Hopkinson for the tenants.

BUCKNILL, L.J. : I will ask Asquith, L.J., to read the first judgment. D

ASQUITH, L.J. : This is an appeal by landlords from a judgment of His Honour Judge Bensley Wells at the Marylebone County Court, awarding the tenants £14 10*s*. 0*d*. (with costs) under s. 9 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sched. I. So amended the sub-section reads as follows: E

> "Where any person lets, or has, since the beginning of the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1939, let any dwelling-house to which this Act applies, or any part thereof, at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the county court on the application of the tenant that the rent charged is yielding or will yield to the landlord a profit in excess of the normal profit as hereinafter defined, the court may order that the rent, so far as it exceeds such sum as would yield such normal profit shall be irrecoverable, and that the amount of any payment of rent in excess of such sum which may have been made in respect of any period after the commencement of the Rent and Mortgage Interest Restrictions Act, 1939, shall be repaid to the tenant." F G

Sub-section (2) (as amended) provides:

> "For the purpose of this section, 'normal profit' means the profit which might reasonably have been expected from a similar letting in the year ending on Sept. 1, 1939." H

The material facts, which were not in dispute, were that from Jan. 22, 1947, to Mar. 5, 1948, the tenants occupied a flat in Maida Vale let to them by the landlords at a rent of £3 13*s*. 6*d*. a week. The flat was fully furnished and certain attendance was also provided, such as the removal of rubbish, use of telephone, etc., and a certain amount of laundering. It was common ground between the parties that a substantial part of the rent was attributable to attendance and the use of furniture, but not that a substantial part of the

rent was attributable to attendance alone. The attendance seems to have been trifling, and when the learned county court judge found that the flat was fully furnished he impliedly found, I think, that the part of the rent referable to use of furniture was substantial. In March, 1948, the tenants were given notice to quit. They applied to a rent tribunal and secured a reduction in the rent for the future. By plaint issued on Apr. 2, 1948, they claimed under
A s. 9 (1) to recover £58 14*s.* 6*d.* as rent overpaid in the past, being £1 0*s.* 3*d.* a week in respect of the period Jan. 22, 1947, to Mar. 5, 1948. The landlords resisted the claim, but it succeeded as to £14 10*s.* 0*d.* The present appeal is from the award of this sum.

The landlords' contention is that s. 9 (1) does not apply. By its express terms, they argue, it only applies to " dwelling-houses to which this Act applies,"
B and this flat, they say, is not such a dwelling-house. In support of this contention they rely on proviso (i) to s. 12 (2) of the Act of 1920, which I will call for short " the proviso." The body of s. 12 (2) (now amended by subsequent legislation) provides that the Act shall apply to dwelling-houses whose rateable value does not exceed specific figures, and the proviso reads as follows:

> " . . . this Act shall not, save as otherwise expressly provided, apply
> C to a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or use of furniture."

This proviso is now modified by s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, which provides:

> " For the purposes of proviso (i) to sub-s. (2) of s. 12 of the principal
> D Act (which relates to the exclusion of dwelling-houses from the principal Act in certain circumstances), a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent."

E The landlords say that this flat is a dwelling-house which is *bona fide* let at a rent a substantial part of which is fairly attributable to the use of furniture, and that, in consequence of the combined effect of the provisions just cited, it is not a dwelling-house to which the Acts apply, and so is not within s. 9 (1) and no claim can be made by the tenants under that sub-section. The county court judge rejected this contention and I think he was right.

F The phrase " a dwelling-house to which this Act applies " recurs constantly in the Acts. In construing it in particular contexts regard must be had to the two distinct governing purposes of this body of legislation. Those two purposes, notoriously, are (i) to prevent increases in rents beyond moderate and prescribed limits, and (ii) to protect tenants from eviction by limiting or suspending the landlord's claim to possession. A dwelling-house is a " dwelling-house to which
G this Act applies " for the first purpose, namely, limitation of rent, if its rateable value is below certain figures specified in the Act—in London £100, but that without more will not make it a " dwelling-house to which this Act applies " for the second purpose, namely, protection from eviction. To secure this last type of protection a further condition must be satisfied, namely, that the contractual tenancy must have been terminated by notice to quit, effluxion
H of time, or the like, and replaced by a so-called statutory tenancy. Section 9 of the Act of 1920 is directed purely to limitation of rent, and in such a setting the natural meaning of " dwelling-house to which this Act applies " is a dwelling-house which (if in London) has a rateable value not exceeding £100. That and no more. *Roppel* v. *Bennett* (1), cited by the tenants and relied on by the county court judge, is a good illustration of the distinction I have indicated between the two purposes for which a dwelling-house can be " a dwelling-house to which this Act applies." For the purposes of the claim, which was a claim to

possession, the house (a substantially furnished house) was held by virtue of the proviso not to be a dwelling-house to which the Act applied, but for the purposes of the counterclaim, namely, for recovery of rent overpaid, it *was* held to be a " dwelling-house to which this Act applies " within s. 9 (1).

That case is binding on this court, and, in my view, is conclusive of this appeal on this particular point. But, out of respect for the argument addressed to us on behalf of the landlords and as these points were not expressly taken before the court in that case, I will refer to one or two other considerations which, in my view, point in the same direction. The proviso contains the words " save as otherwise expressly provided," and I am clearly of opinion that s. 9 (1) " expressly provides otherwise." For simplicity, and to deal with an argument much relied on for the landlords, I will first consider the meaning and interaction of these two provisions as at a time after the Act of 1920 had come into force but before that of 1923 had done so. In this period the proviso *prima facie* removed from the protection of the Act for all purposes (whether limitation of rent or protection from eviction) all houses let furnished, but the words " save as otherwise expressly provided " in effect carved out an exception in the proviso to the extent of the operation of s. 9 (1). The latter section, therefore, applied to all furnished lettings and conferred the protection given by the section—not from eviction, but only from uncontrolled rises in rent—in the cases of " dwelling-houses to which this Act applies." In its context the last phrase could only mean dwelling-houses within the limits of rateable value (or in 1920 of rateable value or rent) set out in the relevant section of the Act in force from time to time. On the landlords' view of its meaning, s. 9 (1) could not have operated on anything. On their view s. 9 (1) applied to dwelling-houses let furnished " to which this Act applies " and the proviso says there are no such houses. But, it is argued, we are not living in 1920, 1921, or 1922, and since 1923 the proviso has been qualified by s. 10 (1) of the Act of that year. This section limits the operation of the proviso (where furniture is concerned) to what may be called for short substantially furnished lettings. Hence, so the argument runs, when you now consider s. 9 (1) and construe the phrase " dwelling-house to which this Act applies " in that sub-section, you must make allowance for the change introduced by the Act of 1923. The phrase now means dwelling-houses (with, of course, a rateable value within the limits specified in the Acts) let furnished, but not substantially furnished, for the latter are taken out of the Acts by the proviso and the 1923 Act. The judge has found that the flat in this case was let *substantially* furnished (this is implied in his expression " fully furnished "). *Ergo*, the flat is not a " dwelling-house to which this Act applies " within s. 9 (1) and no claim lies under that sub-section. I do not find this argument convincing, apart from its being contrary to the ratio on which *Roppel* v. *Bennett* (1) was decided by this court. If before 1923 " dwelling-house to which this Act applies " in s. 9 (1) meant no more than a dwelling-house within the limits of the rent or rateable value laid down by the Acts, the enactment of s. 10 of the 1923 Act has not, in my view, given it a wider meaning. The phrase continues to mean what it then did and no more. The point, however, can be left open, as it was left open in *Riordan* v. *Minchin* (2), since in this case there was a " substantially " furnished letting and such lettings are for reasons given above certainly covered by s. 9 (1). The answer to the landlords' first point may be summarised thus : (i) Section 9 (1) only applies to " dwelling-houses to which this Act applies." (ii) The body of s. 12 (2) (as amended by subsequent Acts) defines such dwelling-houses as dwelling-houses whose rateable value does not exceed certain prescribed figures. (This flat so far is within the class as defined). (iii) But from this class of dwelling-houses the proviso (as modified by s. 10 (1) of the 1923 Act) *prima facie* excepts dwelling-houses let at a rent a substantial amount of which is referable to attendance or furniture. (This flat is within the class so excepted).

But (iv) The proviso is prefaced with the words "save as otherwise expressly provided." These words carve out an exception from the exception to the extent of the operation of s. 9 (1) of the Act of 1920 and s. 10 of the Act of 1923, to which alone they can refer. This flat is within the exception to the exception, and, therefore, is a "dwelling-house to which this Act applies" within the meaning and for the purposes of s. 9 (1). (For a different purpose—recovery of possession—the flat would be outside the protection of the Acts).

A The landlords, however, rely more strongly on a second point. This is that, assuming counsel is wrong on his first point, nevertheless s. 9 (1), while it applies in terms to tenancies where the rent covers occupation of the premises plus use of furniture, does not apply in terms to tenancies where the rent covers occupation of the premises plus use of furniture plus attendance, or any other extra besides furniture, for example, board. B In the absence of some clear implication from the context or otherwise imparting a special meaning to the words used in a statute, they are to be construed in their ordinary literal and grammatical meaning. What is the ordinary grammatical meaning of s. 9 (1) ? According to this standard the words "let at a rent which includes payment in respect of the use of furniture" would appear to be satisfied where the rent includes such payments and also payments in respect of attendance. C A lease is none the less a lease at a rent covering use of furniture because the rent also covers some other service. A man wearing a hat and a coat is none the less a man "wearing a hat" because he is also wearing a coat. It is not clear why after "furniture" we must read in the words "and no other extra."

The present tenancy seems, therefore, to fall within the words in question. D It is true that such a construction would enable the county court judge, on proof that the rent included an element attributable to the use of furniture, to control the whole rent, notwithstanding that it also included elements attributable to other components, for example, attendance or board or both and that one can imagine cases in which these other components might be very large. That is true, but it seems to me a result which, though possibly unintended, flows from the words used whem construed in their primary sense. E The subsection goes on to provide that where it is proved to the satisfaction of the county court judge . . . that the rent charged is yielding or will yield a profit in excess of the normal profit, he may order the excess to be irrecoverable. In this passage, the "rent charged," again construed in its ordinary meaning, must mean the rent in fact charged under the lease in question, and, if that rent covers furniture plus attendance or some other extra, it is none F the less the rent charged, and it is in relation to that rent that the county court judge must perform the calculation prescribed by the section. I cannot see that there is any clear or necessary implication from the context or otherwise to modify the construction which I have indicated. It has been suggested that in a case in which the rent includes use of furniture plus some other extra, for example, attendance, the county court judge, in applying the section and G comparing the profits with the corresponding 1939 "normal" profits, should ascertain and eliminate from both sides of the account the element attributable to attendance. The section, however, does not say so. It is not a necessary implication, and it would add yet another baffling complication to a task, complex enough already in all conscience, which the Acts impose on county court judges. For these reasons I am of opinion that the appeal should be H dismissed.

BUCKNILL, L.J.: I also think that the appeal should be dismissed.

HODSON, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Amery-Parkes & Co.* (for the landlords); *Good, Good & Co.* (for the tenants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

R. *v.* CLARKE.

[Leeds Assizes (Byrne, J.), July 13, 14, 15, 1949.]

Criminal Law—Rape—By husband on wife—Separation order in force.

The accused was charged on indictment, by the first count, with the rape of his wife on Mar. 12, 1949, and, by the second count, with an assault on her occasioning actual bodily harm on the same date. The accused and his wife were married on Oct. 8, 1938, and on Mar. 2, 1949, the wife obtained a separation order containing the usual clause providing that she was no longer bound to cohabit with the accused. The wife had not resumed cohabitation at the time of the alleged offence. On a motion to quash the first count of the indictment on the ground that it disclosed no offence known to the law,

Held: as a general proposition of law a husband cannot be guilty of a rape on his wife, but where justices had made an order containing a provision that a wife be no longer bound to cohabit with her husband the consent to marital intercourse impliedly given by the wife at the time of the marriage was revoked thereby and the husband was not entitled to have intercourse with her without her consent, with the result that he could be guilty of a rape.

[As to Rape by Husband on Wife, see HALSBURY, Hailsham Edn., Vol. 9, p. 476, para. 815.]

Cases referred to:

(1) *R.* v. *Waite*, [1892] 2 Q.B. 600; 61 L.J.M.C. 187; 67 L.T. 300; 14 Digest 54, *203*.
(2) *R.* v. *Clarence*, (1888), 22 Q.B.D. 23; 58 L.J.M.C. 10; 59 L.T. 780; 53 J.P. 149; 15 Digest 818, *8931*.
(3) *R.* v. *Audley* (*Lord*), *Castlehaven's* (*Earl*) *Case*, (1631), 3 State Tr. 401; Hut. 115; 1 Hale P.C. 629; 15 Digest 843, *9264*.
(4) *R.* v. *Lapworth*, [1931] 1 K.B. 117; 100 L.J.K.B. 52; 144 L.T. 126; 95 J.P. 2; Digest Supp.
(5) *Huxtable* v. *Huxtable*, (1899), 68 L.J.P. 83; 27 Digest 309, *2858*.
(6) *Boyce* v. *Cox*, [1922] 1 K.B. 149; 91 L.J.K.B. 122; 126 L.T. 254; 85 J.P. 279; Digest Supp.

Motion to quash a count in an indictment.

The facts appear in the headnote and the judgment.

Veale for the accused.
Stanley-Price for the Crown.

BYRNE, J.: In the first count of the indictment the defendant is charged with raping his wife. His counsel has moved to quash that count on the ground that it does not disclose any offence known to the law.

As a general proposition it can be stated that a husband cannot be guilty of a rape on his wife. No doubt, the reason for that is that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them. The marital right of the husband in such circumstances exists by virtue of the consent given by the wife at the time of the marriage and not by virtue of a consent given at the time of each act of intercourse as in the case of unmarried persons. Thus, the intercourse is not by virtue of any special consent, but is based on an obligation imposed on the wife by reason of the marriage. In Hale's Pleas of the Crown, vol. 1, p. 629, the learned author states the law in this way:

> "... by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

In the present case, the justices made an order on Mar. 2, 1949, on the ground of the husband's persistent cruelty containing a provision that the wife be no longer bound to cohabit with the husband. That order has the effect in all respects of a decree of judicial separation, and one result of it is that both the person and the property of the wife are protected by it. It could be discharged if the wife committed adultery or if she voluntarily resumed cohabitation with A her husband, and by "cohabitation," as I understand it, is meant intercourse when the parties have begun to live together again, or intercourse although they are not living under the same roof. In this case at the material time the wife had not resumed cohabitation. The position, therefore, was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created B by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked. Thus, in my opinion, the husband was not entitled to have intercourse with her without her consent. For these reasons, this motion fails.

The husband then pleaded " Not Guilty " and was tried. Verdict: " Not Guilty " on the indictment on both counts.

C Solicitors: *Wilkinson, Woodward & Ludlam,* Halifax (for the accused); *R. C. Linney,* County Hall, Wakefield (for the Crown).

[*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

D

R. v. BROWES.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Oliver and Stable, JJ.), July 15, 1949.]

E *Criminal Law — Sentence — Supervision — Discharged prisoner — Notification of address to appointed society — " Convicted on indictment " — Person committed for sentence to quarter sessions—Criminal Justice Act,* 1948 (*c.* 58), *s.* 22 (1), (2), *s.* 29 (1).

By the Criminal Justice Act, 1948, s. 21 (1): "Where a person who is not less than 21 years of age (*a*) is convicted on indictment of an offence F punishable with imprisonment for a term of two years or more; and (*b*) has been convicted on at least two previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, then, if the court is satisfied that it is expedient with a view to his reformation . . . the court may pass, in lieu of any other sentence, a sentence of corrective training for such term of not less than two nor G more than four years as the court may determine." By s. 22 (1): "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person (*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment . . . the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having H regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section." By s. 22 (2), where an order is made under s. 22 (1), the offender, on his discharge from prison, is to give his address to an appointed society. By s. 23 (1): "For the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention or to be ordered to be subject to provisions of the last foregoing section, no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the conviction or sentence ; and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by verdict of a jury." By s. 29 (1), if justices deal summarily in respect of an indictable offence and convict a prisoner and, on obtaining information in regard to A his character and previous record, consider that a greater punishment should be inflicted than they have power to inflict, they may commit him to custody to quarter sessions for sentence. By s. 29 (3): " Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say: (*a*) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, B and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment." By s. 29 (3) (*d*), if quarter sessions pass a sentence which justices would not have had power to pass, the offender may appeal against the sentence to the Court of Criminal Appeal.

C

The appellant was convicted by justices of larceny and committed to quarter sessions for sentence under s. 29 (1) of the Act of 1948. The recorder passed a sentence of corrective training under s. 21 (1), but, before doing so, he failed to obtain from the appellant an admission in regard to previous convictions or to obtain a verdict of a jury on the question as required by s. 23 (1). On an appeal against the sentence to D the Court of Criminal Appeal on the ground that the provisions of s. 23 (1) had not been complied with, the Court of Criminal Appeal substituted a sentence of imprisonment for the sentence of corrective training. The question then arose whether or not an order could be made on the appellant under s. 22 (1), as the opening words of the sub-section are: " Where a person is convicted on indictment . . ."

E

Held : an offender who had been committed to quarter sessions for sentence under s. 29 (1) of the Act of 1948 was to be treated for all purposes as though he had been convicted on indictment, and, therefore, he was subject to the provisions of s. 22. As, however, the procedure required by s. 23 (1) applied to s. 22, and had not been followed in this case, an order could not be made on the appellant under s. 22 (1).

F

Appeal against sentence.

The appellant was convicted of larceny by justices of the city of Leicester and was committed to quarter sessions for sentence under the Criminal Justice Act, 1948, s. 29 (1). The recorder of Leicester passed a sentence of four years' corrective training under s. 21 (1) of the Act, but, before doing so, he omitted to obtain an admission from the appellant in regard to previous convictions G or to have the question determined by the verdict of a jury as required by s. 23 (1) of the Act. The appeal from this sentence was allowed by the Court of Criminal Appeal (Lord Goddard, C.J., Streatfeild and Devlin, JJ.), on June 21, 1949, and the court substituted a sentence of imprisonment for the sentence of corrective training. The question then arose whether or not an order could be made on the appellant under s. 22 (1) of the Act requiring H him to notify his address on discharge under s. 22 (2), and the case was stood over for argument on this question. On July 15, 1949, before the present court, it was contended for the appellant that, as the opening words of s. 22 (1) are: " Where a person is convicted on indictment," the sub-section could not apply to the appellant, because he was not convicted on indictment. The court held that an offender who had been committed to quarter sessions for sentence under s. 29 (1) of the Act of 1948 was to be treated for all purposes as though he had been convicted on indictment, and, therefore, he was subject to the provisions of s. 22, but, as the provisions of s. 23 (1) applied to s. 22 as well as to s. 21 (1) and had not been complied with, an order could not be made on the appellant under s. 22 (1).

J. N. Watkins for the appellant.
Maxwell Turner for the Crown.

A **LORD GODDARD, C.J.** [delivering the judgment of the court.] The appellant, having been convicted of the larceny of a motor car, was sentenced by the recorder of the city of Leicester, to four years' corrective training under the Criminal Justice Act, 1948, s. 21 (1). His appeal against that sentence was before the court on June 21, and, for reasons which the court then gave, B the court set aside the sentence of corrective training because the conditions laid down in the statute before such a sentence could be passed had not been fulfilled. The court substituted a sentence of imprisonment for the sentence of corrective training. It is desirable that it should be remembered by all courts, both of assize and quarter sessions, that, before a sentence of corrective training or of preventive detention can be passed, the convicted C person must be asked whether he admits the convictions of which notice has been given and which will render him liable to a sentence either of corrective training or preventive detention. He must be asked specially the question whether he admits the convictions. If he says "Yes," no more need be done. If he denies the convictions, it must be decided by a jury whether he was the person who was previously convicted.

D Another point arises in this case. Section 22 (1) of the Act of 1948 provides:

> "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person (*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment ; or (*b*) has been previously convicted of an offence for which he was sentenced to corrective E training, the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section."

F The provisions of the section are that he shall give his name and address to an appointed society so that they can keep watch on him. It was contended that, as the section says "where a person is convicted on indictment," it cannot apply in the present case. Section 29 (1) of the Act, however, introduces a new procedure whereby, if justices deal summarily in respect of an indictable offence and convict the prisoner, and then, on hearing his character and previous G record, consider that it is a case in which a more severe sentence should be passed than they have power to inflict, they may commit him in custody to quarter sessions for sentence. By s. 29 (3):

> "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say: (*a*) the appeal committee or court of quarter sessions shall inquire into the circumstances H of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment . . . (*d*) if the appeal committee or court of quarter sessions passes a sentence which the court of summary jurisdiction would not have had power to pass, the offender may appeal against the sentence to the Court of Criminal Appeal as if he had been convicted on indictment ; and the provisions of the Criminal Appeal Act, 1907, shall apply accordingly."

In the opinion of the court, it is intended that, where an offender has been committed to quarter sessions for sentence, although he has not been convicted on indictment, he is for all purposes to be treated as though he had been convicted on indictment. He has, in fact, been committed by the justices to quarter sessions for sentence, and it is important that it should be remembered that, when he has been committed to quarter sessions for sentence under s. 29 (1) of the Act of 1948, under s. 29 (3) (*d*) he can appeal to this court against the sentence passed on him by quarter sessions if the sentence is one which the justices would not have had power to pass. If the legislature had not intended that he was to be in the same position as a person convicted on indictment, it would not have given him the right to appeal to this court. The court has no doubt that the intention of the Act is that an offender who has been committed to quarter sessions for sentence under s. 29 (1) is to be treated for all purposes as though he had been convicted on indictment, and, therefore, if the sections are otherwise applicable, he becomes subject, not only to the provisions of s. 22 (1), with which we have just been dealing, but also to the provisions of s. 20 (1), which empowers the court to pass a sentence of Borstal training, and to s. 21 (1). In the present case, however, the procedure required by s. 23 (1) of the Act had not been carried out, with the result that the sentence of corrective training had to be set aside. As the provisions of s. 23 (1) apply to s. 22, it follows that the appellant cannot be ordered to notify his address on being discharged from prison as required by s. 22 (1) and (2).

Appeal allowed. Sentence of imprisonment substituted for sentence of corrective training.

Solicitors : *Registrar, Court of Criminal Appeal* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

HILL *v.* WILLIAM HILL (PARK LANE), LTD.

[House of Lords (Viscount Jowitt, L.C., Viscount Simon, Lord Greene, Lord Normand, Lord Oaksey, Lord MacDermott and Lord Radcliffe), June 14, 15, July 29, 1949.]

Gaming—Debt—Recovery of money alleged to be won on wager—New consideration—Agreement to pay by instalments—Promise by bookmaker not to report to Tattersalls' committee—Enforceability of agreement—Gaming Act, 1845 (*c.* 109), *s.* 18.

The Gaming Act, 1845, s. 18 provides: " All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made . . . "

As a result of betting transactions with the respondents, a firm of bookmakers, the appellant lost £3,635 12*s.* 6*d.* In April, 1946, the appellant being unable to pay, the respondents referred the matter to the committee of Tattersalls who, on July 22, 1946, decided that the appellant should pay the respondents £635 12*s.* 6*d.* within fourteen days and the balance by monthly instalments of £100. If the appellant failed to make these payments, he was liable, at the instigation of the respondents, to be reported to the committee of Tattersalls which would result in his being warned off Newmarket Heath and posted as a defaulter. On Aug. 15, 1946, the appellant informed the respondents that he was unable to pay the £635 12*s.* 6*d.* and offered to send them a cheque for that sum post-dated Oct. 10, 1946, and to pay the monthly

Applied. Coral *v.* Kleyman. [1951] 1 All E.R. 518.

instalments of £100 thereafter. On Aug. 17 the respondents replied, agreeing that, if the post-dated cheque was honoured and the balance of their account was paid by instalments commencing November, 1946, they would refrain from reporting the appellant to the committee of Tattersalls. To this letter the appellant replied on Aug. 20, enclosing the post-dated cheque and agreeing to pay the monthly instalments. On presentation the cheque was dishonoured and the appellant failed to make any payments to the respondents except one of £335 12*s.* 6*d.* on Oct. 19, 1946, which the respondents accepted without prejudice to their rights under the contract. On Feb. 21, 1947, the respondents issued a writ claiming payment of £700 as due to them under the agreement of Aug. 20, 1946. The respondents contended (i) that the sum which the appellant had promised to pay was not money " won upon a wager " within the second branch of s. 18, but was money due under a new lawful and enforceable agreement ; and (ii) that, even if the sum was to be regarded as won on a wager, it was nevertheless recoverable because the second branch of s. 18 was concerned only with suits seeking to enforce the gaming and wagering contracts or agreements dealt with in the first branch of the section, and the agreement of Aug. 20, 1946, was not such a contract or agreement.

HELD (VISCOUNT JOWITT, L.C., LORD OAKSEY, and LORD RADCLIFFE dissenting) : (i) although the agreement contained a new promise by the appellant for good consideration, it was a promise to pay money " won upon a wager " and the respondents' action was brought to recover money alleged to be so won ;

(ii) the second branch of s. 18 did not relate only to suits brought on wagering contracts declared void by the first branch, but applied to all suits brought to recover money alleged to have been won on a wager, and, therefore, the contract was unenforceable.

Bubb v. *Yelverton* (1870) (L.R. 9 Eq. 471) and *Hyams* v. *Stuart King* ([1908] 2 K.B. 696), *overruled.*

Dicta of MAULE and CRESSWELL, JJ., in *Varney* v. *Hickman* (1847) (5 C.B. 280, 282) and LORD CAIRNS, L.C., and BRAMWELL, L.J., in *Diggle* v. *Higgs* (1877) (2 Ex. D. 427, 429), *disapproved.*

[FOR THE GAMING ACT, 1845, s. 18, see HALSBURY'S STATUTES, Vol. 8, p. 1152.] 2nd Edn vol. 10 p. 746

Cases referred to:

(1) *Hyams* v. *Stuart King*, [1908] 2 K.B. 696 ; 77 L.J.K.B. 794 ; 99 L.T. 424 ; 25 Digest 401, *58*.

(2) *Moon* v. *Durden*, (1848), 2 Exch. 22 ; 12 J.P. Jo. 164 ; 25 Digest 399, *44*.

(3) *Varney* v. *Hickman*, (1847), 5 C.B. 271 ; 5 Dow. & L. 364 ; 17 L.J.C.P. 102 ; 10 L.T.O.S. 248 ; 12 J.P. 38 ; 25 Digest 405, *82*.

(4) *Diggle* v. *Higgs*, (1877), 2 Ex. D. 422 ; 46 L.J.Q.B. 721 ; 37 L.T. 27 ; 42 J.P. 245 ; 25 Digest 400, *52*.

(5) *Hough* v. *Windus*, (1884), 12 Q.B.D. 224 ; 53 L.J.Q.B. 165 ; 50 L.T. 312 ; 42 Digest 702, *1188*.

(6) *Bubb* v. *Yelverton*, (1870), L.R. 9 Eq. 471 ; 39 L.J.Ch. 428 ; 22 L.T. 258 ; 25 Digest 400, *55*.

(7) *Martin* v. *Hewson*, (1855), 10 Exch. 737 ; 24 L.J.Ex. 174 ; 24 L.T.O.S. 244 ; 25 Digest 405, *83*.

(8) *Re Browne, Ex p. Martingell*, [1904] 2 K.B. 133 ; 73 L.J.K.B. 446 ; 90 L.T. 291 ; 4 Digest 253, *2413*.

(9) *Goodson* v. *Baker*, (1908), 98 L.T. 415 ; 25 Digest 401, *57*.

(10) *Robertson* v. *Balfour*, 1938. S.C. 207.

(11) *Bradlaugh* v. *Clarke*, (1883), 8 App. Cas. 354 ; 52 L.J.Q.B. 505 ; 48 L.T. 681 ; 47 J.P. 405 ; 42 Digest 638, *412*.

Appeal from a decision of the Court of Appeal (Lord Goddard, C.J., Tucker and Evershed, L.JJ.), dated May 13, 1948, dismissing the appeal of the appellant from a decision of Hallett, J., dated July 7, 1947.

The respondents, a firm of bookmakers, sued the appellant for a sum of money lost to them by the appellant as the result of betting transactions. They contended that, the parties having entered into a new agreement, whereby the appellant promised to pay the sum in question on the respondents' undertaking not to report him to the committee of Tattersalls, the case was taken out of the provisions of s. 18 of the Gaming Act, 1845, and the appellant's promise to pay was enforceable. Hallett, J., and the Court of Appeal, following the decision in *Hyams* v. *Stuart King* (1), upheld this contention, but the House of Lords now decided by a majority that *Hyams* v. *Stuart King* (1) had been wrongly decided and allowed the appeal. The facts appear in the opinions of Viscount Jowitt, L.C., Viscount Simon and Lord Normand.

Salmon, K.C., and *Faulks* for the appellant.

Sir Walter Monckton, K.C., *Fearnley-Whittingstall, K.C.*, and *Wingate-Saul* for the respondents.

The House took time for consideration.

July 29. The following opinions were read.

VISCOUNT JOWITT, L.C. : My Lords, this was an appeal by the defendant in the action, one Tom Hill, from a decision of the Court of Appeal affirming the decision of Hallett, J. The relevant facts lie within a small compass although the point raised is one of difficulty.

The appellant, some time before July, 1946, had had betting transactions with the respondents, William Hill (Park Lane), Ltd., as a result of which he had lost in bets the sum of £3,835 12*s*. 6*d*. He did not pay, and following the common practice the case was reported to the committee of Tattersalls by the respondents. This committee heard evidence and adjudicated on the subject-matter of the complaint on July 22, 1946. They decided that £3,635 12*s*. 6*d*. was due from the appellant and decided further that this sum ought to be paid by a payment of £635 12*s*. 6*d*. within fourteen days and the remaining £3,000 by monthly instalments of £100. The discrepancy between the sum of £3,865 12*s*. 6*d*. and £3,635 12*s*. 6*d*. was due to the fact that £200 of the larger sum had been lost in betting on dog races, with which the committee of Tattersalls had no concern.

It is, of course, clear that this decision of Tattersalls did not create any obligation enforceable at law. All that committee had done was to fix the amount of the wagers due in respect of horse racing and to give a decision as to the manner in which it would be proper for the appellant to discharge the amount so fixed. If the appellant were to fail to pay in accordance with the decision of the committee of Tattersalls, it might have entailed consequences which would have been unpleasant for him, for, at the request of the respondents, Tattersalls' committee would have reported his failure to the stewards of the Jockey Club and the appellant would have been warned off Newmarket Heath and his name would have been posted as a defaulter. We were informed that the appellant was an owner of race horses, and the result of being so warned off would have been that he would have been prevented from running horses in his own name, and would not have been entitled to attend race meetings under the jurisdiction of the stewards of the Jockey Club. Moreover, if he was known to have been posted as a defaulter, it would be unlikely that reputable bookmakers would be willing to accept any bets he might desire to make. Counsel on both sides disclaimed the idea that the respondents would have been acting harshly or improperly had they decided to report the appellant if he failed to carry out the decision of Tattersalls' committee. The threat so to act would, no doubt, have been intended to bring pressure on the appellant to pay, but the cause for so acting would have been so eminently reasonable and proper that I cannot think any question of blackmail arises and I agree with the submission that counsel on both sides made to us on this point. In fact, the appellant did not pay the £635 12*s.* 6*d.* within fourteen days of July 26, 1946, and the following letters then passed between the parties:

A "Ye Olde Chequers Inne,
Cutnall Green, Nr. Droitwich.
Telephone—Cutnall Green 228.
Aug. 15, 1946.

Wm. Hill, Ltd.,
London.

B Dear Sir,

I am sorry that I have not yet been able to comply with the order made against me by Messrs. Tattersalls but as my financial position at the moment is bad I have not been in a position to do so. The best I can do at the moment is to send you a post-dated cheque for Oct. 10 for £635 12*s.* 6*d.* and the rest as agreed by Tattersalls. If you cannot see C your way clear to accept this offer, then I am afraid there is nothing else I can do.

Yours faithfully,
Tom Hill."

To this letter the respondents replied by the letter of Aug. 17, 1946, in the following terms:

D "Tom Hill, Esq.,
Ye Olde Chequers Inne,
Cutnall Green,
Nr. Droitwich.

Dear Sir,

E re Account—£3,835 12*s.* 6*d.*

We have to acknowledge receipt of your letter of the 15th instant, in which you state that up to the present you have been unable to comply with the order of Tattersalls' committee of the 22nd ultimo. We note your suggestion that you are prepared to forward to us a cheque for £635 12*s.* 6*d.* post-dated to Oct. 10, 1946, the balance of our account of F £3,200 to be paid in monthly instalments of £100 as adjudicated by the committee of Tattersalls. We agree to your suggestion, and in consideration of your forwarding your cheque for £635 12*s.* 6*d.* post-dated to Oct. 10, 1946, and of the said cheque being honoured by the bank, and in further consideration of the balance of our account of £3,200 being paid by instalments of £100 commencing November, 1946, and each subsequent month G thereafter until our account is clear, we on our part will refrain from enforcing the order made by Tattersalls' committee on July 22, 1946.

Yours faithfully,
for William Hill (Park Lane), Ltd."

The appellant replied in the following letter of Aug. 20, 1946:

"Ye Olde Chequers Inne,
H Cutnall Green, Nr. Droitwich.
Telephone—Cutnall Green 228.

Wm. Hill, Ltd., Aug. 20, 1946.
London.

Dear Sirs,

With reference to your letter of the 17th inst. re account £3,835 12*s.* 6*d.* I am enclosing cheque for £635 12*s.* 6*d.* post-dated to Oct. 10 as agreed with instalments of £100 per month commencing in November to follow.

> Thanking you for your helpful consideration in this matter and assuring you that as soon as my financial position improves I shall do all I possibly can to settle this account as soon as possible,
>
> Yours faithfully,
> Tom Hill."

The letter of Aug. 17, 1946, was an offer from the respondents which was accepted by the appellant in the letter of Aug. 20, 1946, with the result that a contract was concluded in the terms of these letters. It will be observed that the concession as to time for payment provided for in the contract was substantially greater than that which had been allowed by the decision of Tattersalls' committee, and that so long as payment was made in accordance with this contract, the respondents were precluded from "enforcing the order made by Tattersalls." In other words, they were precluded from trying to have the appellant warned off or posted during a period of nearly three years which would have been involved in making the payments in accordance with the contract.

The post-dated cheque due on Oct. 10, 1946, was not honoured. The first payment which was made was an amount of £335 12*s.* 6*d.*, and this was made on Oct. 19, 1946, and was accepted by the respondents without prejudice to their rights under the contract. The appellant had made no further payment down to the date of the issue of the writ, which was specially endorsed. The endorsement was as follows:

> "STATEMENT OF CLAIM
>
> The plaintiffs' [respondents] claim is for the sum of £700 0*s.* 0*d.* instalments in arrear and payable by the defendant to the plaintiffs under an agreement between the plaintiffs and the defendant on Aug. 20, 1946.
>
> PARTICULARS

		£	s.	d.
1946				
10 Oct.	To balance of instalments due on this date ..	300	0	0
10 Nov.	To instalment due on this date	100	0	0
Dec.	To instalment due on this date	100	0	0
1947				
Jan.	To instalment due on this date	100	0	0
Feb.	To instalment due on this date	100	0	0
		£700	0	0"

The only question that falls for decision in this case is whether the contract concluded by the letters of Aug. 17 and 20 is enforceable at law. It was agreed by counsel on both sides during the argument, that the contract so made was a genuine contract; that it was made for good consideration; that it was not merely a colourable device to obtain payment of a bet; and that it was not a contract "by way of gaming or wagering." The trial judge was, apparently, of the same opinion for he states his view as follows:

> "I think this is a plain case where the defendant [appellant] made a fresh bargain in August in consideration of the plaintiffs [respondents] refraining from following up the procedure with Tattersalls' committee which would inevitably have led to the defendant [appellant] being then and there posted as a defaulter and warned off Newmarket Heath."

We have not been furnished (no doubt as a result of a laudable desire to cut down the amount of printing) with much of the material which was available to the trial judge. For example, we have not had an opportunity of reading the evidence which was given before the trial judge and we have not been supplied with copies of all the letters to which he referred in his judgment. In the result, we have not had sufficient material on which to question the view of the trial judge, but, as I have said, counsel did not ask us to do so and I see no reason to doubt the correctness of his decision.

It is no doubt true that the contract arose out of a wager. If there had been no wager and no money lost as a result of that wager such a contract would never have been concluded, but long before this contract was concluded the last transaction by way of gaming and wagering had taken place and the event A on which the wager depended had been ascertained. Such a contract is, therefore, unquestionably valid and enforceable unless there is some statutory provision which renders it unenforceable, and such a statutory prohibition is to be found, if at all, in s. 18 of the Gaming Act, 1845, which is in the following terms:

> " All contracts or agreements, whether by parole or in writing, by way B of gaming or wagering, shall be null and void ; and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

There follows a proviso that " this enactment " shall not be deemed to apply C in certain conditions which are not here material. Since this contract was admittedly not a contract " by way of gaming or wagering " it is not, therefore, affected by the first limb of this section. It is said, however, that the contract comes within the second limb " no suit shall be brought . . . for recovering any sum of money . . . alleged to be won upon any wager." I cannot regard this limb of the clause as having any such far reaching effect as to invalidate D such a contract as is here in question. It is, to my mind, as a matter of construction, to be treated rather as a provision dealing with procedural matters which are to be the consequences of the simple proposition (stated in the first limb) that all contracts by way of gaming or wagering shall be null and void. I find support for this view from the use of the word " alleged ", from which it is clear that the prohibition contained in the second limb is only to operate E if there is the appropriate allegation. The words we have to construe are not " no suit shall be brought for recovering any sum of money won upon any wager " and it would, I think, be doing violence to the words if we were so to construe them. The mere bringing of an action (even although the action, when the facts came to be investigated, might prove to be based on a contract which was by way of gaming or wagering and therefore null and void) might F bring a defendant who was resisting such an action into public disrepute. The section, therefore, provides that, if it is apparent that the declaration was based on a contract by way of gaming or wagering, the action should be struck out *in limine*.

It is argued that the second limb of this section relates to contracts which, though not by way of gaming or wagering, have some historical connection G with the payment of a bet. The consequences of this view would, I think, be very far reaching, and I have difficulty in seeing where to draw the line. It is not fanciful to suppose that a man who has lost a bet and has not at his immediate disposal funds to pay that which he owes in respect of the bet, might sell a chattel or indeed an estate to the person to whom he had so lost money on terms more favourable than he would have demanded if there had been no H bet and no resulting debt of honour. For example, if the appellant had owned a horse worth £X and had sold it to the respondents for £X-Y in full settlement of all obligations, would such a contract be avoided ? I agree that if such a contract were a mere device to make a bet enforceable at law—in other words if the contract were " colourable " —it could not be enforced, but unless this is the test which separates enforceable contracts from those that cannot be enforced, I find it difficult to find any test. I cannot think that the legislature, if it had intended by the second limb of the section to add such an important provision to the substantive law enacted by the first limb, would have left the whole matter in this state of uncertainty.

In his powerful dissenting judgment in *Hyams* v. *Stuart King* (1) Fletcher Moulton, L.J., thus deals with the problem ([1908] 2 K.B. 723) :

> " Finally it was suggested before us that there was a contract, not to pay the bet, but to pay a sum equal to it in amount, and that the consideration of that contract was a promise not to tell of the defendant's default . . . A But if such a contract had been formally made, it would not, in my opinion, better the position of the plaintiff. I should unhesitatingly hold that such a contract was only colourable, and that the real intention of both parties was that the bet should be paid. Even apart from this, the alleged contract would, in my opinion, be unenforceable. If a son loses a bet of £20 which he cannot pay, it makes no difference, in my mind, whether the bookmaker B says 'I will tell your father if you don't pay the bet,' or 'I will tell your father if you don't give me £20.' In the one case he is trying to get a contract to pay the bet, and in the other case a contract to pay blackmail. Neither of these contracts will be enforced by the courts."

For reasons I have already given I do not regard this contract as colourable, C and I certainly do not regard it as a contract to pay blackmail, and counsel on both sides in the present case agree with me on both these points. If I thought the contract merely colourable, I should regard it as null and void by reason of the first limb of the section. If I thought the contract was a contract to pay blackmail, it would plainly not be enforced by the courts. Yet these are the only answers suggested by Fletcher Moulton, L.J., to such a contract as he D predicated in that case and to such a contract as we find in the present case. In my view, this was a genuine and *bona fide* contract made for good consideration to pay a sum of money which—if its " present value " be regarded—was substantially less than the amount which the appellant had lost to the respondents by betting on horses, and (by reason of the delay in paying the first instalment) was substantially less than the amount which the committee of Tattersalls had E decided should be paid. I cannot think that such a contract is invalidated merely because as a matter of history some of its provisions can be traced back to a bet.

It was argued that we were bound to construe the second limb of s. 18 of the Gaming Act, 1845, as extending the provision expressed in the first limb, because, if the second limb were confined to contracts by way of gaming and wagering, F it would in fact be tautologous. It is, of course, true that the second limb of the section is unnecessary and tautologous if it adds nothing to the first limb, but if it is regarded as procedural it is, I think, possible to give it a sufficient meaning. Moreover, it might have some effect in the case of wagers concluded abroad which were the subject of litigation in this country. But, my Lords, even if the second limb is to be regarded as tautologous, it would certainly not G be the first time in which the legislature had indulged in tautology, and it is interesting to observe that in the Gaming Act, 1892, almost the same words are used in a context in which they are plainly tautologous.

The words contained in the second limb of s. 18 of the Gaming Act, 1845, were considered by Alderson, B., in *Moon* v. *Durden* (2) (2 Exch. 41) to be " redundant " and by Parke, B. (*ibid.*, 44), to be " surplusage." In *Varney* H v. *Hickman* (3) Maule, J., expresses his view as follows (5 C.B. 280) :

> " Now, the first branch of this section declares the contract to be null and void : the second prevents the winner from bringing an action to recover the amount of the bet from the loser : and the third prevents the winner from sueing the stakeholder. It certainly is true that the second branch is involved in the first ; that is to say, that if, the section had stopped at the end of the first branch, it would have followed that no action could be

> brought to enforce a contract so declared to be void. But I apprehend there is nothing unusual in an Act of Parliament stating a legal consequence in this way."

CRESSWELL, J., says (*ibid.*, 282):

> " . . . the second branch of that section may be superfluous, or it may have been inserted *ex abundanti cautela.* It is extremely difficult to say
A what may be the purpose for which it was introduced."

In *Diggle* v. *Higgs* (4) LORD CAIRNS, L.C., expresses his view of the section thus (2 Ex.D. 427):

> "The section amounts to this: all contracts by way of gaming and wagering are null and void; and then, dealing with those contracts, it says
B that no action shall be brought with respect to them: that is to say, all gaming contracts are void, and the winner of the game or wager shall not maintain a suit against his antagonist or the stakeholder. This construction makes one member of the section in unison with the other."

COCKBURN, C.J., expressed his doubt on the point, but was not prepared to differ from the view expressed in *Varney* v. *Hickman* (3). BRAMWELL, L.J., expresses
C his agreement with the view of LORD CAIRNS and adds (*ibid.*, 429):

> "I only wish to add that the clause of s. 18, that 'no suit shall be brought for recovering money won upon a wager' is unnecessary, and might have been left out of the statute; it seems to me to be wholly superfluous."

It is no doubt the fact that these expressions of opinion were not strictly necessary
D for the decision of the point then before the courts, but they do indicate the view which great masters of the law have taken with regard to the true construction of the section, and I find support in them for the construction which I have myself arrived at independently of these cases. For these reasons I am of the opinion that the decision of the Court of Appeal was right and I should be in favour of dismissing this appeal.

E **VISCOUNT SIMON**: My Lords, the conclusion to be reached by the House in this appeal will determine the answer to a question which has been the subject of considerable debate among legal text-writers and commentators for forty years past, *viz.*, whether the decision arrived at by the Court of Appeal in *Hyams* v. *Stuart King* (1) is good law. In that case, the promise, at the request of the loser of a bet, by the winner not to present or seek to enforce
F payment of the loser's cheque for the amount he had lost, together with the winner's promise not to expose his default, was held by the majority of the court (SIR GORELL BARNES, P., and FARWELL, L.J.) to be good consideration for a new and enforceable agreement by the loser to pay what was owing. Inasmuch as forbearance to claim prompt payment of an unenforceable debt like a bet cannot constitute good consideration for a legally binding promise
G to pay the amount later on, the real point of the decision of the majority was that the promise not to expose the loser's default to his detriment constituted effective consideration, in consequence of which the sum owing could be recovered in an action. FLETCHER MOULTON, L.J., delivered a dissenting judgment, holding that the language of s. 18 of the Gaming Act, 1845, prevented the winner from recovering in the action the sum sued for, as in his opinion it was "a sum
H of money alleged to be won upon a wager," notwithstanding that the fresh promise had been made. The present appellant admits that, if the view of the majority in *Hyams* v. *Stuart King* (1) is correct, his appeal must fail, but he contends that the minority view of FLETCHER MOULTON, L.J., correctly construes the section and that by applying this view to the facts of the case now before us the appeal should succeed.

The relevant facts in the present case are as follows. As a result of betting with the respondents the appellant lost, on balance of account, the sum of

£3,835 12*s*. 6*d*., all but £200 of which was lost in betting on horse-racing. In April, 1946, the appellant declared himself unable to pay and the respondents thereupon referred the matter of their claim against the appellant to the committee of Tattersalls. This committee concerns itself solely with bets on horse-racing and, after hearing evidence, made an order in respect of the £3,635 12*s*. 6*d*. so lost, directing the appellant to pay to the respondents the sum of £635 12*s*. 6*d*. forthwith and thereafter to pay the remainder of the gambling debt at the rate of £100 per month. So far, there can be no question that the debt, though a debt of honour, was not a debt payment of which could be enforced by law, for the promise to pay it, by the first words of s. 18, was "null and void." What followed, however, is said by the respondents to constitute a new agreement which is untouched by the section. If the order made by Tattersalls' committee is not complied with, the unpaid bookmaker, according to a well-established practice, may invite the committee to send to the loser what is called "the usual ten day letter." This is a letter calling on the loser to comply with the committee's order within ten days and stating that, failing such compliance, the committee will report the matter to the stewards of the Jockey Club. It would automatically follow from this course of proceeding that the loser is "warned off Newmarket Heath" and is thereby precluded from entering a horse for any race or appearing on any race course controlled by the stewards of the Jockey Club and, in effect, from placing any further bets with bookmakers on horse-races. Before any application had been made for the ten day letter, the appellant, on Aug. 15, wrote to the respondents stating that he was not able to comply with the order made by Tattersalls' committee, but sending a cheque for £635 12*s*. 6*d*. post-dated Oct. 10, and offering monthly instalments of £100 thereafter. On Aug. 17 the respondents replied in a letter headed "re Account £3,835 12*s*. 6*d*." noting the appellant's statement that up to the present he had been unable to comply with the order of Tattersalls' committee and agreeing that, if the post-dated cheque was honoured and if "the balance of our account of £3,200" was paid by instalments commencing November, 1946, "we on our part will refrain from enforcing the order made by Tattersalls' committee." To this the appellant replied on Aug. 20 enclosing the post-dated cheque and agreeing to pay the monthly instalments. The cheque, on due presentation, was dishonoured and the appellant failed to pay any instalments. Ultimately, he sent a cheque for £335 12*s*. 6*d*. which was accepted by the respondents without prejudice and was duly met. On Feb. 21, 1947, the respondents issued a specially endorsed writ in which their claim was stated to be "for the sum of £700 instalments in arrear and payable by the defendant [appellant] to the plaintiffs [respondents] under an agreement between the plaintiffs and the defendant on Aug. 20, 1946." The appellant got leave to defend on filing an affidavit stating that the money claimed had been won on wagers on horse-races and setting up s. 18 of the Act of 1845 as an answer. HALLETT, J., gave judgment in favour of the respondents, holding that the case fell within the decision in *Hyams* v. *Stuart King* (1) inasmuch as "the defendant made a fresh bargain in August in consideration of the plaintiffs' refraining from following up the procedure with Tattersalls' committee which would inevitably have led to the defendant being then and there posted as a defaulter and warned off Newmarket Heath." In the Court of Appeal it was conceded that the case was covered by the former decision and, as I have said, the present appellant admits that his appeal to this House must fail unless he satisfied us that *Hyams* v. *Stuart King* (1) should be overruled.

The real issue in this case is not, therefore, whether there was "a fresh bargain," or whether the respondents gave good consideration for the appellant's agreement to pay in the manner defined in the letters of Aug. 17 and Aug. 20, but whether the payments he thus contracted to make were payments of "a sum of money alleged to be won upon a wager" within the meaning of the second limb of s. 18. The contract sued on is identified in the writ as being the agreement made on Aug. 20, and if it was not so identified details of it could have been obtained by demanding particulars. What, then, is this contract alleged by the respondents on which the suit is brought ? It is a contract to pay what Tattersalls' committee ordered the appellant to pay, though the respondents are giving more time for such payment. But there can be no question that what the committee ordered the appellant to pay was a sum of money won by the respondents from him on wagers as to the result of horse-races. Tattersalls' committee did not profess to have any jurisdiction to deal with any other subject-matter and indeed the respondents' letter of Aug. 17 correctly interprets the letter of Aug. 15, to which it is a reply, as containing the statement " that up to the present you have been unable to comply with the order of Tattersalls' committee." The arrangement, by the very terms of the letter of Aug. 17, is to pay by instalments " the balance of our account " and the account is an account of betting transactions and of nothing else. The first limb of s. 18 does not apply to the case because the contract sued on is not " by way of gaming or wagering " but is a new bargain, but, inasmuch as the new bargain was to pay the betting account, an action brought on it, as it seems to me, is nevertheless brought for recovering sums won by betting.

In opposition to this view of the matter three considerations are urged and I must deal with them in turn. First, it is said that the second limb of the section is mere repetition of the first, and thus, if the action is not defeated under the first limb, it cannot fail under the second. Secondly, this last contention is varied by arguing that the second limb is not entirely tautologous, but is governed by the opening provision which enacts a substantive change in the law by following this up with the corresponding provision relating to procedure. Thirdly, it is suggested that the word " alleged " in the second limb creates a difficulty which shows that the appellant's construction of the section is wrong.

As regards the first of these objections, it is to be observed that though a Parliamentary enactment (like Parliamentary eloquence) is capable of saying the same thing twice over without adding anything to what has already been said once, this repetition in the case of an Act of Parliament is not to be assumed. When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which would not be there if the words were left out. If the choice is between tautology and retrospective effect (as in *Hough* v. *Windus* (5)) it is natural to prefer a construction which implies the reproach that Parliament has said the same thing twice over in preference to a construction which would have the result of undeclared retrospective interference, but no difficulty of choice of that sort arises here. Indeed, the proper construction of one section can seldom be assisted by reference to a decision on the construction of quite a different section in another statute. The presumption, therefore, is that the second limb of s. 18 is not coincident in effect with the first limb. It is noteworthy that in *Hyams* v. *Stuart King* (1) the report of the argument contains no trace of a submission to this effect and FLETCHER MOULTON, L.J., observes ([1908] 2 K.B. 712) :

> " . . . too little attention has been paid to the distinction between the two parts of this enactment, and the second part has been treated as being in effect merely a repetition of the first part."

This is the more striking because the actual facts in that case as set out (*ibid.*, 697) show that the winner of the bet wrote to the loser :

> " ' You promised faithfully that, if I kept quiet and did not injure your

> business by telling any of the s.p. men, or take proceedings, you would pay every farthing that was owing '."

The winner went on to reproach the loser for breaking his word, so that the argument would have been a powerful one that it was this debt which the plaintiff was seeking to recover. It appears to me that FLETCHER MOULTON, L.J., was entirely justified in saying that the statute was so framed as to defeat an action, though not brought on the original wagering contract, if it was brought on an A alleged new contract to pay a sum won on the wager. SIR GORELL BARNES refers briefly to this contention that the second limb of s. 18 goes further than the first limb, but dismisses it by saying (*ibid.*, 705) :

> " . . . when the nature of the contract, as I have stated it, is considered, the contract does not, in my opinion, fall within the language nor the meaning of the statute." B

What the President meant by " the contract as I have stated it " appears from the previous page where he describes it as one

> " . . . that in consideration that the plaintiff would give the defendants a reasonable time within which to pay the amount which the defendants ought to have paid him on Nov. 4, and would forbear to declare them C defaulters if they paid within that further time, they would pay him on or before the expiration of that time the amount which both parties considered was due to the plaintiff in honour, though not by law."

But it seems to me that the amount which was due to the plaintiff in honour was a sum won on a wager, as FLETCHER MOULTON, L.J., proceeded to point out. FARWELL, L.J.'s judgment does not appear to contain any implied reference D to FLETCHER MOULTON, L.J.'s view, and indeed he regards " the gist of the case " as concerned with the question whether threatening to post a defaulter for failure to pay a lost bet could properly be described as blackmail. I should agree that in ordinary circumstances it would not amount to a criminal offence, but that does not touch the point raised in FLETCHER MOULTON, L.J.'s dissenting judgment on which the present appellant relies. What happens in such a case E as this is that by a new contract it is sought to transform an obligation of honour into a legal liability, and the argument against the appellant on this part of the case must be that this transformation turns money which was in the first place won on a wager into something else. But it appears to me that, at any rate on the facts of the present case, it is clear that the sum of money sought to be recovered not only owes its origin to the fact that bets were made but is itself F a sum of money so won. When the long history of our legislation to discourage gaming in this country is considered, it is difficult to suppose that the legislature in 1845 did not realise that the object in view would not be attained merely by enacting that bets could not be recovered as such. The Act of 1845 begins with a preamble reciting that previous legislation had not proved completely effective to prevent the mischiefs arising from this cause. I would accept without further G comment the passage in FLETCHER MOULTON, L.J.'s judgment (*ibid.*, 713) where he says :

> " One cannot read the Gaming Act, 1845, without perceiving that it was a very serious attempt on the part of the legislature to put down wagering, and I decline to think that such an obvious and fatal blot was permitted to exist in it, which would well-nigh neutralise its practical effect, when I H find language used which is perfectly apt to meet the case, and which to my mind can fairly bear no other interpretation than that which would thus render it effective."

As for the second suggested objection, it is enough to say that if all the legislature had wanted to do after providing that contracts by way of wagering should be null and void was to add that, as a matter of procedure, no suit should be brought to enforce them, it would have been quite simple to say so. Instead of this, the second limb of the section is framed in quite different and much wider terms, and, in my opinion, aims at defeating the attempt to recover betting losses by such a device as the present.

Lastly, as to the word "alleged." No difficulty arises in the present case from the use of this word, for the respondents do in terms allege that the sum they seek to recover is claimed under a contract to pay the balance of the A betting account and to satisfy an order of Tattersalls' committee which is concerned with nothing but establishing betting liability. Even if the case was one in which this did not clearly appear from the claim itself, particulars as to the nature of the contract relied on would disclose it. The language of the second limb of the section appears to be apt to cover the case where a plaintiff's declaration was of this nature and would justify the defendant in B meeting the declaration by a demurrer. In modern practice, as soon as the nature of the plaintiff's case is found to fall within the second limb, the procedure would be to seek to strike out the statement of claim and to dismiss the action on the ground that such a claim could not possibly succeed. It may be that if a plaintiff managed to launch an action to recover his winnings on betting without either alleging that this was the nature of his claim or being C compelled to give particulars to disclose it, the truth of the matter could be established by the defendant, though in that event the language of the section is awkward because the defendant's success would depend not on what he alleged, but on what was proved. In any event, I do not see how the suggested difficulty in construing the word "alleged" assists the contention of the present respondents. The view which I adopt involves the overruling of the decision in D *Bubb* v. *Yelverton* (6). There LORD ROMILLY, M.R., in the year 1870 held that a bond given by a loser of a bet as security for paying the sum involved could be enforced on the ground that "it was given, not to pay racing debts, but to avoid the consequences of not having paid them." There were special circumstances in that case which may have induced the MASTER OF THE ROLLS to reach his conclusion, but I agree with FLETCHER MOULTON, L.J., that the bond E constituted an agreement to pay money won on wagers notwithstanding the new considerations, and is thus unenforceable under the second limb of s. 18. There is an indication in the report of the argument for the loser that this contention was put forward, and it ought to have prevailed. Subsequent cases which essentially depend on following *Bubb* v. *Yelverton* (6) must also be regarded as wrongly decided.

F We were referred to *dicta* to be found in some of the judgments in *Varney* v. *Hickman* (3) and in *Diggle* v. *Higgs* (4). These two cases arose out of a demand by the plaintiff to recover money which he had deposited with a stakeholder to abide the event in respect of which he had made a bet. In the first case the plaintiff had repudiated the wager before the event was ascertained and it was held that he was entitled to recover the amount as money had and received. G In the later case the plaintiff succeeded even after the event had been decided and the plaintiff had lost his bet, inasmuch as the money was still in the hands of the stakeholder and had not been paid over to the winner. Neither of these cases, therefore, directly involved the portion of s. 18 of the Act of 1845 which prohibits the maintenance of actions for the recovery of money won on any wager, and the decisions turned on the proper application of a later limb of the H section dealing with the recovery of what had been deposited in the hands of a stakeholder, and lay down that the language of that limb does not deprive a party who deposits money with a stakeholder to abide the event of a wager of what PARKE, B., in *Martin* v. *Hewson* (7) (a cock-fighting case) calls (10 Exch. 738) a *locus poenitentiae*. But MAULE, J., in *Varney* v. *Hickman* (3) and LORD CAIRNS, L.C., and BRAMWELL, L.J., in *Diggle* v. *Higgs* (4) expressed a view as to the interpretation of the second limb of the section on which the present respondents rely. MAULE, J., said (5 C.B. 280):

> "Now, the first branch of this section declares the contract to be null and void: the second prevents the winner from bringing an action to recover the amount of the bet from the loser: and the third prevents the winner from suing the stakeholder. It certainly is true that the second branch is involved in the first; that is to say, that, if the section had stopped at the end of the first branch, it would have followed that no action could be brought to enforce a contract so declared to be void. But I apprehend there is nothing unusual in an Act of Parliament stating a legal consequence in this way."

Logically, it does not follow that because the second branch was not needed to prevent the success of an action to recover a bet, therefore the ambit of the second branch is limited to the case where the action would fail even apart from what the second branch says, for it would still be a possible view that the second branch also covers some actions which were not rendered void by the first limb. But I think Maule, J., did mean to express the view that the second limb was merely tautologous, and this is certainly the effect of Bramwell, L.J.'s observation in *Diggle* v. *Higgs* (4) where he roundly declares that the words of the second limb are unnecessary and might have been left out of the statute. These *dicta*, however, were not essential to the correctness of the decisions in which they occur, and it is to be observed that Cockburn, C.J., while concurring in the actual decision in *Diggle* v. *Higgs* (4), entertained a different opinion of the true construction of the section as a whole. Now that the question of the proper range of the second limb of s. 18 comes up as the direct issue for final decision the *dicta* to which I have referred must give way before the analysis and reasoning which Fletcher Moulton, L.J., first set on foot.

In the course of the argument before us hypothetic illustrations were put in which it was suggested that a "valuable thing" agreed by the loser of a bet to be given to the winner in consideration of the bet being treated as wiped out and no complaint being made of the failure to pay it promptly in cash might not be shown to be sued for as "won on a wager." If such a situation were to arise it would be for the judge of fact to decide whether this was or was not the case, but on the evidence in the present appeal it was plainly the sum won on wagering that it was sought to compel the appellant to pay. That, in my opinion, is a claim which under the second limb of s. 18 cannot be enforced by legal proceedings, notwithstanding the new agreement, and consequently the appeal, in my opinion, should succeed.

LORD GREENE: My Lords, section 18 of the Gaming Act, 1845, by its first branch makes gaming and wagering agreements null and void. Such contracts, therefore, are struck with invalidity at the outset, *i.e.*, before the event contemplated by the wager has occurred. The appropriate consequence of this enactment would be relief before the event by way of declaration, and, perhaps, an order for delivery up of a written agreement as well as relief after the event by way of dismissal of an action to recover a sum won. The second branch is different. It is concerned with a state of affairs which can only arise after the event. What it prohibits is the bringing of any suit "for recovering any sum of money or valuable thing alleged to be won upon any wager." The first argument on behalf of the respondents is that the second branch merely repeats, in language appropriate to procedure, what has already been enacted as a matter of substantive law by the first branch and is in effect tautological. I am unable to accept this argument. I need not cite authority for the proposition that *prima facie* every word in an Act of Parliament must be given an effective meaning of its own. Whether or not the legislature in any given case has condescended to tautology is a question the answer to which depends on the language used, but, in the absence of an appropriate context, one statutory provision which is expressed in entirely different language from another, whether in the same or a different section, is not to be interpreted as repetitive or unnecessary. Here the language of the first branch is entirely different from the language of the second branch. Under the first branch the agreement is a nullity before the race is run. The second branch assumes the race to have been run and the bet to have been lost. It is true that the language of the second branch would prohibit the bringing of an action on a wager which had been won. To that extent I agree that it covers ground already adequately A covered by the first branch, but this is no justification for limiting the words of the second branch as suggested. They are quite general and when read in their ordinary meaning they extend to any action to recover money alleged to be won on a wager. A competent draftsman would have used very different words if all that he had been instructed to prohibit had been an action on a contract rendered null and void by the first branch.

B In support of the argument that the second branch is in effect tautological, reliance is placed on certain authorities of which I need only refer to two. In neither of them did the question with which we are concerned arise. In neither of them was its solution necessary to the decision. If the observations relied on are to be understood as intended to apply to such a case as the present they are *dicta* only and, in my opinion, incorrect. C These cases are *Varney* v. *Hickman* (3) and *Diggle* v. *Higgs* (4). Both were concerned with the third branch of the section which prohibits the bringing of an action to recover money deposited with a stakeholder to abide the event of a wager. In the former, the event had not happened and one of the parties sought to recover his deposit. In the latter, it had happened, but, the stakeholder not having yet paid over the money deposited, D the loser sought to recover his part of it from the stakeholder. In each case the plaintiff succeeded since the court construed the third branch as applying only to a claim against the stakeholder by the winner of the wager. In the former case MAULE, J., said (5 C.B. 280) :

> " . . . the second branch is involved in the first; that is to say, that, if the section had stopped at the end of the first branch, it would have followed E that no action could be brought to enforce a contract so declared to be void."

This appears to me to be no more than a statement that as regards the enforcement of contracts declared to be void by the first branch the second branch carried the matter no further. This is far from having the implication suggested on behalf of the respondents. The question is: Is the second branch confined to such actions or does it extend to other actions as well ? The language used makes F it, in my opinion, impossible to confine it in the manner suggested. I find myself in complete agreement with what was said on this topic by FLETCHER MOULTON, L.J., in *Hyams* v. *Stuart King* (1) ([1908 2 K.B. 713) :

> " It provides with complete generality that no action shall be brought to recover anything alleged to be won upon any wager, without in any G way limiting the application of the provision to the wagering contract itself."

In *Diggle* v. *Higgs* (4) BRAMWELL, L.J., said (3 Ex. D. 429) :

> " I only wish to add that the clause of s. 18, that ' no suit shall be brought for recovering money won upon a wager ' is unnecessary, and might have been left out of the statute ; it seems to me to be wholly superfluous."

H This *dictum* is, in my opinion, incorrect. On the construction of the section, therefore, I come to the conclusion that the second branch means what it says and is not confined to actions where the agreement sued on is the wagering agreement itself. As I shall hope presently to show the agreement here alleged, sued on and proved, is an agreement to pay money won on a wager. The promise which it is sought to enforce is a promise to pay that money and nothing else.

My Lords, much confusion appears to me to have arisen in this class of case through a failure to recognise that the question is not to be answered by finding a new consideration moving from the winner of the wager. Such a consideration from the point of view of contract law, apart from the Act, would indeed be sufficient to support a promise to pay unpaid bets, but the Act, as I interpret it, directs the court to look at the nature and true subject-matter of the promise given in exchange for that consideration by the loser. If that promise is one which the Act forbids the court to enforce, it matters not how new or how valuable the consideration moving from the promisee may be. An early example of this confusion is to be found in *Bubb* v. *Yelverton* (6). I am unable to accept, or indeed to follow, the reasoning of Lord Romilly, M.R., in that case. He says (L.R. 9 Eq. 474): " Here there was a perfectly good consideration quite ulterior to and independent of any racing debt." As a bald statement of the goodness of the consideration moving from the winner I can agree with this. If it means that the promise given by the loser in exchange for that consideration is " ulterior to " (whatever that may mean) " and independent of any racing debt " it is completely at variance with the facts as found. The bond on which the action was brought was given in part payment of wagering debts as appears without the possibility of doubt from the statement of facts. What was the promise but a promise secured by bond to pay a wagering debt ? I cannot see. The fact that the sum which the betting creditors were willing to accept was, as it seems, less than the full amount of the bets lost does not in the least affect its character. A sentence in the judgment, which is often quoted, appears to me, when it is analysed, to be of no assistance and indeed calculated to mislead. The Master of the Rolls said of the bond that it was given " not to pay racing debts, but to avoid the consequences of not having paid them." The best way of avoiding the consequences of not having paid racing debts is to pay them ; and the promise of the loser was merely a promise to do so. The fact that it was given to avoid the consequences of not having paid the debts cannot, as I see it, convert it into a promise of a different character. A method of avoiding a similar difficulty commended itself to the majority of the Court of Appeal in *Hyams* v. *Stuart King* (1) without, indeed (as Fletcher Moulton, L.J., pointed out), either any finding of the trial judge to support it, any pleading on which it could be based, any facts sufficient to raise it, or any argument of counsel advocating it. It consisted in saying that the promise of the loser was to pay not the bet but a " certain sum of money to avoid the consequences of not having paid the racing debts " (*per* Gorell Barnes, P. ([1908] 2 K.B. 702)) echoing the language of Lord Romilly, M.R., in *Bubb* v. *Yelverton* (6). Farwell, L.J., elaborated this theory. He said ([1908] 2 K.B. 728) :

> " Here the agreement sued on is an agreement to pay a sum of money in consideration of forbearance to post the defendant as a defaulter ; the sum of money may be equal to or less than the lost bet, but it is not payment of the bet . . ."

I pause here to call particular attention to the reason given by the learned Lord Justice. It is :

> " . . . because that [*i.e.*, the bet] was payable on settling day . . . [the] money, which, though equal to the amount of the bet, is not in fact the bet, but is compensation for its non-payment . . ."

It appears to me that Fletcher Moulton, L.J., gave unanswerable grounds (which I do not delay to cite) for rejecting this reasoning. I only propose to add one sentence, *viz.*, that, just as in the case of an ordinary debt paid after its due date, payment of a bet is no less payment of a bet because settling day is past and to say that the passing of settling day by some mysterious alchemy transmutes a promise (unenforceable by statute) to pay an unpaid debt into an innocent promise (unaffected by the statute) to pay an equivalent sum of money appears to me, with the utmost respect to the memory of Farwell, L.J.,

to shut one's eye to reality and to permit an unwarrantable evasion both of the language and of the spirit of the statute. The reasoning of GORELL BARNES, P., on this topic appears to me, to be inconsistent with the facts as stated by him. The only promise found was a promise to "pay every farthing that was owing"—a clearer promise to pay an unpaid bet, and nothing but an unpaid bet, I cannot myself imagine. Again, the promise (and the only promise) alleged by
A the plaintiff is stated (*ibid.*, 701) to be "a promise for good and fresh consideration to pay the balance claimed by him." What is this but a promise to pay the unpaid balance of the bets ? I cannot see. As *Hyams* v. *Stuart King* (1) is really the respondents' sheet anchor, I should, I think, add the statement that in the judgment of FARWELL, L.J., there is a similar inconsistency. He says (*ibid.*, 725) the promise was "to pay the £108 10*s*. by instalments as soon
B as the firm got the money." The £108 10*s*. was the unpaid amount of the bet and nothing else. Again, he said (*ibid.*) that there was nothing illegal in the winner's agreement not to expose the loser "in consideration of the payment of amount lost."

In the present case, the promise sought to be enforced is alleged (as it was bound to be alleged if the pleading was to accord with the facts) to be a promise
C to pay unpaid bets. The agreement alleged is "an agreement between the plaintiffs and the defendant on Aug. 20, 1946." It is not disputed that the reference is to the appellant's letter of Aug. 20, 1946, which must be treated as incorporated in the pleading and must be construed in the light of the other documents directly or indirectly referred to in it. Those documents are the respondents' letter of Aug. 17, the appellant's letter of Aug. 15 and the order of
D Tattersalls' committee made on July 22. It is unfortunate that this order was not produced at the trial. It was a relevant document for the purpose of construing the claim, and the learned trial judge should have insisted on its production. However, we have sufficient material to enable us to know what was the substance of its contents. These various documents make it, to my mind, clear beyond controversy that the promise sued on, as alleged in the
E statement of claim, was a promise to pay the unpaid balance of a betting account in accordance with the committee's order subject to certain immaterial modifications which were agreed between the parties. As stated in para. 6 of the respondents' case, the order of the committee was an order to pay in the manner and at the times therein mentioned the bets outstanding on the account.

Counsel for the respondents put as his first argument the limited view which
F I have already rejected as to the meaning of the second branch of the section. Under this head he claimed that, even if the appellant's promise was to be regarded as a promise to pay unpaid bets, the second branch did not invalidate it. If he were wrong on this he submitted as an alternative argument the theory that was evolved in *Bubb* v. *Yelverton* (6) and *Hyams* v. *Stuart King* (1) that the promise was a promise to pay, not unpaid bets, but an amount equal to the
G unpaid bets. He argued that the bets played no more than a historical role and formed no necessary part of the allegation on which the claim in the action was founded, that the word "alleged" in the second branch of the section means alleged as a material allegation, and that if the allegation in the pleading was an allegation of an agreement to pay the unpaid bets as such, that allegation was in that respect immaterial and could be ignored leaving the pleading to
H be read as alleging a promise to pay a sum of money at large. Apart from the casual method of treating a pleading which this argument involves, I am quite unable to accept it. The obligation of honour to pay the bet was not a mere matter of history leading up to the promise sued on. It was, as I see it, the actual subject-matter, both in language and in substance, of the promise. Payment of the debt of honour was the only matter with which Tattersalls' committee—itself in this regard a court of honour and nothing more—was concerned. It was, as I have explained, the only thing which the committee ordered the

appellant to discharge. I am unable to follow the reasoning which would transform this debt of honour into something else. I can find no evidence to support the view that any such transformation took place ; on the contrary all the evidence is the other way. Nor do I think that it would have been permissible for the respondents to re-cast their pleading by alleging an agreement not, as now pleaded, to pay the outstanding bets, but to pay a sum at large. No such amendment was asked for nor, in view of the only evidence in the case, could it have been granted. If enquiry is made when did such a transformation take place, the only answer suggested was that it took place in and by virtue of the order of the committee. I have already given my reasons for thinking that the order of the committee did nothing more than order the payment of the bets with which alone, as a court of honour, it was concerned.

My Lords, I do not myself feel any real doubt as to the meaning of the word " alleged " in the section. The context in which it occurs is concerned with the bringing of a suit, and in such a context I should expect the word " alleged " to mean, alleged for the purposes of the suit, *i.e.*, alleged in the declaration in which the claim is set forth. In the year 1845 when the Gaming Act was passed, the rules of pleading were more strictly observed than they are to-day. Implicit in the second limb of the section is a direction to the court not to entertain a suit of the nature indicated ; a pleading based on the allegation mentioned was not only made demurrable, but the court of its own motion must decline to allow an action based on it to proceed. This, as it seems to me, makes it of vital importance to ascertain the nature of the agreement alleged. I agree that the word " alleged " must mean " alleged as a matter of material relevance," but in pleading an agreement it must always be material to allege the real consideration. A failure to prove it means either (1) that the action must fail or (2) that it can only succeed if the pleading is amended which, in an ordinary case, the court might properly allow. But in a case covered by this limb of the section, if, on the face of the pleading, the agreement alleged is an agreement not to pay the unpaid amount of a wager but to pay a sum at large, and if at the trial the only agreement proved is, in fact, an agreement to pay the unpaid amount of a wager, no amendment setting up the real agreement as proved would be permissible since it would convert the action into a prohibited suit. The action in such a case would, therefore, fail not because the section forbade it (since on the face of the pleading the allegation would have been an innocent one) but because the plaintiff had failed to prove the agreement alleged and was prevented by the section from amending his pleading so as to allege the agreement which was actually proved. If the two parties to a wagering agreement make a subsequent agreement by which for consideration the loser promises to pay his losses to the winner, that, and nothing else, is the agreement which must be pleaded. In such a case if the winner alleges instead an agreement to pay the sum at large, he will be alleging an agreement different to that which, in truth, was made, and his action will fail. Not only does the prohibition contained in the second branch of the section itself require the court to satisfy itself as to the true nature of the sum sued for, but the two allegations are quite different. This can be seen from the fact that, apart from the application of the Gaming Act, different defences would be open to the defendant. For example, where the agreement was to pay the amount lost on a wager, it would be a good defence that the wager was not in fact lost. No such defence would be relevant in an action on an agreement to pay a sum at large. I am unable to accept the view that the true nature of the agreement relied on is not a material allegation.

I must not be understood as suggesting that there can never be a case where a promise by a defaulting backer, given in consideration of a promise by the winner of the bet not to report the default, may be enforced. A promise in order to be obnoxious to the second branch of the section must be a promise to pay the bet, and the prohibition relates only to recovery of money or a valuable thing alleged to be lost. The question what the agreement really comes, to is a question for the tribunal of fact which will not be deceived by any specious attempt to conceal the real nature of the promise. If the loser in terms agrees (as was found by the majority in *Hyams*' case (1)) : "if you will refrain from reporting me, I promise to pay a sum of money equal to the amount of the bet A which I lost to you ", I have difficulty in thinking that a tribunal of fact would regard the promise as being anything but a promise to pay the bet. It would indeed be strange if the consequences of the section could be evaded by so patent and artificial a device. In the result, I am of opinion that this appeal should be allowed and that *Bubb* v. *Yelverton* (6) and *Hyams* v. *Stuart King* (1) should be overruled.

B **LORD NORMAND :** My Lords, this appeal from a judgment of the Court of Appeal, affirming a judgment of HALLETT, J., raises an interesting question on the law of betting in that it involves a re-consideration of *Hyams* v. *Stuart King* (1) and of certain earlier authorities on which the decision in that case was based. The respondents, a company carrying on business as bookmakers, sue the appellant who had had betting transactions on horse C racing and dog racing with them as the result of which he had by March, 1946, lost to them a sum of £3,835 12*s*. 6*d*. As he failed to pay, the respondents, in July, 1946, reported his default to the committee of Tattersalls. The committee after hearing evidence, ordered, on July 22, that the appellant should pay to the respondents the sum of £3,635 12*s*. 6*d*., being the sum held by the committee to have been lost on horse racing bets, by a payment of £635 12*s*. 6*d*. within D fourteen days, and the balance by means of thirty monthly instalments of £100 each. The committee refused to make an order in respect of £200 said to have been lost on dog racing over which Tattersalls exercised no control. The appellant failed to comply with the committee's order and on Aug. 15, 1946, he wrote the following letter to the respondents :

> E "I am sorry that I have not yet been able to comply with the order made against me by Messrs. Tattersalls but as my financial position at the moment is bad I have not been in a position to do so. The best I can do at the moment is to send you a post-dated cheque for Oct. 10 for £635 12*s*. 6*d*. and the rest as agreed by Tattersalls. If you cannot see your way clear to accept this offer, then I am afraid there is nothing else I can do."

F The respondents, on Aug. 17, replied as follows:

> "Re account—£3,835 12*s*. 6*d*.
>
> We have to acknowledge receipt of your letter of the 15th instant, in which you state that up to the present you have been unable to comply with the order of Tattersalls' committee of the 22nd ultimo. We note G your suggestion that you are prepared to forward to us a cheque for £635 12*s*. 6*d*. post-dated to Oct. 10, 1946, the balance of our account of £3,200 to be paid in monthly instalments of £100 as adjudicated by the committee of Tattersalls. We agree to your suggestion, and in consideration of your forwarding your cheque for £635 12*s*. 6*d*. post-dated to Oct. 10, 1946, and of the said cheque being honoured by the bank, and H in further consideration of the balance of our account of £3,200 being paid by instalments of £100 commencing November, 1946, and each subsequent month thereafter until our account is clear, we on our part will refrain from enforcing the order made by Tattersalls' committee on July 22, 1946."

On Aug. 20, 1946, the appellant accepted the offer contained in that letter by a letter in these terms :

> "With reference to your letter of the 17th inst. re account £3,835 12*s*. 6*d*.

> I am enclosing cheque for £635 12*s.* 6*d.* post-dated to Oct. 10 as agreed with instalments of £100 per month commencing in November to follow. Thanking you for your helpful consideration in this matter and assuring you that as soon as my financial position improves I shall do all I possibly can to settle this account as soon as possible . . ."

In their statement of claim for payment of instalments in arrear at the date of the writ, *viz.*, Feb. 21, 1947, the respondents allege as its foundation the agreement of Aug. 20, by which is meant the agreement embodied in the letters of Aug. 17 and 20, 1946. From these facts it is clear that the contract which is the ground of action is not itself a betting contract, and that the consideration given by the respondents for the appellant's obligations under it was their refraining from enforcing the order made by Tattersalls' committee on July 22, 1946. This was a consideration the nature of which I should explain. A B

The functions and procedure of Tattersalls' committee are described in the judgment of Hallett, J., which may be supplemented by statements in the cases of the parties. It appears that it is open to anyone alleging that he has won a bet from another on horse racing, and that he has not been paid by the date of the settlement, to report the matter to Tattersalls' committee. The committee then holds an enquiry at which evidence may be taken, and decides C whether a bet has been lost and, if so, of what amount. It may then make a written order for payment on terms and by instalments. Up to this point that was the procedure followed in the present case. If the loser fails to make payments in compliance with the committee's direction, the next step is that the creditor may report the default to the committee and request it to send to the defaulter a letter described as "the usual ten day letter," calling on D the defaulter to comply with the committee's order within ten days, and stating that, if he fails to comply, the committee will report him to the stewards of the Jockey Club. If that is done, the automatic result is that the defaulter is warned off Newmarket Heath, and is thereby precluded from entering a horse for any race, or appearing on any race course, controlled by the stewards of the Jockey Club and, in effect, from placing any further bets on race horses. E He also incurs a serious social stigma. The whole procedure is, therefore, a means of compelling payment of lost bets by social sanctions.

The defence to the suit is that the claim is to recover a sum of money won on a wager within the meaning of s. 18 of the Gaming Act, 1845, and by this defence the appellant challenges the decision in *Hyams*' case (1) which the courts below have followed in construing s. 18. The section enacts that: F

> "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the G event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

The section divides into three branches. The first branch affects with nullity H all gaming and wagering contracts and agreements, but as I have said the contract which is the foundation of the suit is not a wagering contract. There had been wagering contracts between the parties, but the wagers had been lost and won before the formation of the contract on which this action is founded. It is, however, not on the first branch that the appellant bases his defence. He relies on the first part of the second branch, and his contention is that, the sum which he has contracted to pay, is a sum alleged in the claim to be won on a wager, and, therefore, that the suit falls within the express terms of the enactment. This contention does not in any way depend on an illegality or defect in the formation of the contract, and it is conceded that the contract was for a good and fresh consideration untainted with any illegality. The respondents' contentions are, first, that the sum which the appellant promised to pay is no longer money won on a wager, but is a sum of money at large due under a lawful and enforceable contract; and, second, that, even if the sum is to be regarded as a sum won on a wager, it is nevertheless recoverable, because the second branch of s. 18 is throughout concerned only with suits seeking to enforce the gaming and wagering contracts or agreements dealt with in the first branch.

It will be convenient before dealing with these contentions to take account of *Hyams'* case (1). The facts in that case were that betting transactions between the parties, who were bookmakers, resulted in the defendant giving a cheque to the plaintiff for the amount of bets lost to him. At the defendant's request the cheque was held over by the plaintiff and part of the amount of the cheque was paid by the defendant. Subsequently a new verbal agreement was come to by which the defendant promised to pay the balance in a few days in consideration of the plaintiff's holding over of the cheque for a further time and refraining from declaring the defendant a defaulter, and so injuring his business. The balance was not paid, and the plaintiff, therefore, issued a writ by the indorsement of which he claimed the balance due to him on account stated. At the trial the plaintiff was allowed to set up the fresh agreement and he was held entitled to recover. On appeal the majority of the court, Sir Gorell Barnes, P., and Farwell, L.J., affirmed the judgment. Fletcher Moulton, L.J., dissented. The ground of Sir Gorell Barnes' judgment is that, though the mere giving of time to pay that which cannot be enforced does not amount to consideration, the plaintiff's refraining to declare the defendant a defaulter was good and lawful consideration and that the new contract was a good and enforceable contract. He followed the earlier decisions of *Bubb* v. *Yelverton* (6) and *Re Browne. Ex parte Martingell* (8), to which I shall later make reference. Sir Gorell Barnes did not deal directly with the meaning and effect of the provision in s. 18 that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won on any wager, but he cited it and I think that he regarded this provision as explicatory of the legal consequences of the enactment in the first branch of the section, and as limited in its scope to wagering contracts and agreements. Farwell, L.J., agreed with the President in the result, but in some respects his reasoning was different. He first disposed of an argument for the appellant that the use of extra-legal remedies, such as posting a defaulter in order to enforce payment of a debt of honour, savoured of blackmail. The learned Lord Justice rejected this argument on the unanswerable ground that no wrong is done if an aggrieved party makes use of the ordinary means allowed by society to compel the loser to pay his debt of honour. He then said that he regarded the lawfulness of the consideration moving from the plaintiff as the gist of the case. His reason was that a debt of honour, though of imperfect obligation, becomes enforceable, if another and distinct legal consideration can be established to support it. Thus the lawfulness of the new consideration alleged by the plaintiff became the crux of the case. If that consideration had been tainted with blackmail, the defendant's obligation would have been as unenforceable after the formation of the new contract as it was before it, but since it was free of all taint of illegality, the learned Lord Justice held that the defendant's obligation was perfected and enforceable. Though that is the *ratio* of his judgment, I must refer to some other observations not easily reconcilable with it. He said ([1908] 2 K.B. 728):

> "Here the agreement sued on is an agreement to pay a sum of money in consideration of forbearance to post the defendant as a defaulter; the sum of money may be equal to or less than the lost bet, but it is not payment of the bet, because that was payable on settling day, and non-payment on that day made the loser a defaulter and liable to be posted."

This is the only passage in the majority judgments which seems to be specifically directed to the argument that the suit was not maintainable because it was, A notwithstanding the fresh consideration, an attempt to recover a sum of money alleged to be won by a wager. Though that argument was not submitted by the defendant in *Hyams*' case (1), it was the basis of the dissenting judgment of FLETCHER MOULTON, L.J. On the facts he held that the promise sued on was a promise to pay the bet and nothing else or different, and that the real intention of the parties was that the bet should be paid. On the construction B of s. 18 he held that the provision that no suit shall be brought or maintained in any court of law or equity for recovering any sum alleged to be won on a wager was not in effect merely a repetition of, or explicatory of, the preceding enactment that all contracts or agreements, whether by parole or in writing, by way of gaming or wagering shall be null and void. He based this construction not only on the generality of the wording of the provision, but also on the C ground that it would be idle to enact that no suit shall be brought on a contract which the statute had already rendered void. In his consideration of the earlier authorities he expressed the opinion that the decision in *Bubb* v. *Yelverton* (6) in which LORD ROMILLY, M.R., upheld the validity of a bond given for a sum of money, admittedly in compromise for sums won on bets, had been influenced, first, by an argument based on the language of the Gaming Act, 1710, as D amended by the Gaming Act, 1835, s. 1, which seemed to place bonds in a special and peculiar position by reason that they are not named in the amending section, although they are named in the repealing section; and, second, by the fact that there would be a serious loss to the estate of the party who had made the bets if they were not paid or compromised. He added that these special circumstances did not, in his judgment, justify the decision. On the E other hand, he gave reasons for allowing that the decision in *Re Browne. Ex parte Martingell* (8) might be justified on its special circumstances. In that case bills to the amount of a betting debt were given in consideration of the withdrawal of a letter of complaint which had been sent to the committee of the defaulter's club, and BUCKLEY, J., held that these bills were not for the bet, but for a wholly new consideration and were valid. FLETCHER MOULTON, F L.J., said ([1908] 2 K.B. 721):

> "If this means that the judge found as a fact that the bills were not in payment of the bets, but were simply the price of the withdrawal of a letter of complaint that had actually been sent, there is ground for saying that the case had nothing to do with the laws against gaming and therefore G laid down no principle with regard to them."

He also considered that *Goodson* v. *Baker* (9) was wrongly decided. In that case there was no evidence of any fresh consideration since all that the bookmaker had done or promised was to extend the time for payment without agreeing to refrain from posting the loser as a defaulter.

The first issue to be decided is whether the sums sued for in the present H case and in *Hyams*' case (1) were moneys won on a wager. So far as *Hyams*' case (1) is concerned, there is, I think, no room for doubt. The sum sued for was in fact the balance due on a bookmaking account. The proposition that the money sued for was not the bet because the bet was payable on settling day, though it is supported by the high authority of FARWELL, L.J., is, if I may say so with respect, not maintainable. The payment of a sum due under a contract, though made after the due term, is nevertheless a payment in

discharge of the debtor's obligation under the contract unless it contains special and exceptional terms. In the present case, the proceedings before Tattersalls' committee are a factor which was not present in *Hyams*' case (1), but the order of that committee created no new obligation. It was an order for the payment of the wagering debt, the same in amount and the same in character, and, in my opinion, the promise made in the contract alleged in the claim is
A a promise to pay money won on a wager or wagers, though the promise is new and the consideration for it is new. The terms of the contract expressly establish that the promise to pay is a promise to comply with the order of Tattersalls' committee subject to modifications of date, and that the sum to be paid is the balance of the bookmaking account, including the sums won on bets on dog racing which were not included in the order of Tattersalls' committee.
B I think, therefore, that the appellant has succeeded in showing that, in the literal meaning of the words, this is a suit for recovering sums alleged to be won on a wager. By averring the contract the respondents incorporated in their allegations its terms and these terms disclose that the sum promised was won by betting. The respondents' construction of s. 18 fails, in my opinion, to account for the words "recovering any sum of money or valuable thing alleged
C to be won upon any wager." It treats them as a periphrasis for "enforcing any such contract or agreement." On the other hand, the appellant's construction gives effect to the words according to their normal and ordinary meaning. The purpose of this part of s. 18 is not to strike a second and an unnecessary blow at contracts and agreements already stricken with nullity, but to strike at any suit for recovering money or valuables won by wagering. The language
D is appropriate for that purpose, and it is a purpose which is a logical sequel and reinforcement of the first branch of the section. The legislature cannot have been unmindful that a provision making gaming and wagering contracts and agreements null and void might be rendered nugatory by additional promises or covenants given or entered into for security or in satisfaction of money lost by gaming and wagering. The preamble to the Act of 1835 shows
E that such supplementary promises and covenants were familiar to Parliament.

In the debate the word "alleged" was much canvassed. In the present case it gives rise to no difficulty because, as has already been said, the respondents themselves alleged a contract from which it appears the sum sued for was won on a wager. My noble and learned friends LORD SIMON and LORD GREENE have explained in their speeches why the word "alleged" may have been
F inserted in the section by relating it to the rules of procedure which were in force in 1845. Under the old procedure the plaintiff failed in his claim if he alleged that the sum sued for was won on a wager, or if he alleged another ground of action but it was proved that the sum sued for was won on a wager. Under the present procedure the result will still be the same in either of the cases figured. Even so, there may yet be cases, of which *Re Browne. Ex parte*
G *Martingell* (8) is an example, in which a difficult question will have to be decided on the facts—whether the contract before the court is in truth a contract for the payment of a wagering debt or a contract in which the loser of a wagering debt has bound himself to pay a sum of money of a different character.

The respondents cited a series of authorities concerned with the second part of the second branch, that is, the provision that a sum of money deposited in
H the hands of a person to abide the event on which any wager shall have been made is irrecoverable. It will be sufficient to refer to two of these cases. In *Varney* v. *Hickman* (3) it was held that the money deposited with a stakeholder can be recovered by a party repudiating the wager before the event on which it depended was determined. The ground of the decision was that the provision dealing with stakeholders was aimed at preventing the winner of a wager enforcing payment and was thus in line with the legal results of the first branch of the section ; but MAULE, J., referred also to the first part

of the second branch and he said that it was involved in the first branch of the section and that if the section had stopped at the end of the first branch it would have followed that no action could be brought to enforce a contract so declared to be void. Cresswell, J., similarly said that the provision might be superfluous or it might have been enacted *ex abundanti cautela.* In *Diggle* v. *Higgs* (4) the plaintiff was held entitled to recover from a stakeholder, after the determination of the match, but before the money had been paid over to the winner. In that case Bramwell, L.J., gave it as his opinion (2 Ex. D. 429) A that the provision that " no suit shall be brought for recovering money won upon a wager " is unnecessary and might have been left out of the statute. These *dicta* on the meaning of the first part of the second branch of s. 18 are not essential to the conclusion, and the decisions do not, in my opinion, involve a construction by which the words " any sum of money . . . deposited in the hands of any person to abide the event on which any wager shall have been made," B become tautological or merely expository of the necessary legal consequences of the first branch of the section. These decisions, therefore, do not help the respondents, but the *dicta* which I have cited are weighty, coming as they do from judges of great eminence, and it is on them rather than on the decisions that the respondents rely. I think, however, that the construction of the words " no suit shall be brought for recovering any money or valuable thing alleged C to be won upon a wager " was not raised in the cited cases in such a way as to bring before the court the kind of question which has arisen in the present case, and that a decision of the appeal cannot safely be rested on the *dicta.* *Hough* v. *Windus* (5), also cited by the respondents, has little relevance to the case. It illustrates the familiar principle that the rule that that construction is to be preferred which gives meaning to each word of a written instrument D is not unbending but may yield to a more compelling rule where there is a conflict between them. In the case cited it was held that a statute should not be so construed as to give it a retrospective effect even if the result were that some word or words must be treated as superfluous.

A consideration of these authorities appears to me to leave unimpaired the *ratio* of the dissenting judgment in *Hyams*' case (1) that the first part of the E second branch of s. 18 provides with complete generality that no action shall be brought to recover anything alleged to be won on any wager, without in any way limiting the application of the provision to the wagering contract itself. I, therefore, reach the conclusion that the appeal should be allowed, that *Hyams*' case (1), *Bubb* v. *Yelverton* (6) and *Goodson* v. *Baker* (9) should be overruled, and that the *dicta* in *Varney* v. *Hickman* (3) and *Diggle* v. F *Higgs* (4) should be disapproved. The view taken in *Bubb* v. *Yelverton* (6) has prevailed for eighty years, but it cannot be said that it has been tacitly recognised by intervening legislation, or that obligations with a tract of future time have been undertaken on the faith of it. The lapse of time is not, therefore, a sufficient reason for refusing to give effect to what appears to be the true construction of the statute. G

Before parting from the appeal I would refer to the Scottish case, *Robertson* v. *Balfour* (10). I have no doubt that that case was rightly decided, but the common law of Scotland on gaming and wagering differs greatly from the common law of England. In Scotland it is settled law that wagering agreements, being *sponsiones ludicrae,* are matters with which the court ought not to occupy itself ; whereas by the common law of England the ordinary wagering H agreement dependent on the result of horse racing and similar events was enforceable by the courts. Apart from that vital difference, there is in Scotland no need for consideration to support and render enforceable obligations not under seal. Moreover, the Gaming Act, 1845, does not apply to Scotland. It is obvious, therefore, that neither the decision in *Robertson* v. *Balfour* (10) nor the *dictum* of Lord Mackay for which the case was cited can be of any assistance in the present case.

LORD OAKSEY : My Lords, in my opinion, *Bubb* v. *Yelverton* (6) and *Hyams* v. *Stuart King* (1) were rightly decided and this appeal should, therefore, be dismissed.

An agreement by way of wagering has never been illegal. By s. 18 of the Gaming Act, 1845, it was made null and void but not illegal. A legal nullity can have no legal effect. It creates no taint in money derived from it, but it is argued that the words which follow the declaration of nullity, " . . . and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," make it impossible to enter into a binding legal contract in reference to the sum of money won under the wagering agreement. In my opinion, the words of the section have no such meaning. It cannot be denied that apart from the section it was perfectly legal for one person to enter into a contract which would be enforceable to pay any sum of money in consideration of a promise by another person to refrain from doing something which he was entitled to do. Now there is nothing illegal, or even defamatory, in making a truthful report to Tattersalls' committee, but its consequences may be very serious indeed to the bettor for he, and his horses, may be warned off Newmarket Heath and all race courses which are conducted under the Rules of Racing. How serious this result may be was exemplified in *Bubb* v. *Yelverton* (6), for as LORD ROMILLY, M.R., said (L.R. 9 Eq. 475):

> " He [the defaulter] was compelled to do so by the circumstance that Mr. Steel and Mr. Nicholls would have taken steps respecting him with the Jockey Club, which would not only have been exceedingly painful to him, but would besides have involved him in very serious and considerable pecuniary liabilities . . ."

In my opinion, it would require the clearest possible words in a statute to render such a contract unenforceable and to prevent a man who has done nothing illegal, but has merely been unable for the time being to pay a betting debt, from protecting himself from results which may be as disastrous to him financially as they may be socially. That, in my view, is the true way in which to consider the matter. Why cannot a man who cannot pay his betting debt protect himself by making a promise to pay for good consideration ? An action brought on such a promise is not, in my opinion, an action to recover the sum of money won on a wager, but an action to recover a sum of money due on a lawful contract. It is, in my view, begging the question to say that it is an action to recover a sum won on a wager because the sum of money due on the contract may be the same in amount as the sum won on the wager. Suppose the sum is different or suppose instead of a sum of money the contract is to hand over a motor car or some other " valuable thing," a racehorse for instance, in consideration of not being reported and having all the bettor's horses rendered valueless. Is the court to consider the amount of the consideration, and if it comes to the conclusion that the motor car or other valuable thing is of equal value with the amount of the bet refuse to enforce the contract ? In my opinion, the appellant's argument cannot be sustained unless it is held that no enforceable contract can be made by a defaulter which involves any part of the amount lost on the bet. The argument appears to be based on the Chancery doctrine of following trust moneys, notwithstanding that there is no reference to the doctrine, no fiduciary relationship between the parties and no legal taint in the money. If one turns to the words of the section, there appears to me to be no such provision. The part of the section in question is speaking in legal terminology—" suit," " recovering," " alleged." Such words, in my view, refer to the cause of action, and prohibit a suit the cause of which is the breach of an agreement by way of wager. In such an action it would be necessary for the plaintiff to allege the wager as the cause of action. In the present action it is not. The present action is to recover a sum of money due on an entirely different contract which apart from the suggested meaning of the section has all the characteristics of a legal contract. It is said that on this view this part of the section is tautologous, and that every word in a statute should be given a meaning. By many eminent judges this part of the section has been considered tautologous and such an objection is, in my view, nothing when compared with an interpretation which places a defaulter in the position to which I have alluded. Moreover, the appellant's construction gives no intelligible meaning to the word "alleged." It was suggested in the course of the argument that the word "alleged" was satisfied by the fact that the writ in the present case referred to the facts of the case, and included a reference to the account between the backer and the layer, but the question, is what does the word "alleged" mean in the section, and it appears to me that the allegations of the particular pleader in the present action have no bearing on that meaning. In my opinion, the word "alleged" means alleged by the plaintiff and necessarily alleged as material to the action of which the section is speaking. In the present case it was only material to allege the appellant's promise to pay in consideration of not being reported. It was quite irrelevant to allege that the sum promised to be paid had been promised to be paid on a previous occasion in a wager.

The law as I have stated it has stood since the year 1870, and the legislature has never seen fit to alter it. With the greatest respect to those of your Lordships who take a different view, I am of opinion that that is a very good reason for giving the same interpretation to words, which are at any rate so far ambiguous that they receive that interpretation from the MASTER OF THE ROLLS in 1870 and from the PRESIDENT of the Probate Division and FARWELL, L.J., in 1908. Since writing this opinion I have had the advantage of reading the opinions of the LORD CHANCELLOR and of LORD RADCLIFFE in print and I agree with their reasons.

LORD MACDERMOTT: My Lords, the main question raised in this appeal—and on the view I take it is unnecessary to go beyond it—is whether the action brought by the respondents against the appellant is struck at by s. 18 of the Gaming Act, 1845. Omitting the proviso which is not, in my opinion, of assistance in the determination of this question, the section may be regarded conveniently, though perhaps not very grammatically, as consisting of three parts or branches. Set out so as to mark this division it reads thus:

> "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void:
>
> and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager,
>
> or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made:
>
> Provided . . ."

My Lords, it is plain that the present suit was not brought on any of the numerous wagers which were made between the parties and as the result of which the appellant had lost to the respondents by the month of April, 1946, the sum of £3,835 12*s*. 6*d*. The suit was brought instead on an agreement made in August, 1946, after the appellant had defaulted in this sum. By it the appellant undertook to give the respondents his cheque for £635 12*s*. 6*d*., post-dated to Oct. 10, 1946, and to pay the balance of their account by monthly instalments of £100 commencing in November of the same year. The respondents, on their part, agreed to payment as thus promised and in consideration therefor, as the learned trial judge has found, undertook to refrain from following up the procedure with Tattersalls which had then been commenced and which, if continued, would inevitably have led to the appellant being posted as a defaulter and warned off Newmarket Heath. It is also clear that the relevant wagers between the parties, though void under the first branch of the section, were not illegal. The August agreement stands on a somewhat different footing. The antecedent transactions were not such as to taint it with illegality, and it was not illegal in itself, but it lay outside the first branch of the section and A has not been avoided thereby. So much, indeed, was conceded on behalf of the appellant, but he contended, and it is the substance of his case, that the August agreement was for payment of the lost wagers and, accordingly, that the respondents' suit, based as it was on this agreement, was brought to recover money won on wagers and was, therefore, within the prohibition enacted by the second branch of s. 18. To this two answers were made. First of all it was B said that the suit was not brought to recover what had been won, and, secondly, that the second branch of the section only related to proceedings on foot of contracts or agreements declared to be void by the first branch and so had no applicability to the present case.

My Lords, the first of these answers ignores what is, to my mind, the plain import of almost every relevant document in the case. There is nothing C colourable or equivocal about the material provisions of the August agreement. The letters constituting it leave no room for doubt that the intention of the parties was that the betting debt should be discharged by means of the spaced payments therein detailed. This correspondence has already been examined and I need not go through it again. It can be sufficiently summarised by saying that on Aug. 17, 1946, the respondents D made it clear that they were prepared to take payment of their account for £3,835 12*s.* 6*d.* by a post-dated cheque for £635 12*s.* 6*d.*, with monthly instalments thereafter to clear the balance of £3,200, and that the appellant made it equally clear by his letter of Aug. 20, that he would make these payments in discharge of the respondents' account. His purpose is but emphasised in the assurance concluding this letter that " as soon as my E financial position improves I shall do all I possibly can to settle this account as soon as possible." The nature of the respondents' suit is equally unambiguous. The endorsement on the writ speaks for itself. It says:

> " The plaintiffs' claim is for the sum of £700 0*s.* 0*d.* instalments in arrear and payable by the defendant to the plaintiffs under an agreement between the plaintiffs and the defendant on Aug. 20, 1946."

F This is followed by particulars setting out the instalments, as agreed in the correspondence, in so far as they had accrued and remained unpaid up to the commencement of the proceedings. Now if one were to pause here and, looking only to the evidence, ask what the respondents sought to recover by this suit, I think the facts would admit of but one answer, namely, certain instalments of the amount of their betting account with the appellant. That, in the G absence of any other consideration, would settle this particular aspect of the case in the appellant's favour. It was, however, contended that the law justified a different conclusion, and I must refer briefly to two of the authorities cited in support of this proposition. In *Bubb* v. *Yelverton* (6) the claim in dispute was on a bond for £10,000 given to secure the second instalment of a sum payable by the Marquis of Hastings under an agreement made by him H with his betting creditors whereby the creditors agreed to accept the payments offered " in satisfaction of their claims " and, as I read the report, to abandon proceedings before the Jockey Club which would have led to the marquis being posted as a defaulter. Against the claim it was submitted, *inter alia*, that the proceeding was one to recover a debt due on a wager and so fell within the prohibition in s. 18. LORD ROMILLY, M.R., held in favour of the claimants and in the course of his judgment—I refer only to what is material to the point under discussion—he said, speaking of the bond (L.R. 9 Eq. 474):

> "It is impossible to read the evidence without seeing that it was given, not to pay racing debts, but to avoid the consequences of not having paid them."

This *dictum* was cited and applied by Buckley, J., in *Re Browne. Ex parte Martingell* (8). There the betting creditor, having sued unsuccessfully to recover £800, due in respect of bets which he had made and paid for and on behalf of the debtor, wrote complaining of the latter's conduct to the club A of which they were both members. Subsequently they reached an agreement whereby, in consideration of the creditor withdrawing his letter of complaint, the debtor paid £100 in cash and accepted four bills for £100 each in the creditor's favour. The debtor having become bankrupt, the creditor sought to prove in respect of the bills and, despite the contention that they were really given in satisfaction of the old debt of £800, and the concluding words B of s. 1 of the Gaming Act, 1892—the enactment on which the original action had foundered—which say, that "no action shall be brought or maintained to recover any such sum of money," the proof was allowed. Buckley, J., observed ([1904] 2 K.B. 135):

> "The bills were given for an altogether new consideration, which was not an illegal consideration. They were given, not to pay the gaming C debt, but, as Romilly, M.R., said in *Bubb* v. *Yelverton* (6), to avoid the consequences of not having paid it."

I turn now to the decision of the Court of Appeal in *Hyams* v. *Stuart King* (1), on this particular point. I need not recite its facts. In so far as material they are not to be distinguished from those of the present case and there can be D no doubt that, if the Court of Appeal was right, the appeal before your Lordships must fail. The majority judgments accept, I think without reservation, the distinction drawn by Lord Romilly in *Bubb* v. *Yelverton* (6). Farwell, L.J., indeed, seems to develop it somewhat for he says ([1908] 2 K.B. 728):

> ". . . the contract not to post . . . is sufficient to support a promise to pay money, which, though equal to the amount of the bet, is not in E fact the bet, but is compensation for its non-payment, and the action cannot be said to be brought for recovering any sum alleged to have been won on any wager within [the Gaming Act, 1845]."

My Lords, when default is made in payment of a debt of honour the defaulter may well find himself willing to confer, it may be by gift or contract, some advantage on the winner which he would not otherwise have thought of con- F ferring. In contracts made in such circumstances it does not, in my opinion, necessarily follow that the consideration moving from the loser will always be a "sum of money or valuable thing alleged to be won upon any wager" within the meaning of s. 18. In cases of doubt I think the court must look to the reality of the transaction and come to a finding as to what the true intention was. Where the promise is to pay money it will generally, I think, G be relevant to enquire whether the debt of honour is to be regarded as discharged by the payment, but the circumstances to be considered must, of course, depend on the facts of each instance. There is, however, neither need nor place for such an investigation where, as here, the terms of the agreement afford a plain answer, unless it can be said that the observations of Lord Romilly, which I have quoted above, mark a reliable criterion capable H of general application. In my opinion, they do not do so. They sound in motive, and the subtle distinction which they draw seems to me at variance with the well established principle that a man cannot modify the contractual intention to be deduced from his words or conduct by exposing what he had in the back of his mind. For this reason I doubt very much if *Bubb* v. *Yelverton* (6) and *Re Browne. Ex parte Martingell* (8) can be regarded as correctly decided even on their particular facts. But, however that may be, it follows, if I am right in the view expressed, that *Hyams* v. *Stuart King* (1) cannot be supported on the strength of these authorities, and without their aid it cannot be said that the new agreement on which the plaintiff in that case succeeded was such as, in itself, to justify the conclusion that the loser's promise was to pay, not the balance of the bet, but something different. In this connection I need only refer to two passages in the majority judgments which go to show how little room there was in the agreement as there established for the refinement introduced by *Bubb* v. *Yelverton* (6). SIR GORELL BARNES, P., describes ([1908] 2 K.B. 704) the consideration for the plaintiff's promise to give time and forbear to declare the defendants' defaulters as the undertaking of the defendants that:

> " . . . they [the defendants] would pay him [the plaintiff] on or before the expiration of that time the amount which both parties considered was due to the plaintiff in honour, though not by law."

FARWELL, L.J. (*ibid.*, 725) speaks to the same effect in summarising the position thus:

> " A bet made by the plaintiff with the defendant's firm, and lost by the latter ; a cheque for £108 10*s*. 0*d*. sent in payment on Nov. 4, a request on Nov. 5 from the defendant's partner to the plaintiff, acted on by the plaintiff, to hold the cheque over and to refrain from publishing their default to other bookmakers, and a promise in consideration thereof to pay the £108 10*s*. 0*d*. by instalments as soon as the firm got the money."

For these reasons I am of opinion that the respondents' first submission fails and that what they sought to recover in this suit was in truth and in fact a part of their betting debt.

Now as to the respondents' second submission. Does the second branch of s. 18 apply to the enforcement of the August agreement as I have found it to be, or is it limited to suits brought on the wagering contract itself? In *Hyams* v. *Stuart King* (1) the point is barely touched on in the majority judgments, which I think must be taken as founded, in the main, on the absence of illegality and the *Bubb* v. *Yelverton* (6) line of authority. The dissenting judgment of FLETCHER MOULTON, L.J., takes the view urged on behalf of the appellant and deals with the matter at some length and more fully than it is dealt with in the earlier cases. These, however, contain *dicta* which clearly favour the respondents' contention that the second branch of the section is but a procedural echo of the first, reliance being placed in particular on the observations of MAULE, J., in *Varney* v. *Hickman* (3), and of LORD CAIRNS, L.C., and BRAMWELL, L.J., in *Diggle* v. *Higgs* (4). The question is entirely one of construction, and the following excerpts from two of the judgments just referred to will suffice to indicate the nature of the conflict of judicial opinion which must now be settled. In *Diggle* v. *Higgs* (4) LORD CAIRNS says (2 Ex. D. 427):

> " The section amounts to this : all contracts by way of gaming and wagering are null and void ; and then, dealing with those contracts, it says that no action shall be brought with respect to them : that is to say, all gaming contracts are void, and the winner of the game or wager shall not maintain a suit against his antagonist or the stakeholder. This construction makes one member of the section in unison with the other."

In *Hyams* v. *Stuart King* (1) FLETCHER MOULTON, L.J., puts it thus ([1908] 2 K.B. 713) in contrasting what I have called the first and second branches:

> " The language of the later provision is in my opinion much wider. It provides with complete generality that no action shall be brought to recover anything alleged to be won upon any wager, without in any way limiting the application of the provision to the wagering contract itself."

My Lords, the other sections of the Act of 1845 do not seem to me to give any assistance on the true meaning of s. 18. Nor have I been able to find much help in the legislative history of gaming and wagering. The enactments repealed by s. 15 of the Act of 1845 certainly formed a strict code and evince no obvious desire to let their prohibitions be evaded with the ease with which the first and second branches of s. 18 might be circumvented were the respondents' contentions to prevail. But, as Lord Watson said in *Bradlaugh* v. *Clarke* (11) (8 App. Cas. 380), it is "an extremely hazardous proceeding to refer to provisions which have been absolutely repealed, in order to ascertain what the legislature meant to enact in their room and stead," and I do not think any real weight can be attached to considerations of that kind. It is, however, legitimate and relevant to observe, for what it is worth, that in 1845 the legislature must be taken as aware of the practice of making agreements to pay wagering losses, for s. 3 of the statute 16 Chas. 2, c. 7, which is repealed by s. 15 of the Act of 1845, struck expressly at that very thing. The question for decision, therefore, hinges on the language of s. 18, and in particular on that of its second branch. So regarding it, I am unable to agree that either the second branch, or the third, is merely expository of the first. It may well be that the third only relates to the winner who seeks his winnings from the stakeholder. The point does not arise here and need not be further considered, but even if that be the case, I find it hard to see why the third branch should be regarded as but a legal consequence of the first. In the ordinary course the stakeholder is not sued on the wagering contract for he is not usually a party to it. He is sued for money had and received, and the avoidance of the wagering contract without more does not give him a good answer to a claim by the winner. This, to my mind, disposes of much of the reasoning underlying the *dicta* in *Varney* v. *Hickman* (3) and *Diggle* v. *Higgs* (4) relied on by the respondents. It does not, of course, conclude the matter so far as the second branch is concerned, but it may, I think fairly, be said to weaken the case for treating that branch as adding nothing to the substance of the enactment.

My Lords, had the words "alleged to be" been omitted from the second branch I confess I should have found difficulty in discerning a foothold for the respondents' contention. If the intention was merely to reflect the procedural consequences of making all wagering contracts void, I cannot but think that the natural way of effecting it would have been to add after the first branch some such sentence as—"and the same shall not be enforceable in any court of law or equity." The words used—I leave the "alleged to be" out of account for the moment—do not appear to me to be apt for this purpose as, in strictness, the expression "no suit shall be brought or maintained" confronts the would-be suitor with a higher obstacle than that which has to be met by one whose claim is defective only in that it is based on a transaction of no legal effect. On the other hand, the wording of the second branch—I again assume the omission referred to—does seem apt and effectual if the intention of the legislature was that this limb of the section should not only cover the transactions previously made void, but should reach beyond them so as to preclude resort to an obvious way round the earlier provision. What then is the effect of the words "alleged to be"? If, as the respondents contended, they mean "alleged *by the plaintiff*, as a necessary part of his case, to be" I think it must be admitted that they would lend force to what the respondents say as to the true construction of the section. In my opinion, however, this contention should be rejected. Whatever the true scope of the second branch may be, it must at least relate to suits brought on original wagering contracts declared void by the first branch, and I think it is quite impossible to accept the view that the legislature, having thus armed the loser with an effective defence by that branch, should proceed to make the second operate only if the winner himself chose to reveal the unenforceability of his claim. Were that the position, the second would not even declare the consequences of the first, or, so far as I can see, fit in with any understandable design. For this reason, if for no other, I think the word "alleged" must embrace allegations by a defendant as well as by a plaintiff; and, as the second branch, on this view, can hardly have been intended to depend on a A bare plea, I also think it must follow that "alleged" is used as meaning "properly alleged" or "alleged and proved or admitted." If such be the significance of the words "alleged to be" I see nothing in them to detract from the meaning I would, as already indicated, attribute to the second branch were they omitted.

For these reasons I share the view expressed by FLETCHER MOULTON, L.J., B in *Hyams* v. *Stuart King* (1) on the interpretation of the second branch of s. 18 and am, accordingly, of opinion that the respondents' second submission also fails. In the result, if I am right in the conclusions stated, the decision in *Hyams* v. *Stuart King* (1) cannot be supported and ought to be overruled. I think, therefore, that the appeal should be allowed and the respondents' claim dismissed.

C **LORD RADCLIFFE**: My Lords, I think that this appeal ought not to succeed. It succeeds if s. 18 of the Gaming Act, 1845, renders the respondents' action unmaintainable: it fails if that section, properly understood, has no application to the promise which the respondents' action seeks to enforce. The first thing to do is to see what the section provides. It falls, as I read it, into three parts. The first contains a declaration of substantive law to the D effect that contracts by way of gaming or wagering are to be null and void. The second relates to procedural or adjectival law and enacts that:

> ". . . no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of E any person to abide the event on which any wager shall have been made . . ."

The third part provides that "this enactment" is not to be deemed to apply to certain subscriptions or contributions or agreements therefor, the precise definition of which is not relevant. It is, indeed, possible that the second part of this section ought to be construed so as to render unenforceable at law a F contract to pay a sum of money which is not itself a wagering contract, but I confess that I should myself expect to find some compulsive indication that the legislature did so intend before I adopted this construction. Certainly I should approach a section so framed with the expectation that the second part did not go beyond the first and that it did not make a further contribution to the substantive law of contract by invalidating not merely contracts of G gaming or wagering, but other sorts of contract as well.

I have not been able to find in the section any such compulsive indication as would lead me to abandon this expectation. Indeed such indications as there are, slight in themselves, tend to support my original view as to the range of the section. The second, or procedural, part is introduced by the word "and"; the words "alleged to be won" are used to describe the sum H of money of which recovery by legal action is forbidden; the proviso refers to what has gone before as "this enactment." It may be true that, if the view that I have suggested is right, the first part of the section would have sufficed to procure the failure of actions to enforce gaming or wagering contracts, and that the second part would accordingly be tautologous in the sense that it was unnecessary. I hesitate to accept even the basis of the argument. The second part, being *lex fori*, might well apply to relieve our courts of the duty of adjudicating on foreign wagering contracts which by the ordinary rules of private international law would escape invalidation by the first part. But, if the second part is tautologous, be it so. Such instances of legislative abundance are not unknown. In fact, s. 1 of the Gaming Act, 1892, which ends with the words " and no action shall be brought or maintained to recover any such sum of money " contains what must be on any view just such a tautology. In this s. 18 the procedural consequence is not expressed so simply, but that is because the makers of the section were trying by one composite phrase to disable both the winner's action to enforce his contract against the loser and the winner's action to get the stakes out of the stakeholder's hands. By their language they have raised doubts as to the legislative intention, although these doubts, I think, belong more to the twentieth century than to that century in which the Act was passed. This is not the first occasion on which the range and effect of the second part of the section have been discussed, and the nineteenth century judges were, I think, unanimous in holding that it added nothing of substance to the first. I do not feel much weight in this argument for extending the operation of the second part of s. 18 of the Act of 1845 because it would otherwise be tautologous. That it did weigh with Fletcher Moulton, L.J., in his dissenting judgment in *Hyams* v. *Stuart King* (1) is plain (see [1908] 2 K.B. 713). I prefer the construction of the section which was adopted by Rolfe, Alderson and Parke, BB., in *Moon* v. *Durden* (2), by Maule, J., in *Varney* v. *Hickman* (3), and by Lord Cairns, L.C., and Bramwell, L.J., in *Diggle* v. *Higgs* (4). The words of Lord Cairns (2 Ex. D. 427) appear to me accurately to state the effect of the section:

> " The section amounts to this : all contracts by way of gaming and wagering are null and void ; and then, dealing with those contracts, it says that no action shall be brought with respect to them : that is to say, all gaming contracts are void, and the winner of the game or wager shall not maintain a suit against his antagonist or the stakeholder."

We were rightly reminded by counsel for the appellant that each of these observations was made in a case which dealt directly with wagering contracts and in which, therefore, the first part of the section itself avoided the contract. But the observations are general observations on the construction of the section, and, apart from that, the decisions themselves are significant in showing that a merely literal reading of the section has been rejected by the courts when the respective rights of depositor and stakeholder have been in issue.

It remains to apply s. 18 to the facts of this appeal. They are not in dispute. In any common parlance the appellant is being sued for payment of his betting debts, and in this, as in other cases on similar facts, I should expect to find the parties describing the promise which here is contained in the appellant's letter of Aug. 15 and 20, 1946, as a promise to pay the bets, but I do not think that common parlance must necessarily determine the parties' legal rights, since I think that the procedural part of s. 18 was directed to causes of action, not to common parlance. A bet is a transaction, not a piece of property. Money won on a betting transaction has no existence until paid. Nothing exists except the loser's promise to pay what he has lost, a promise which the statute has made unenforceable at law. Such was the appellant's promise to pay the respondents £3,835 12*s*. 6*d*. as the promise stood in July, 1946. When the committee of Tattersalls had dealt with the parties on July 22, 1946, the appellant had an obligation to pay £635 12*s*. 6*d*. within fourteen days and £3,000 by monthly instalments of £100. (I omit reference to the £200 lost on bets on dog racing, which the committee did not deal with). The committee's order was, of course, no more enforceable at law than the betting promise, but its obligations were evidently regarded by the parties as superseding that promise. The appellant's honour as a racing or betting man would have been intact had his payments observed no more than the dates which the committee required of him. No doubt, they were ordering the appellant to pay his bet or his betting debt, but, if we are to speak of unenforceable obligations as obligations at all, I think that an obligation to pay £3,635 presently is, and is regarded in business as being, substantially a different thing from an obligation to pay £635 within fourteen days and the balance of £3,000, without interest, by equal monthly instalments over the next two and a half years.

A In the racing world there are sanctions other than those which a law court can impose. The bargain that was made in August was, it is conceded, not a wagering contract. Nor do the facts of the appeal, as I understand them, allow us to say that the consideration then given by the respondents was "colourable," fictitious, or a device. That solution of the problem, which FLETCHER MOULTON, L.J., favoured, is not open to us. The contract, then, B was not anything other than a contract valid by English law, except so far as s. 18 has the effect of preventing an action being brought or maintained to recover the promised payment. The bargain consisted in the appellant undertaking to make such payments as were prescribed by the Tattersalls' order, subject to deferment of the initial payment, on the respondents' undertaking not to "enforce" the order according to its original terms. By refraining C from taking this action, which was within their power, they afforded the appellant what was good consideration for his promise. It was certainly what he wanted at the time. Its value is not measurable, nor is it relevant. Indeed, the appellant's argument, if I understand it, would be the same if the respondents instead of refraining from reporting him had taken some positive steps at his request such as finding a large sum of money to pay off a pressing creditor. D According to our law of contract, what had happened when these premises were exchanged in August? I think that we ought to say that a new contract had been made, not that a wagering contract, hitherto void, had received the support of a new consideration.

When the respondents sue to enforce this promise which the appellant made in August, 1946, they are not, as I see it, bringing or maintaining an action E to recover a sum of money alleged to be won on a wager within the meaning of s. 18. That is why I think that the appeal ought to fail. It is part of the history of the matter that £3,835 12*s.* 6*d.* was owing on betting transactions, but what the respondents seek to recover in this action is part of the sum of money promised to them for good consideration in August, 1946, and not the sum of money which they won from the appellant on their previous wagers F with him. Only if the promised sums have continuing identity—whatever that may mean—could one be the same as the other. The respondents cause of action is a new contract, in enforcing which it may be a natural, but is not a relevant, averment that the moneys promised represented previous betting debts, and if it is not essential to the recovery to allege that the sum was won on what was a wagering contract, I cannot think that it is in truth a sum of G money "alleged" to be so won within the meaning of the section.

Appeal allowed.

Solicitors: *Collyer-Bristow & Co.*, agents for *A. D. Capel Loft & Son*, Stourport-on-Severn (for the appellant); *Hardcastle Sanders & Co.* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

FRED LONG AND SONS, LTD. *v.* BURGESS AND ANOTHER.

[COURT OF APPEAL (Bucknill and Asquith, L.JJ., and Hodson, J.), July 14, 25, 1949.]

Administration—Relation back—Death intestate of contractual tenant of dwelling-house subject to Rent Restrictions Acts—Vesting of tenancy in the probate judge—Notice to President of Probate Division to quit—Subsequent grant of letters of administration—Right of administrator to retain possession of dwelling-house—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), *s.* 12 (1) (*f*)—*Administration of Estates Act,* 1925 (c. 23), *s.* 9.

Rent Restriction—Possession—Death of tenant—Contractual tenancy—Sons residing in house at time of tenant's death—Vesting of tenancy in the probate judge—Notice to President of Probate Division to quit—Subsequent grant of letters of administration to son—Doctrine of relation back—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), *s.* 12 (1) (*f*).

On Nov. 7, 1948, the contractual tenant of a dwelling-house to which the Rent Restrictions Acts applied died intestate, and on Nov. 18 the landlords served a notice to quit on the President of the Probate, Divorce and Admiralty Division of the High Court, in whom the tenancy was vested under the Administration of Estates Act, 1925, s. 9. A week later they started an action for possession against the sons of the deceased tenant who had continued to live in the house after the tenant's death. On Jan. 15, 1949, one of the sons obtained a grant of letters of administration, and he contended that by the doctrine of relation back the estate of the deceased tenant, including her contractual tenancy, was vested in him as from the date of her death, and, therefore, as he was a person deriving title under the original tenant, within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*f*), he was entitled to the protection of the Rent Restrictions Acts.

HELD: the doctrine of relation back could be applied only to protect the estate from wrongful injury occurring in the interval between the death of an intestate and the grant of letters of administration and could not be applied so as to invalidate interests lawfully acquired in the interval or so as to give the administrator a title to something which had been extinguished in the interval without fault on the part of anyone; the contract of tenancy, which was vested in the President of the Probate, Divorce and Admiralty Division on the death of the tenant intestate, was validly terminated by the notice to quit served on the President on Nov. 18, 1948 (*Smith* v. *Mather* ([1948] 1 All E.R. 704), *applied*); and the doctrine of relation back could not be applied so as to include in the subsequent grant of letters of administration the tenancy which had been extinguished; and, therefore, the administrator was not a person deriving title under the original tenant within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*f*), and he was not entitled to the protection of the Rent Restrictions Acts.

[AS TO THE DOCTRINE OF RELATION BACK, see HALSBURY, Hailsham Edn., Vol. 14, pp. 176, 177, paras. 277-281; and FOR CASES, see DIGEST, Vol. 23, pp. 67-70, Nos. *513-535*.]

Cases referred to:

(1) *Smith* v. *Mather,* [1948] 1 All E.R. 704; [1948] 2 K.B. 212; [1948] L.J.R. 1209.

(2) *Thynne* v. *Salmon,* [1948] 1 All E.R. 49; [1948] 1 K.B. 482; [1948] L.J.R. 506.

(3) *Ingall* v. *Moran,* [1944] 1 All E.R. 97; [1944] K.B. 160; 113 L.J.K.B. 298; 170 L.T. 57; 2nd Digest Supp.

(4) *Waring* v. *Dewberry,* (1718), 1 Stra. 97; Fortes. Rep. 360; 18 Digest 346, *826*.

(5) *R.* v. *Horsley* (*Inhabitants*), (1807), 8 East, 405 ; 23 Digest 68, *518.*

APPEAL by the landlords from an order of His Honour JUDGE CAREY EVANS, at Great Yarmouth County Court, dated Feb. 11, 1949.

After the death intestate of the contractual tenant of a dwelling-house which was within the scope of the Rent Restrictions Acts, the landlords served a notice to quit on the President of the Probate, Divorce and Admiralty Division of the High Court, in whom the tenancy was vested under the Administration of Estates Act, 1925, s. 9, and a week later they started an action for possession against the deceased tenant's sons who had continued to live in the house after the tenant's death. At the request of the defendants' solicitors, the county court judge adjourned the hearing of the case to enable one of the sons to take out a grant of letters of administration, and at the adjourned hearing, after the grant had been obtained, the learned judge held that by reason of the doctrine of relation back the deceased tenant's contractual tenancy from the date of her death was vested in the administrator, and, therefore, the administrator was the contractual tenant at the moment of the determination of the tenancy and, as such, was entitled to hold over as statutory tenant. The Court of Appeal now reversed his decision and held that the landlords were entitled to an order for possession. The facts appear in the judgment of BUCKNILL, L.J.

Stephen Chapman and *Norman King* for the landlords (the plaintiffs).

The defendants were not represented.

Cur. adv. vult.

July 25. The following judgments were read.

BUCKNILL, L.J. : This appeal raises an interesting question on the construction and application of the Administration of Estates Act, 1925, s. 9, which enacts:

> "Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the probate judge in the same manner and to the same extent as formerly in the case of personal estate it vested in the ordinary."

The section is included in pt. II of the Act, which is headed "Executors and Administrators." The Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (1), which replaced the Administration of Estates Act, 1925, s. 10 (which was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 226 (1) and sched. VI), enacts that in granting letters of administration the court shall have regard to the rights of all persons interested in the estate of the deceased person. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 163 (1), which re-enacts the Administration of Estates Act, 1925, s. 16 (1) (also repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 226 (1) and sched. VI), deals with the power of the court to grant administration of the estate of the deceased while legal proceedings are pending touching the validity of the will of a deceased, or for obtaining, recalling, or revoking any administration. By the Administration of Estates Act, 1925, s. 55 (xv):

> "'Probate judge' means the President of the Probate, Divorce and Admiralty Division of the High Court."

Schedule II to the Act repeals a large number of statutes, starting with the statute 13 Edw. I [Statute of Westminster the Second], c. 19 and c. 23. Section 9 of the Administration of Estates Act, 1925, was, in effect, a re-enactment of s. 19 of the Court of Probate Act, 1858 (which was repealed by s. 56 and sched. II of the Administration of Estates Act, 1925), except that s. 19 applied only to personal estate and effects. The learned editors of MORTIMER ON PROBATE LAW AND PRACTICE (2nd ed., 1927), p. 280, state that the jurisdiction which the ecclesiastical courts exercised over the effects of persons dying without a will rested on a very ancient foundation. In the early periods of legal history the ordinary had by common law the absolute disposal of the personal property of all intestates, but these powers were gradually abridged by Acts of Parliament. BLACKSTONE in his COMMENTARIES ON THE LAWS OF ENGLAND, book II, p. 496, states that the administrators " are only the officers of the ordinary, appointed by him in pursuance of " the statute 31 Edw. III, c. 11 [Administration on Intestacy, 1357], and that their title and authority were derived exclusively from the ecclesiastical judge by grants which are usually denominated letters of administration. Eventually, by the Court of Probate Act, 1857, s. 3, the jurisdiction of the ecclesiastical and all other courts to grant letters of administration was abolished and, by s. 4, the jurisdiction was transferred to the newly constituted Court of Probate.

The facts of this case are not in dispute. From about 1943 Mrs. Burgess lived at 121 Lichfield Road, Yarmouth, with her two sons under a contractual tenancy at a rental of 9*s*. 3*d*. a week including rates. On Nov. 7, 1948, Mrs. Burgess died intestate, and on Nov. 18 her landlords served a notice to quit on the President of the Probate, Divorce and Admiralty Division. Counsel for the defendants, Alfred and Clifford Burgess, the two sons of Mrs. Burgess, admitted that this was a valid determination on Nov. 27 of the contractual tenancy. A week later the landlords started this action for possession against the two sons, who continued to live in the home after their mother's death. The defendants by their defence claimed the protection of the Rent Restrictions Acts. On Jan. 6, 1949, the case came on for hearing before His Honour JUDGE CAREY EVANS. The solicitor for the defendants admitted that no grant of letters of administration had been applied for. After the defendant Alfred Burgess had given evidence, the case for the defendants had been closed, and *Smith* v. *Mather* (1) had been referred to, the solicitor for the defendants said that he desired an adjournment to enable the defendants, or one of them, to take out letters of administration. The learned judge's note is that:

> " . . . [the] adjournment was not opposed by solicitor for the plaintiff, though he will contend that the defendants have no defence even if letters of administration are granted."

The case was then adjourned to Feb. 10, when the defendants were represented by counsel. Letters of administration, dated Jan. 15, 1949, in favour of the defendant Clifford Burgess were produced, and the point was taken on behalf of the defendants that the doctrine of relation back applied, that the defendant Clifford Burgess was now in a position to show that he was a statutory tenant, and that no order for possession could be made. On the following day the learned judge gave a careful and reasoned judgment, and in the course of it he said that, as Mrs. Burgess was a contractual tenant at her death, neither defendant could claim a statutory tenancy under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*g*), in accordance with the decision in *Thynne* v. *Salmon* (2). He pointed out that, if the contractual tenancy had been current at the date of the grant of administration, the administrator would be entitled to the benefit of the Acts because he came under s. 12 (1) (*f*) of the Act of 1920, which enacts that the expression " tenant " includes " any person from time to time deriving title under the original . . . tenant," and he was also residing in the house at all material times. He then dealt with the argument that when the letters of administration were granted on Jan. 15, 1949, no weekly tenancy existed which could vest in the administrator because it had been terminated by the notice to quit to the President of the Probate, Divorce and Admiralty Division, and no statutory tenancy had then vested in the President because he was not in possession of the premises.

To meet this argument, the learned judge applied the doctrine of "relation back," as expounded by LUXMOORE, L.J., in *Ingall* v. *Moran* (3), where the Lord Justice said ([1944] 1 All E.R. 101):

> "It is true that when a grant of administration is made the intestate's estate including all choses in action vests in the person to whom the grant is made, and the title thereto then relates back to the date of the intestate's death . . ."

The learned judge applied the doctrine, as embodied in that statement, to the present case and said that by that doctrine the deceased's estate (including her contractual tenancy from the time of her death) was vested in the administrator, and he held that, by reason of the doctrine of relation back, the administrator was the contractual tenant at the moment of the determination of the tenancy, and, as such, was entitled to hold over as statutory tenant. The judge said that his decision did not conflict with the decision in *Smith* v. *Mather* (1) because in that case there never was a grant of administration, and that the "fatal conflict" envisaged in *Thynne* v. *Salmon* (2) did not arise in this case because the President of the Probate, Divorce and Admiralty Division was the only person in whom the tenancy vested until the grant of administration, and as from the date of the grant by virtue of the doctrine of relation back the administrator alone is deemed in law to have been the person in whom the tenancy vested. In conclusion the learned judge said:

> "It is very important to interpret *Smith* v. *Mather* (1) in the light of the facts before the Court of Appeal, and to remember that they were not considering at all the effects of the doctrine of relation back."

The difficult problem before us, as I see it, raises the following questions. (*a*) Did the notice to quit terminate the tenancy on Nov. 27, 1948 ? If so, (*b*) Does the grant of administration on Jan. 15, 1949, coupled with the doctrine of relation back, bring to life the tenancy which had terminated on Nov. 27. (*c*) Does the doctrine of relation back put the administrator in the same position as the President when notice to quit was served on him, and, if so, what effect would the notice to quit on the administrator have in terminating the tenancy agreement ? There seems to be very little authority on the subject. In my opinion, the cases which deal with the doctrine of relation back do not have any such similarity to the facts of this case as to enable one to say that the principle contained in them should apply to this case. I think that on principle and historically the vesting of the estate in the President of the Probate, Divorce and Admiralty Division is a positive act with some legal substance. Normally the court, formerly composed of the probate judge, appoints a person or persons to deal with the property of the intestate through a grant of administration, but I see no reason why in a case of necessity the President should not have legal power to give directions about the property. If he cannot do so, no one can. That is why the property is vested in him. If the President's position is such as I have indicated, I think he must have the legal capacity to receive a valid notice to quit, and such notice, after the proper lapse of time, has full legal effect. If no grant of administration has been made, there is no person other than the President to whom the notice to quit can validly be given. At any date subsequent to the death of the intestate a grant of administration may be made. There is no time limit in this matter. If a grant made years after the death is to make invalid the notice to quit validly given to the President, confusion and uncertainty will prevail and injustice may be done to those who have acted on the assumption that the notice to quit given to the President had full legal effect.

In *Smith* v. *Mather* (1) the facts were similar to this case. The mother was the contractual tenant, and her son and daughter were living with her at the time of her death. The mother died intestate in October, 1946, and in December, 1946, the landlords served notice to quit on the President. No letters of administration were taken out at any time. The county court judge dismissed the landlords' action for possession, but on appeal the Court of Appeal held that the notice to the President was valid and that it was the proper procedure for giving effect to the landlords' right to determine the tenancy. The appeal was, therefore, allowed. It is quite true that the son or daughter did not think A of applying for letters of administration during the hearing of the case before the county court judge, but, surely, if they had done so and had succeeded in obtaining a grant, the grant must be taken of such property only as the intestate had at the time of the grant, and cannot be taken to include a right of property which had validly been extinguished or transferred. In argument in *Mather's* case (1) counsel for the defendants submitted that the rule laid B down in *Thynne* v. *Salmon* (2) did not apply because in that case a grant of administration had been made whereas in *Mather's* case (1) the fatal conflict as to liability for rent between two different persons did not arise inasmuch as the President would not become liable to pay rent when the contractual tenancy became vested in him under the Administration of Estates Act, 1925, s. 9. This argument in *Smith* v. *Mather* (1) was rejected by the Court of Appeal. C In his judgment Somervell, L.J., said ([1948] 1 All E.R. 705):

> " In circumstances such as the present . . . there must be a power in the landlord to bring the tenancy to an end by whatever notice is provided for in the agreement, and the proper procedure for doing that in the case of an intestacy is the procedure adopted in this case, namely, serving a notice to quit on the President of the Probate, Divorce and Admiralty D Division."

If, then, the notice terminates the contract, it seems to me that it would be unjust to hold that a subsequent grant of letters of administration brought the dead contract to life. The circumstances in which the grant was made in this case vividly illustrate the sort of injustice which the extension of the E doctrine to this kind of case might do. I think that the appeal should be allowed.

ASQUITH, L.J. : I agree. My Lord has recited the facts and I will not repeat them. The main grounds on which counsel for the landlords invited us to reverse the decision of the county court judge were the following. (i) The principle of " relation back," it was argued, has no application where F the asset, the administrator's title to which is sought to be antedated by its operation, has ceased to exist by the time when letters of administration are granted. For the title to relate back, it must be a title to something *in esse* at the date of the grant. A lease extinguished in the interval between the death and the grant (which I will call, for short, " the interval ") is, in this respect, in just the same position as a chattel lost or destroyed in the interval. G The title cannot effectively relate back, for it is a title to nothing. The doctrine of relation back cannot breathe new life into a corpse. (ii) The principle of relation back, it was further contended, only applies (to quote the language used in Williams on Executors and Administrators, 12th ed., vol. 1, pp. 409-411) " for particular purposes," and these, when analysed, turn out all to be connected with the protection or preservation of the estate H from wrongful injury in the interval. If in the interval the estate has been damnified by tortious acts on the part of anyone, or, in the case of leaseholds, by breaches of covenant, then the administrator, though appointed after the acts complained of, can sue in respect of them. The principle of relation back, however, does not apply outside the limits of the purpose which called it into being. Here it is not necessary to the protection of the estate to invoke it—*ergo* it cannot be invoked. (iii) Even where the principle is otherwise applicable, it cannot be so applied as to disturb interests lawfully acquired during the interval: *Waring* v. *Dewberry* (4). In the interval, in the present case, the landlords by a valid notice served on the President of the Probate, Divorce and Admiralty Division lawfully re-absorbed into their reversion the outstanding leasehold interest which had been vested in the deceased and thereafter in the President. They cannot now be divested of this. (iv) It was further argued that to hold that the title related back in such a case as the present might lead to inconvenient, if not intolerable, consequences. For instance, suppose that, after validly terminating the President's interest in the tenancy, as they did, the landlords re-entered and occupied the premises themselves, or re-let to a third person, and then, perhaps, years later, an administrator is appointed. If his title "relates back," the landlords or their new lessees have been trespassing for years and are liable for mesne profits accordingly, subject possibly to an offset of the rent for which the administrator would have been liable in respect of that period. Or suppose that the landlord, after re-entering, had sold the freehold to X, who had mortgaged it to Y or let it to Z. The application of the doctrine of relation back would create chaos in such a case. (v) Lastly, it is said that, assuming that all the above contentions fail, the trial below was in any event vitiated by the improper action of the county court judge in proposing and ordering an adjournment at a time when the defendants had no defence whatever, so as to allow them to try, by obtaining administration, to acquire one, and that, even if such action was not improper, its sequel, the grant of administration to one of the defendants, could not affect the issues which were raised on the pleadings and which alone the judge had to determine, *viz.*, whether at the time of the plaint or joinder of issue the defendants had any defence.

The argument on the defendants' side followed these lines. (i) The principle of relation back vests any leasehold interest (such as the deceased woman's contractual tenancy) in the administrator as from the date of the death, so as to enable him to sue on the covenants, subject to his liability for the rents and profits, in respect of the interval: see *R.* v. *Horsley* (*Inhabitants*) (5) *per* LORD ELLENBOROUGH, C.J. (8 East, 410). (ii) Therefore, the administrator must be treated as having notionally acquired the title to this contractual tenancy on Nov. 7, 1948—at the instant when Mrs. Burgess died. (iii) If he had, the contractual tenancy could never have vested in the President, nor could any notice served on the President have had any effect on the rights of the parties. The administrator became contractual tenant, in contemplation of law, on Nov. 7, 1948, and nothing has happened since to bring his interest to an end. Subject to the next point, he has never had notice to quit and is still contractual tenant. (iv) Alternatively, if the notice to quit served on the President has any relevance or efficacy, this can only be because in such circumstances the President was the administrator's agent or representative to receive it, and because notice served on the President equals a notice served on him, the administrator. But if notice had been served on the administrator, the latter would have been converted from a contractual to a statutory tenant, enjoying the protection of the Rent Restrictions Acts, which he has done nothing to forfeit.

In my view, these arguments cannot prevail. The landlords are right, and the appeal should be allowed. It seems to me that there is much force in the contentions advanced for the landlords (*a*) that the doctrine of relation back must not be applied save to protect the estate from wrongful injury occurring in the interval (of which in this case there was none); (*b*) that a title cannot relate back if it is a title to something which has perished or been extinguished without fault or wrong on the part of anyone in the interval; (*c*) that the principle of relation back cannot be applied so as to invalidate interests lawfully acquired in the interval; and (*d*) that to apply it in circumstances such as those of the present case leaves the landlord, it may be for years, in a position of intolerable doubt as to his right, *e.g.*, whether he can safely re-enter and deal with the property or not. These reasons seems to me to require that the appeal should be allowed, and I need to express no view as to the argument founded on the adjournment of the proceedings in the county court.

HODSON, J.: I agree.

Appeal allowed with costs.

Solicitors: *Gardiner & Co.*, agents for *Humphrey Lynde & Elliott*, Great Yarmouth (for the landlords).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

Re HOWLETT (*deceased*). HOWLETT *v.* HOWLETT.

[Chancery Division (Danckwerts, J.), July 6, 7, 8, 1949.]

Trustee—Occupation of trust property—Liability to account for rents and profits—Acquiescence by beneficiary—Application of Limitation Act, 1939 (*c.* 21), *s.* 19 (1) (*b*).

Limitation of Action—Trustee—Occupation of trust property by trustee—Liability to account for rents and profits—Application of period of limitation—Limitation Act, 1939 (*c.* 21), *s.* 19 (1) (*b*).

On Dec. 12, 1923, Mrs. H. died intestate possessed of a wharf in Kent which devolved according to the custom of gavelkind on her son, then an infant, subject to the life interest of her husband in one half of the rents and profits defeasible on his re-marriage. The husband, who was the administrator of Mrs. H.'s estate, occupied the wharf for his own purposes, and, although he re-married on Jan. 9, 1927, he continued so to occupy it until his death on Oct. 11, 1944. Until July, 1928, the son, who reached the age of 21 years on July 27, 1929, had lived with the husband without paying for his own maintenance, but at no time did he receive anything in respect of the rents and profits of the wharf, being unaware of his rights thereto during the husband's lifetime. The son now claimed against the husband's estate in respect of the rents and profits which ought to have been paid to him during the husband's lifetime, and he also claimed a sum representing the depreciation in value of the wharf owing to the husband's failure to repair.

Held: (i) the husband, having entered into occupation of the wharf, was bailiff for the son, and he could not divest himself of that character, although he was entitled to take credit for the maintenance of the son up to July, 1928.

Re Hobbs (1887) (36 Ch.D. 553), *Wall* v. *Stanwick* (1887) (34 Ch.D. 763), and *Howard* v. *Shrewsbury* (*Earl*) (1874) (L.R. 17 Eq. 378), *applied.*

(ii) as the son, though aware of the facts, was unaware that in consequence thereof he had beneficial rights in possession in the wharf during the husband's lifetime, he was not disentitled to relief by acquiescence.

Cockerell v. *Cholmeley* (1830) (1 Russ. & M. 418), *applied.*

(iii) as the husband had remained in possession of trust property for his own purposes, he could not be heard to say that he had not received any rents or profits in respect of it and, therefore, having made no payments of the trust moneys of any kind, the husband must be considered to have retained possession thereof, and the application of a period of limitation under the Limitation Act, 1939, was excluded by s. 19 (1) (*b*) of that Act.

(iv) although the husband, as trustee, was bound to see that the wharf did not fall into decay for want of repair, the effect of his liability in that regard was that the amount of the notional rents and profits for which his estate was now liable should be reduced by the proportion of the cost of repairs which would properly be payable out of the annual rents.

Dictum of COTTON, L.J., in *Re Hotchkys* (1886) (32 Ch.D. 416), *applied.*

[AS TO LIMITATION OF ACTIONS AGAINST TRUSTEES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 749, 752, 753, paras. 1025, 1029, 1030 ; and FOR CASES, see DIGEST, Vol. 32, pp. 491-497, Nos. *1526-1585.*]

Cases referred to:

(1) *Re Hobbs*, (1887), 36 Ch.D. 553 ; 57 L.J.Ch. 184 ; 58 L.T. 9 ; 28 Digest 193, *504.*

(2) *Wall* v. *Stanwick*, (1887), 34 Ch.D. 763 ; 56 L.J.Ch. 501 ; 56 L.T. 309 ; 28 Digest 192, *501.*

(3) *Howard* v. *Shrewsbury* (*Earl*), (1874), L.R. 17 Eq. 378 ; 43 L.J.Ch. 495 ; 29 L.T. 862 ; 28 Digest 191, *496.*

(4) *Cockerell* v. *Cholmeley*, (1830), 1 Russ. & M. 418 ; Taml. 435 ; 43 Digest 1001, *4422.*

(5) *Re Hotchkys*, (1886), 32 Ch.D. 408 ; 55 L.J.Ch. 546 ; 55 L.T. 110 ; 43 Digest 908, *3490.*

(6) *Thorne* v. *Heard*, [1894] 1 Ch. 599 ; 63 L.J.Ch. 356 ; 70 L.T. 541 ; 32 Digest 492, *1535.*

(7) *Toates* v. *Toates*, [1926] 2 K.B. 30 ; 95 L.J.K.B. 526 ; 135 L.T. 25 ; 90 J.P. 103 ; 32 Digest 499, *1601.*

(8) *Re Hyatt*, (1888), 38 Ch.D. 609 ; 57 L.J.Ch. 777 ; 59 L.T. 297 ; 24 Digest 673, *6993.*

ACTION for (1) a declaration that William Henry Howlett, the plaintiff's father, was guilty of a breach of trust in retaining a certain wharf for his own use and benefit and in failing to repair the same ; (2) (*a*) a declaration that the said wharf ought (for the purposes of account) to have an annual value by way of occupation rent of £250 per annum set on it during the said occupation by William Henry Howlett, and (*b*) that the estate of the said William Henry Howlett (now deceased) should be charged with such value ; (3) an account of the rents and profits of the said wharf received by the said William Henry Howlett, deceased ; and (4) payment of £1,000 in respect of his failure to repair, and also payment of the amount found due to the plaintiff on taking such account, with interest. DANCKWERTS, J., made the declaration referred to as (1) above, and ordered the payment by the defendant (the administratrix of the estate of the said William Henry Howlett, deceased) to the plaintiff of £1,600 representing the occupation rent less an allowance in respect of the cost of repairs. The facts appear in the judgment and are summarised in the headnote.

C. Montgomery White, K.C., and *E. Blanshard Stamp* for the plaintiff, the son.

Cross, K.C., and *G. D. Johnston* for the defendant, the executrix of the will of William Henry Howlett, deceased, the plaintiff's father.

DANCKWERTS, J. : On Mar. 15, 1912, certain property at Gravesend on which a wharf was constructed was conveyed to Henry Rutland. On May 20, 1912, Henry Rutland conveyed the same property by way of gift to Ada Amelia Howlett, who was the wife of William Henry Howlett. On Dec. 12, 1923, Ada Amelia Howlett died intestate. She was survived by her husband, William Henry Howlett, and by her son, also called William Henry Howlett, who is the plaintiff. The property was held by the custom of gavelkind in the county of Kent, and under the law applicable thereto the husband got an interest in half the rents and profits until his death or re-marriage, and subject to that the son, who was the heir at law, was entitled to the property. On July 8, 1924, letters of administration of Mrs. Howlett's estate were granted to the husband. On Jan. 9, 1927, the husband re-married, and, accordingly, his interest ceased. He married the present defendant, Mrs. Maude Pauline Howlett. On July 27, 1929, the plaintiff attained the age of 21. The husband died on Oct. 11, 1944. There was a probate action which delayed matters in regard to the probate of his will, but while those proceedings were in progress, on Feb. 22, 1945, the plaintiff obtained letters of administration *de bonis non* of the estate of his mother, Mrs. Ada Amelia Howlett. On Dec. 4, 1945, an order was made in the Probate Division appointing Clement Bowlby Cawthorne to be administrator *pendente lite* of the husband's estate, and an order was made in pursuance of which he handed over the title deeds belonging to the property to the plaintiff. An order was made on June 16, 1948, for probate in solemn form of the husband's will, probate being granted to the defendant in this action. On Oct. 22, 1948, the writ in this action was issued.

The plaintiff says that his father, William Henry Howlett, having entered into possession of the property, was bailiff for him, the plaintiff, and became chargeable accordingly. In support of that proposition counsel for the plaintiff cited *Re Hobbs* (1), *Wall* v. *Stanwick* (2) and *Howard* v. *Earl of Shrewsbury* (3). Those authorities establish, I think, the following propositions. First, the husband was chargeable as bailiff for the plaintiff by reason of his occupation of the property. Secondly, the husband was entitled to take credit for the maintenance of his son so long as he resided with him. It appears that the son continued to reside with the husband until about July, 1928, *i.e.*, for a period of about eighteen months after the re-marriage of the husband, and then he went to live with a sister, Mrs. Lincoln, and at various other places. Thirdly, having come into the position of bailiff for the plaintiff, the husband could not divest himself of the character in which he held the property. It was also submitted on behalf of the plaintiff that by virtue of the Land Transfer Act, 1897, s. 2, when the husband became the administrator of the estate of Mrs. Ada Amelia Howlett he became an express trustee for his son.

It was submitted to me by counsel for the defendant that he was only a bare trustee by virtue of that Act for the purpose of transferring the assets of the estate in due course, but I was not satisfied by this argument of counsel and it seems to me that the husband was in a position of trustee, apart from being in the character of bailiff for his son, by virtue of the Land Transfer Act, 1897, s. 2.

On Jan. 1, 1926, the legal estate in the property was vested in the husband in his capacity of administrator and the beneficial interests were divided between himself and his son. Accordingly, the Law of Property Act, 1925, sched. I, pt. IV, para. 1 (1), applied and made him a trustee for sale, possibly, on the statutory trusts which are contained in s. 35 of the same Act, but I think that makes no difference to the situation. It is quite possible that he merely continued to hold in the character of personal representative.

The defences, as I understood them, were in substance four. First, it was contended and pleaded that the plaintiff was disentitled to the relief claimed by virtue of his acquiescence, laches and delay. Secondly, there was the claim that in any case the husband, and, therefore, the defendant, was entitled to credit for maintenance of the plaintiff by the husband during the period during which the plaintiff resided with him. Thirdly, it was contended that there was no obligation on the husband to keep the wharf in repair. Fourthly, there was the defence based on the Limitation Act, 1939.

As regards the first defence—acquiescence, laches and delay—I was referred, on behalf of the plaintiff, to *Cockerell* v. *Cholmeley* (4) as authority for the proposition that to found a defence of acquiescence the party concerned against whom the plea is raised must not only know the facts but also the consequences. This seems to me to be substantially correct. The plaintiff gave evidence, and it was reasonably clear to me from his evidence that, while the plaintiff understood that on his father's death he would come into ownership of the wharf, he never understood his rights during his father's lifetime and evidently did not understand that his father was only entitled until his re-marriage A to half the rents and profits and that on his re-marriage he was then disentitled to receive them any longer. Accordingly, it seems to me that the defence of acquiescence fails, and I think counsel accepted that, in view of the evidence, he could not seriously press that defence.

As regards the question of maintenance, it appears to me that, if and so far as I hold that the defendant is accountable in respect of her husband's B occupation of the property in any respect during the period when the son lived with the husband, the husband is entitled to credit for a reasonable sum for maintenance, and, therefore, to that extent that defence will be available. As regards the question of keeping in repair, counsel for the plaintiff referred me to *Re Hotchkys* (5) where there is a proposition which in general terms is indisputable. It appears in the judgment of COTTON, L.J. He says (32 Ch.D. C 416):

> "In my opinion, in a case where trustees have property vested in them under circumstances like these, there is an obligation upon them, for the purpose of properly carrying out and performing their trust with regard to the property, to see that the property does not fall into decay from want of proper repair."

D The position of trustees in regard to their obligations as regards repair of trust property is far from clear and settled, in my view, and *Re Hotchkys* (5) is generally cited, I think, on the question how far repairs should fall on capital or on income. It does not follow that because trust property is kept in its proper state of repair the repairs necessarily come out of income. It may be that they ought to come out of the capital of the estate. Counsel for the E defendant contended that in any case the question only affected the amount of the occupation rent or notional rents and profits which might be charged against the husband, *i.e.*, the trustee, and, in my opinion, there is a good deal to be said for that view. As regards the actual cost of repairing the property, which has fallen into a serious condition of decay, there was a great conflict between the evidence of the experts. However that may be, I do not propose F to decide the figure which would be needed to put this barge-repairing wharf back into the same state of repair as that in which it may have been when Mrs. Ada Amelia Howlett died or at any other date. On the view of the case which I propose to take it will not be necessary for me to decide that.

The fourth and last defence is based on the Limitation Act, 1939. Section 2 (2) provides:

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> "An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action."

In the present case the writ was issued on Oct. 22, 1948. The husband died on Oct. 11, 1944, and, therefore, it is argued, under the Act the only period in respect of which a claim for an account can be made is limited to the period H between Oct. 22, 1942, and Oct. 11, 1944. However, the Limitation Act, 1939, s. 19, which is headed "Actions in respect of trust property . . ." provides:

> "(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—(*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (*b*) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use. (2) Subject as aforesaid, an action

> by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."

Counsel for the defendant based an argument on the express terms of s. 19 (1) (*b*) of the Act. He said that it had no application to any trust property or rents or profits which were not actually received by the trustee in question A and which the trustee had not, so far as the first part of the sub-section is concerned, in his possession at the date when the action was brought. He referred me to *Thorne* v. *Heard* (6), which was decided under the Trustee Act, 1888, s. 8. That section uses slightly different language from that employed in s. 19 (1) (*b*) of the Act of 1939. I do not know why the change was made when the Limitation Act, 1939, was passed, but the exception appearing in B s. 8 is:

> " . . . where the claim is founded upon any fraud . . . or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use . . ."

Probably there is no substance in the difference, but there is that slight change C in the wording of the sub-section.

In support of his proposition, counsel pointed out that there was no evidence whatever of any receipt by the husband of any rent, and that seems plainly to be so on the evidence which was given in this case. He submitted that the section refers to an actual receipt, and not a notional receipt, of any trust funds, and for that he referred me to *Thorne* v. *Heard* (6) ([1894] 1 Ch. 606. D That was a case where mortgagees on selling property employed a solicitor to complete the transaction, and the solicitor received more money than was required for the discharge of the principal and interest and costs. Instead of accounting either to them or to the borrower, who would be entitled to any surplus, the solicitor put the money in his pocket. The mortgagees were primarily chargeable with the money which their solicitor had obtained, but they were E able to discharge themselves under the Trustee Act, 1888, because, although they had received the trust money, they did not still retain it and had not converted it to their own use. Accordingly, the exception in the Act of 1888 did not apply, and the mortgagees had a defence under the Act.

Counsel for the plaintiff in reply on this point, which seems to me to be very vital in the case, referred me to certain authorities. He said first of all that F the husband could not be heard to say he did not receive any rents as he was in occupation, and for that proposition he cited to me *Toates* v. *Toates* (7). I do not think that case helps me very much, because all it decided was that, for the purposes of the Statute of Limitations, under the Land Transfer Act, 1897 a personal representative is an express trustee. It did not affect the point which I have to decide. Counsel then submitted that a trustee cannot G be allowed to plead his own *devastavit* or set up his own wrong in his defence, and he referred me to *Re Hyatt* (8). That case again does not afford me any assistance, because it was decided before the Trustee Act, 1888, and so the precise point that I have to consider did not come to be dealt with in that case either.

I think, however, that there is force in the contention which counsel for the H plaintiff makes that a trustee who remains in occupation of trust property for his own purposes—and, undoubtedly, the husband did so remain in occupation in the present case—cannot be heard to say that he has not received any rents or profits in respect of the property. Having received, therefore, in theory rents and profits, because he is chargeable with an occupation rent, he cannot discharge himself unless he can show that he has paid moneys away, and, therefore, either discharge himself by proper payments, or, indeed, perhaps escape under the Limitation Act, 1939, having made improper payments. But here the husband, it seems, did not make any payments of any kind. He merely used the property for his own purposes, and I think the submission of counsel for the plaintiff is justified, that, having received the occupation rent for which he is chargeable, he must be considered as still having it in his own pocket at the material date, and therefore, cannot escape under the provisions of the Limitation Act, 1939.

[HIS LORDSHIP, therefore, found for the plaintiff, and, having considered the relevant factors, concluded that the amount with which the husband's estate should be chargeable was a proper occupation rent less the cost of repair in respect of the whole period during which he was in occupation, reduced by a reasonable sum for the maintenance of the plaintiff up to July, 1928. HIS LORDSHIP, accordingly, ordered the payment to the plaintiff out of the husband's estate of £1,600, as being the net amount for which the husband's executrix was accountable after allowing for the cost of repairs.]

Order accordingly. Subject to the payment by the plaintiff of the costs occasioned by an amendment to the writ, the plaintiff to have the costs.

Solicitors: *Warren & Warren* (for the plaintiff); *Keene, Marsland & Co.* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

R. *v.* McGRATH.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Oliver, Stable, Birkett and Slade, JJ.), July 25, 1949.]

Criminal Law—Appeal—Reference by Home Secretary—Consideration of fresh evidence—Criminal Appeal Act, 1907 (*c.* 23), *s.* 19 (*a*).

The appellant was convicted of receiving stolen goods, his defence, an alibi, having been rejected by the jury. His appeal against conviction, when first before the court, was dismissed on the ground that there was evidence before the jury on which they could properly have reached their verdict, and that the trial had been properly conducted. The Home Secretary later caused further inquiries to be made, which tended to establish the alibi set up by the appellant. He, therefore, referred the matter to the court under s. 19 of the Criminal Appeal Act, 1907, for further consideration.

HELD: different considerations applied when a case was referred to the court by the Home Secretary from those which applied when an appeal came before the court in the ordinary way. In the latter case the court would not usurp the function of the jury when the trial had been properly conducted, nor would it hear further evidence unless it were shown that the proposed witnesses had not been available to give evidence at the trial or that some point which could not have been foreseen arose on which the evidence would have been material, but the object of a reference to the court by the Home Secretary was to assist him in respect of the exercise of the royal prerogative, and any evidence could be considered which might achieve that object.

[FOR THE CRIMINAL APPEAL ACT, 1907 (*c.* 23), s. 19 (*a*), see HALSBURY'S STATUTES, Vol. 4, p. 736].

REFERENCE by the Home Secretary to the Court of Criminal Appeal, under s. 19 of the Criminal Appeal Act, 1907.

The appellant was tried and convicted at the London Sessions on Oct. 20, 1948, of receiving and was sentenced to three years' penal servitude. His appeal against conviction was dismissed by the court, on Feb. 4, 1949, but on the present reference the court quashed the conviction and sentence. The facts appear in the judgment of the court delivered by Lord Goddard, C.J.

Melford Stevenson, K.C., and *J. A. S. Toogood* for the appellant.
Sebag Shaw and *Paul Wrightson* for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was charged with the crime of receiving. His defence, which was an alibi, was rejected by the jury and he was convicted in October, 1948. He appealed, and his appeal was heard and dismissed on Feb. 8, 1949.

The goods in question were stolen, and were moved in a lorry, which, it was said, the appellant was driving, at about 9.55 p.m. on Sept. 22, 1948. The lorry was stopped by two police officers who found the stolen property in it. They had ample opportunity of observing the men who were driving or were in the lorry. One of the men was immediately taken into custody and removed to the police car. The other remained in the driver's seat and a police officer got up beside him. On the way to the police station, to which he was ordered to drive the lorry, and when the lorry was going at a considerable pace, the driver opened the door of the lorry and jumped out. It is obvious that the two police officers, who gave evidence and had picked out the men at an identification parade, had an ample opportunity of seeing and recognising the man who was driving the lorry. They had no doubt that it was the appellant, and there is no suggestion that the officers were giving false evidence, nor is it questioned that they gave their evidence carefully and properly in the court below. The appellant's defence, if it were true, was the best possible defence—that it was a case of mistaken identity and that he had nothing whatever to do with the lorry that night. It is only fair to say that, when he was arrested, as he was very soon after this incident, no trace could be found on his body of any cut or scratch or bruise such as a man might have got in throwing himself out of a lorry, but that is by no means conclusive.

At the trial the question whether or not his alibi should be accepted must have turned very largely on the question whether he came back from hop-picking on Sept. 21 or on Sept. 22, the day on which the offence was committed. If he came back on Sept. 21, obviously he had every opportunity, in conjunction with his associates, of planning the crime and committing it. If he came back on Sept. 22, the chances that he was engaged in this particular crime were very much reduced. Indeed, it would be in the highest degree unlikely that he was engaged in this crime, because there is no doubt from the evidence of witnesses which was not challenged except as to whether they were speaking of an occasion on Sept. 21 or Sept. 22, that he was spending the evening with his young woman visiting various public houses, more particularly, The Ship, at Rotherhithe. He was seen in that public house by witnesses whose good faith was not challenged, at any rate up to just before 9.30 p.m. If he had not come back from the hop-picking until that day, and if he was with his young woman in these various public houses up to shortly before 9.30, it was most unlikely that he would be driving a lorry full of stolen goods about ten minutes to ten. A most material question, therefore, was whether he did come back from hop-picking on Sept. 21 or Sept. 22. The confusion which arose was probably due to his using some expression which indicated that he came back from the hop-picking on Sept. 21. A man may easily, especially when confronted with the police, make a mistake as to the date he returned being the 21st or the 22nd, but it is now clear that he returned on Sept. 22. When the case first came before this court, it was simply a case in which a man had been convicted by the verdict of a jury, there being evidence on both sides. This court is frequently asked to reverse verdicts in cases in which a jury have rejected an alibi, but this court cannot interfere in those cases in the ordinary way, because to do so would be to usurp the function of the jury. Where there is evidence on which a jury can act and there has been a proper direction to the jury this court cannot substitute itself for the jury and re-try the case. That is not our function. If we took any other attitude, it would strike at the very root of trial by jury.

Although we think this man's conviction must be quashed, there is no question but that he had a perfectly fair trial in the sense that evidence was taken on both sides. No improper questions were asked, a perfectly fair summing-up was given by the deputy chairman. He pointed out to the jury, as was his duty, the ample opportunity that the police officers had of satisfying themselves as to the identity of the driver. Mistakes are sometimes made by honest witnesses in cases of identity, and if this matter had been cleared up and it had been proved that the day on which the appellant came back was Sept. 22 and not Sept. 21, we cannot but think that a very different conclusion would have been come to by the jury. It may be that, there not being the same opportunities for investigation as might take place in other cases, all the people who could have thrown light on this case were not called. One of them, who might have been a most material witness in the appellant's favour—a member of Bermondsey Borough Council whose statement now is that he saw this man in company with his young woman in an omnibus about eleven o'clock, which would make it very unlikely that he had been engaged in this undertaking—had been seen but had not been called. When the case came before this court, the possibility of this man being a witness was vaguely referred to and the appellant did ask for further evidence to be called, but he gave no reason why these witnesses had not been called at the trial, nor do I now know why it was that the importance of establishing this date, the 21st or 22nd, had not been fully realised. But it is well established that this court will not hear further evidence unless it is shown that the proposed witnesses were not available at the trial, or that some point which could not have been foreseen arose at the trial on which the evidence would have been material. That was not suggested in this case.

When, however, the case comes before the court on a reference from the Home Secretary different considerations arise. Cases come before this court on such a reference because representations have been made to him that they are proper cases for the exercise of the royal prerogative. The Home Secretary has a much wider discretion than this court. He can hear and consider any evidence he likes which would influence him in considering whether or not he he should advise the exercise of the royal prerogative. In this case he caused further enquiry to be made, and, because of the enquiries which the police have made, this case has once more come before this court. The police are now satisfied that the appellant did not return from hop-picking until about 6.30 p.m. on Sept. 22, and that, therefore, he was not in London on Sept. 21. There is also before us a statement by Mr. Simmonds which counsel for the prosecution does not challenge, that at about eleven o'clock, he saw the appellant with his young woman in an omnibus. That would greatly reduce the possibility of his being the man who flung himself out of the lorry.

In these circumstances, the court feels that, if these facts had been before the jury, the probabilities are that they would have felt that the two police officers, whose good faith is not attacked but whose identification is attacked, were mistaken. Accordingly, we have come to the conclusion that the only safe thing to do is to act on the powers given to us and to say that we think that this conviction must be quashed.

Conviction quashed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Solicitor Metropolitan Police* (for the Crown).

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

PUBLIC TRUSTEE *v.* MANCHESTER CORPORATION AND OTHERS.

[Chancery Division (Danckwerts, J.), July 14, 21, 1949.]

Mines—Coal mine—Compensation—Disposal of compensation as between freeholder and lessee—Effect of non-registration of interest and failure to make claim—Costs—Coal (Registration of Ownership) Act, 1937 (*c.* 56, *s.* 1 (3), *sched. I, para.* 1—*Coal Act,* 1938 (*c.* 52), *s.* 7 (3), *s.* 39, *sched. III, pt. II and pt. IV, para.* 6, *para.* 21 (6), *para.* 22 (1) (*as amended by the Coal Act,* 1943 (*c.* 38), *s.* 13).

The Coal Act, 1938, sched. III, pt. IV, para. 21, provides : " (6) . . . the compensation for a holding and the income thereof shall be held and disposed of in such manner as to confer on the existing owners whose interests are comprised in the holding, their personal representatives or assigns, the like benefits, so far as may be, as they would have had from their respective interests in the premises in which the holding subsisted if those premises had not been acquired by the commission."

On Oct. 21, 1740, the predecessors in title of M., the present freeholder, granted a mining lease for 200 years of certain areas known as C., A. and B. Between 1811 and 1880 leases were granted by M.'s predecessors in title of the said areas in plots for terms, some of 999 years and others of 9,999 years, without exception of minerals. On Feb. 16, 1909, a fresh mining lease was granted of C., A. and B. for the period which remained unexpired of the lease of 1740, but restricting more severely the rights of the mining lessees to let down the surface. On Feb. 17, 1927, a mining lease for forty years was granted in respect of A. and B. This originating summons raised the question of the proper distribution, as between the owner of the fee simple of C., A. and B. and the lessees and under-lessees thereof, of the compensation payable under the Coal Act, 1938, in respect of the vesting in the Coal Commission of all coal and coal mines in the areas C., A. and B., which together constituted one unit or holding,

Held : (i) the lessees and under-lessees were " existing owners whose interests are comprised in the holding " within the meaning of para. 21 (6), and the compensation was, therefore, to be held and disposed of so as to confer the like benefits as they would have had if the holding had not been acquired by the commission.

(ii) a fair division of the compensation attributable to each plot would be fifty per cent. to M., the freeholder, and fifty per cent. to the lessee, whose share where there was an underlease would be further sub-divided.

The Coal (Registration of Ownership) Act, 1937, s. 1 (1) directed the Board of Trade to establish a register for the purposes of recording certain particulars as to proprietary interests in coal and mines of coal. By s. 1 (3) : " Registrations under this Act shall be effected in respect of such proprietary interests . . . as are . . . to be treated as constituting units of separate ownership, and applications for registration must be made accordingly . . . " By para. 1 of sched. I to the Act : " (1) . . . each of the following proprietary interests . . . in coal hereditaments shall constitute a unit of separate ownership . . . (*a*) each freehold reversion (that is to say, in the case of all the coal and mines of coal that are comprised in a coal-mining lease derived immediately out of the fee simple and in the case of property and rights held in association with any such coal or mine, the interest therein of the estate owner in respect of the fee simple in the coal and mines together with the interests therein of all persons claiming under him) ; (*b*) each leasehold reversion (that is to say, in the case of all the coal and mines of coal that are comprised in a coal-mining lease that is an underlease and in the case of property and rights held in association with any such coal or mine, the interest therein of the estate owner in respect of the term of years out of which that underlease is immediately derived together with the interests therein of all persons claiming under him) ; (*c*) each freeholder in possession (that is to say, in the case of all the coal and mines of coal that are not comprised in any coal-mining lease and are in the legal ownership as respects the fee simple of the same estate owner and in the case of property and rights held in association with any such coal or mine, the interest therein of the estate owner in respect of the fee simple in the coal and mines together with the interests therein of all persons claiming under him). (2) In this paragraph the expression "person claiming under" means, in relation to a person referred to as claiming under the estate owner in respect of a fee simple, or under the estate owner in respect of a term of years, a person interested in respect of . . . . (*d*) an interest arising under a lease, other than a coal-mining lease, which is derived out of that fee simple or of that term of years, as the case may be, either immediately or by way of underlease derived out of a lease other than a coal-mining lease." The Coal Act, 1938, sched. III, pt. II, para. 6, provides: "In order for compensation to be payable under s. 6 of this Act in respect of a holding, an application for the registration under the Registration Act of particulars in respect thereof must have been made before the valuation date, or, if not so made, must be made within the period of six months beginning on that date." The Act of 1938 further provides by s. 7 : "(3) In order for compensation to be payable in respect of any holding, the requirements of sched. III to this Act as to—(*a*) the registration of particulars under the Coal (Registration of Ownership) Act, 1937 . . . and (*b*) the making of claims for compensation ; must be satisfied within the limits of time specified in that schedule."

M., the freeholder, had registered the holding under the Act of 1937 and made a claim for compensation, but S., the lessee of parts and underlessee of other parts of the holding, did not register particulars or make claim to compensation within the prescribed time.

HELD : providing particulars of the holding were registered and a claim to entitle him to share the compensation was made by some person who had a proprietary interest in the holding, the requirement of the Acts of 1937 and 1938 were satisfied, and there was no obligation on S. or other persons who might be interested to carry out those requirements, and S. was not, therefore, debarred from participating in the compensation payable in respect of the holding.

The Act of 1938, by sched. III, pt. IV, para. 22 (1) (as amended by the Coal Act, 1943, s. 13) provides : "Subject to the provisions of this paragraph and of s. 39 of this Act, the commission shall pay the costs reasonably incurred by any person—(*a*) in connection with the ascertainment of the person entitled to the compensation for a holding ; and . . . (*c*) . . . in connection with any application to the court that may be requisite for the purpose of determining the manner in which the compensation ought to be held and disposed of." Section 39 of the Act provides : "The provisions . . . with respect to the payment of costs by the commission . . . shall have effect subject to the following limitation, namely, that their liability shall not extend to costs incurred . . . that are occasioned by any proceedings for the determination of disputes between adverse claimants . . ." It was argued on the question of costs by the National Coal Board (the successors of the Coal Commission) that the present case was a dispute between adverse claimants.

HELD : although there were competing claims, this was not a case of adverse litigation because the position of the parties before the Coal Act, 1938, affected their interests was well known, and the questions arose on the proper construction of that Act.

[AS TO METHOD OF DISTRIBUTION OF COMPENSATION ON COMPULSORY PURCHASE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 153, 154, para. 174; and FOR CASES, see DIGEST, Vol. 11, pp. 247, 248, Nos. *1464-1503.*]

Cases referred to:

(1) *Re Leeds* (*Duke*), [1947] 2 All E.R. 200; [1947] Ch. 525; [1947] L.J.R. 1141; 177 L.T. 503; 2nd Digest Supp.

(2) *Re Blandy-Jenkins* (*decd.*), [1948] 1 All E.R. 582; [1948] Ch. 322; [1948] L.J.R. 1315. A

(3) *Williams* v. *Sharpe*, [1949] 2 All E.R. 102.

(4) *Re Markham Main Colliery, Ltd.*, (1925), 134 L.T. 253; 34 Digest 635, *323.*

(5) *Re Bareham*, (1881), 17 Ch.D. 329; 11 Digest 272, *1993.*

(6) *Re English* (*a Lunatic*), (1865), 12 L.T. 561; 11 Digest 271, *1981.*

(7) *Re Longworth's* (*deceased*) *Estate*, (1853), 1 K. & J. 1; 2 Eq. Rep. 776; 23 L.J.Ch. 104; 22 L.T.O.S. 197; 11 Digest 272, *1995.* B

ADJOURNED SUMMONS issued by the Public Trustee as trustee of the compensation moneys payable under the Coal Act, 1938, in respect of a holding within the meaning of the Coal (Registration of Ownership) Act, 1937, and the Act of 1938, to determine *inter alia* the questions whether (1) lessees and under-lessees of parts of the holding were entitled to share in the compensation moneys C with the freeholder, and, if so, how the moneys ought to be divided, (2) whether non-registration of an interest or failure to claim in conformity with the provisions of the Act of 1937 caused the loss of a right to share in the moneys, and (3) how the costs of the application ought to be borne.

DANCKWERTS, J., whose decision depended on the statutory provisions set out in the headnote, held that leaseholders were entitled to share equally with D the freeholder in the compensation moneys attributable to the appropriate area of the holding leased, but a leaseholder's moiety should be divided, where the land was subject to an underlease, between the lessee and the under-lessee in some manner to be decided; that failure to register did not defeat a claim to share in the compensation moneys, providing the holding was registered by someone having a registrable interest therein; and that the National Coal E Board must pay the costs.

H. A. Rose for the plaintiff, the Public Trustee.

Wilfrid Hunt for Manchester Corporation, lessees and under-lessees of various parts of the holding.

Wigglesworth for Mrs. S. H. Shawe, lessee and under-lessee of various parts of the holding. F

S. Cope Morgan, K.C., and *Scarman* for Sir Oswald Mosley, the freeholder.

C. A. J. Bonner for the National Coal Board.

Cur. adv. vult.

July 21. **DANCKWERTS, J.,** read the following judgment. The questions raised by the originating summons in this case relate to the proper distribution of the compensation awarded under the provisions of the Coal G Act, 1938, in respect of a "holding," as defined by the Coal (Registration of Ownership) Act, 1937, and the Coal Act, 1938. The coal in question is under the surface of parts of the city of Manchester known as Collyhurst, Ancoats and Beswick, and the amount of the compensation is nearly £14,000. It is held by the Public Trustee, as trustee of the sum in question, by virtue of an appointment made by the Coal Commission on Nov. 10, 1942, in pursuance H of powers conferred by para. 18 of sched. III, pt. IV, to the Coal Act, 1938. The material date is Jan. 1, 1939, which is referred to in the Coal Act, 1938, as the "valuation date": [see s. 3 (2)]. The third defendant, Sir Oswald Mosley, claims to be the owner in fee simple of the holding which is the subject of the compensation. The first defendants, the lord mayor, aldermen and citizens of the city of Manchester, are lessees of some parts and under-lessees of other parts of the holding, and the defendant Mrs. Septima Holcroft Shawe is a lessee or under-lessee of other parts of the holding. The distinction between the Manchester Corporation and Mrs. Shawe is that Mrs. Shawe did not register particulars under the Coal (Registration of Ownership) Act, 1937 (hereinafter referred to as "the Registration Act, 1937"), but the Manchester Corporation did register such particulars.

The material leases were granted by the predecessors of Sir Oswald Mosley A between 1811 and 1880 without any exception of minerals and so the interest of Sir Oswald Mosley in the minerals in or under the surface of the property included in the leases passed to the lessees for the duration of the leasehold terms, which were for 999 years or, in some cases, for 9,999 years, at comparatively small rents. Certain mining leases of the holding or parts of it were granted by Sir Oswald Mosley or his predecessors. On Oct. 21, 1740, B a mining lease was granted in respect of the Collyhurst, Ancoats and Beswick areas for a term of 200 years. On Feb. 16, 1909, a fresh lease was granted of the same properties for the period which remained unexpired of the same term. This term of years was, therefore, due to expire in October, 1940. On Feb. 17, 1927, a mining lease for 40 years was granted in respect of the Ancoats and Beswick areas only. The lease of 1909 restricted the rights of the mining C lessees to let down the surface more severely than the lease of 1740 did. I mention this because counsel for Sir Oswald Mosley based an argument which he put forward on the submission that the mining lessees were not entitled to let down the surface. The matter is complicated by the fact that the surface is now covered with houses and is divided into some 500 plots and in many cases the present owners of the plots have not, so far, been ascertained.

D The Coal Act, 1938, s. 1, constituted the Coal Commission as a body corporate, and the Coal Commission, or their successors, the National Coal Board, are defendants in view of their possible liability for the costs of these proceedings. Under s. 3 (1) of the Act of 1938 the Coal Commission were to acquire the fee simple in all coal and mines of coal and other property and rights mentioned, and, by s. 3 (3), on the vesting date (which was July 1, 1942) all coal and mines of E coal as existing at that date were to vest in the commission

> " . . . for a title comprising all interests then subsisting in any such coal or mine other than retained interests."

("Retained interests" are interests in coal or a mine of coal that arise under a coal-mining lease and are provided for by s. 5). By s. 3 (2), during the inter- F vening period between Jan. 1, 1939 (the valuation date), and July 1, 1942 (the vesting date), the coal and mines of coal are to be held as if all the existing owners thereof had, in respect of all their interests therein, other than retained interests, and with full capacity so to do, entered into a contract on the valuation date for the sale thereof to the commission at a price to be ascertained by valuation, with provision for completion of the contract on the vesting date. The G compensation is provided for by s. 6. It is an aggregate amount of £66,450,000, which is to be divided proportionately to the aggregate value of the coal hereditaments in each region between the "valuation regions" into which Great Britain was to be divided. The sums reached by such division were to be divided between the units comprised in each region which are described as "holdings." The sum which is the subject of the present proceedings is the H allocation to one unit or holding, and, in this particular case, the holding has been fortunate in that the allocation has been received on the footing of 24*s.* in the £ in respect of the valuation of the holding.

The questions which I have to determine concern the shares in which the sum received in respect of the holding ought to be divided between the various parties who had interests as freeholder, lessee or under-lessee, in the property contained in the holding, and include the question whether failure to register under the Coal (Registration of Ownership) Act, 1937, or to make a claim prevents any of the lessees or under-lessees from claiming a share. Section 7 of the Act of 1938, which bears the cross-heading, "Ascertainment and distribution of compensation," provides :

> "(1) The sums to be paid for compensation as aforesaid shall be ascertained by valuation, in accordance with the provisions of this section, of the interests, other than retained interests, that subsist at the valuation date in coal, mines of coal and acquired property and rights (in this Act referred to as 'acquired interests'). (2) The subject of each valuation shall be a unit (in this Act referred to as 'a holding') consisting of an acquired interest, or of a group of such interests, that is under the provisions of sched. III to this Act to constitute a unit for compensation purposes. (3) In order for compensation to be payable in respect of any holding, the requirements of sched. III to this Act as to (*a*) the registration of particulars under the Coal (Registration of Ownership) Act, 1937 (in this Act referred to as the 'Registration Act'); and (*b*) the making of claims for compensation : must be satisfied within the limits of time specified in that schedule. (4) The value of a holding shall be taken to be the amount which the holding might have been expected to realise if this Act had not been passed and the holding had been sold on the valuation date in the open market by the existing owners thereof, selling as willing vendors to a willing purchaser, under a contract providing for completion thereof on the vesting date, so however that, where a right to withdraw support is to vest in the commission with coal or a mine of coal in which a holding subsisted, it shall be valued as if each of the existing owners thereof, having power to grant that right to the purchaser for an interest corresponding to the existing owner's interest in the coal or mine, had agreed so to grant it in addition to any acquired rights in which the holding subsisted . . . (9) Subject as aforesaid, the compensation payable under s. 6 of this Act shall be ascertained and paid subject to and in accordance with the provisions of sched. III to this Act."

A B C D

Turning to pt. IV of sched. III to the Act, I find that para. 21 bears a cross-heading, "Disposal of compensation as between beneficial interests," and provides : E

> "(1) The compensation for a holding when paid by the commission to the person entitled to receive it from them, including any sum paid on account thereof under para. 19 or 20 of this schedule, and the income thereof, shall, in order to its being applied as compensation to the persons whose interests are comprised in the holding, be held and disposed of for the benefit of those persons, or their personal representatives or assigns, in accordance with the succeeding provisions of this paragraph." F

Paragraph 21 (2) deals with interests under a settlement, and was considered in *Re Duke of Leeds* (1), *Re Blandy-Jenkins* (2), and *Williams* v. *Sharpe* (3). The present case does not fall within that sub-paragraph or sub-paras. (3), (4) or (5). Sub-paragraph (6) appears to be material, and is in the following terms : G

> "Subject as aforesaid the compensation for a holding and the income thereof shall be held and disposed of in such manner as to confer on the existing owners whose interests are comprised in the holding, their personal representatives or assigns, the like benefits, so far as may be, as they would have had from their respective interests in the premises in which the holding subsisted if those premises had not been acquired by the commission." H

Section 44 of the Act (which is the interpretation section) contains the following material definitions :

> "'Claiming under' shall be construed, in relation to a person referred to as claiming under the estate owner in respect of the fee simple, or under

> the estate owner in respect of a term of years, in any land, as referring to any person interested in that land in respect of . . . (*d*) a term of years under a lease, other than a coal mining lease, which is derived out of that fee simple or of that term of years, as the case may be (either immediately or by way of underlease derived out of a lease other than a coal mining lease), or an interest created out of such a term of years ; . . . 'Existing owners' A means, in relation to any coal or mine of coal, all persons who have at the valuation date an acquired interest therein ; . . . 'Lease' includes an underlease, or tenancy and an agreement for a lease, underlease, or tenancy . . ."

It is also necessary to refer to pt. I of sched. III to the Act, which by para. 1 deals with the acquired interests, or groups of such interests, which are to B constitute a unit for compensation purposes, and provides (in substance) that in the case of (*a*) each freehold reversion on a coal mining lease, (*b*) each leasehold reversion on a mining lease and (*c*) each freehold in possession, the unit for compensation purposes is to be the interest therein of the estate owner in respect of the fee simple or in respect of the term created by the lease out of which an underlease was derived, "together with the interests therein of all C persons claiming under him." There are similar provisions in the Coal (Registration of Ownership) Act, 1937, [see sched. I, pt. I, para. 1]. These can be more conveniently referred to when I deal with the question of registration and the making of a claim, but they assist me in reaching the conclusion at which I have arrived on this part of the case also.

Now, the position in the present case is that (at any rate for the purposes of D the present application) the interests to be dealt with are all legal estates. Sir Oswald Mosley had the legal fee simple and the lessees and under-lessees had legal terms of years. When the leases were granted between 1811 and 1880 the mining lease of 1740 was in existence, and if, and in so far as, an interest in the minerals included in that lease passed to the lessees it was a reversionary interest and they took subject to the terms of the mining lease. But the E reversion was very near the date of falling in on Jan. 1, 1939. Where the minerals had not been excepted from the leases, the title of Sir Oswald Mosley to grant the leases of 1909 and 1927 is open to question, but the lease of 1909, of course, did not extend the term granted by the lease of 1740. Apart from the question of any existing mining lease, the legal position appears to have been that the landlord could not work the minerals until the determination of F any long term of years, because he had parted with the minerals for that period, and the lessees or under-lessees could not work the minerals, because to do so would amount to waste.

Counsel for Sir Oswald Mosley contended (as I understood his argument) that the lessees had not any interest in the minerals, and that all they had was a cause of action against Sir Oswald Mosley or his predecessors for damages, G which (as they could not work the minerals) must be trifling, or a right not to have the surface let down, against which they were adequately protected by the provisions of the lease of 1909. Accordingly, he contended that the value of the interests of the lessees and under-lessees was nothing, or so small a sum that the maxim *de minimis* should apply, and he contended that this represented a practical view, which would have the advantage, of course, that the complica-H tions caused by the leases and underleases could be wholly disregarded. This argument seems to me to ignore the legal realities of the case. An interest in land or minerals is none the less an interest because it is reversionary, and on Jan. 1, 1939 (the valuation date) the reversion was very near becoming an interest in possession so far as the leases of 1740 and 1909 were concerned. If the lessees or under-lessees could not work the minerals, neither could Sir Oswald Mosley until the lessees' interest expired, unless some arrangement was come to. In my view, it is plain that the lessees and under-lessees are "existing owners whose interests are comprised in the holding" within the meaning of para. 21 (6) of sched. III to the Act, and, accordingly, the compensation is to be held and disposed of so as to confer on them the like benefits in accordance with the provisions of that paragraph.

I was referred by counsel for Manchester Corporation to a case concerning copyholds considered by the Railway and Canal Commission Court, *Re Markham Main Colliery, Ltd.* (4). This does seem to provide some basis of A comparison, because, though the minerals were vested in the lord of the manor, he could not, in fact, work them without the concurrence of the copyholders. The court divided the royalties in the proportion of two-thirds to the lord of the manor and one-third to the copyholders. It was claimed in that case that division in equal shares was usual in such cases. In the present case, I am not given any practical assistance from actual examples because Mr. Edwin Morgan, B who made affidavits in this case, though a mining engineer of experience, could not recollect ever having had a similar case in which the interests of freeholder and lessee were concerned in regard to the minerals. It seems to me that the lessees and under-lessees are entitled to share in the parts of the compensation in the present case which are properly referable to the plots in which they have an interest. The parties requested me to decide the respective shares of the C freeholder and the lessee in such parts, and, giving the best consideration that I can to the somewhat incalculable factors to be considered, my view is that a fair division would be fifty per cent. to the freeholder and fifty per cent. to the lessee. It was admitted that, on this footing, the lessee's share must be reduced by further division where there is an underlease of the property in question, and that I could not be expected to give a ruling as to the method of such D division on the information at present before me, as the situation must depend on the facts of each particular case. The position, therefore, as between lessee and under-lessee must be reserved.

Having decided this question of principle, I now have to decide whether lessees or under-lessees who have failed to register particulars in accordance with the Registration Act, 1937, or to make a claim, are now debarred from E sharing in the compensation paid. The Coal (Registration of Ownership) Act, 1937 (according to the preamble), was passed

> ". . . to make provision for the ascertainment and registration of particulars as to proprietary interests in unworked coal and mines of coal"

and certain associated matters, and was a necessary preliminary to the acquisition by the Coal Commission of the coal and mines under the Coal Act, 1938. F Section 1 provides:

> "(1) For the purpose of recording such particulars as are hereinafter mentioned as to proprietary interests that subsist in coal and mines of coal in Great Britain and in certain property and rights held in association therewith, the Board of Trade shall establish a register, to be called 'the G coal holdings register' . . . (3) Registrations under this Act shall be effected in respect of such proprietary interests or groups of proprietary interests as are, under the provisions of sched. I to this Act, to be treated as constituting units of separate ownership, and applications for registration must be made accordingly. Any such interest or group of interests is in this Act referred to as a 'holding'."

H

By s. 4, "proprietary interest" is defined as meaning:

> ". . . any interest in coal hereditaments with the exception of—(*a*) an interest arising under a coal-mining lease in coal hereditaments comprised therein that are not comprised in any underlease derived out of that lease; and (*b*) an interest arising by virtue of the grant of a right under the Mines (Working Facilities and Support) Act, 1923, either as originally enacted or as extended by s. 13 of the Mining Industry Act, 1926."

Paragraph (1) of sched. I to the Act of 1937 contains provisions similar to those enacted in pt. I of sched. III to the Coal Act, 1938, and a definition of " person claiming under " similar to the definition contained in s. 44 of that Act. Paragraph 1 provides :

> " (1) Subject to the provisions of para. 2 of this schedule, each of the following proprietary interests . . . in coal hereditaments shall constitute a unit of separate ownership for the purposes of this Act, namely :—(*a*) each freehold reversion (that is to say, in the case of all the coal and mines of coal that are comprised in a coal-mining lease derived immediately out of the fee simple and in the case of property and rights held in association with any such coal or mine, the interest therein of the estate owner in respect of the fee simple in the coal and mines together with the interests therein of all persons claiming under him) ; (*b*) each leasehold reversion (that is to say, in the case of all the coal and mines of coal that are comprised in a coal-mining lease that is an underlease and in the case of property and rights held in association with any such coal or mine, the interest therein of the estate owner in respect of the term of years out of which that underlease is immediately derived together with the interests therein of all persons claiming under him) ; (*c*) each freehold in possession (that is to say, in the case of all the coal and mines of coal that are not comprised in any coal-mining lease and are in the legal ownership as respects the fee simple of the same estate owner and in the case of property and rights held in association with any such coal or mine, the interest therein of the estate owner in respect of the fee simple in the coal and mines together with the interests therein of all persons claiming under him). (2) In this paragraph the expression ' person claiming under ' means, in relation to a person referred to as claiming under the estate owner in respect of a fee simple, or under the estate owner in respect of a term of years, a person interested in respect of . . . (*d*) an interest arising under a lease, other than a coal-mining lease, which is derived out of that fee simple or of that term of years, as the case may be, either immediately or by way of underlease derived out of a lease other than a coal-mining lease."

Paragraph 2 of sched. I provides for rules to be made by the Board of Trade for the consolidation or division of units. By para. 1 (1) of pt. I of sched. II to the Act of 1937 an application for the registration of particulars in respect of a holding must be in the prescribed form and supported by a statement and a statutory declaration, and sub-para. (2) provides :

> " An application for the registration of particulars in respect of a holding must be made by a person who has a proprietary interest that constitutes or is comprised in a holding."

Paragraph 5 (1) of the same schedule contains provisions for the payment by the commission of the costs reasonably incurred

> " . . . by the person by whom an application for the registration of particulars in respect of a holding is duly made in giving effect in relation to that holding to the provisions of pt. I of this schedule . . ."

with a proviso evidently designed to limit the liability of the commission to one set of costs in respect of each holding and to discourage a number of applications for registration in respect of the same holding. There is a similar provision in respect of the costs of valuation proceedings in the Coal Act, 1938, sched. III, para. 15. Paragraph 6 of the said sched. III provides :

> " In order for compensation to be payable under s. 6 of this Act in respect of a holding, an application for the registration under the Registra-

> tion Act of particulars in respect thereof must have been made before the valuation date, or, if not so made, must be made within the period of six months beginning on that date."

Finally, it will be remembered that the Coal Act, 1938, s. 7 (3), provides that in order for compensation to be payable in respect of any holding, the requirements of sched. III to the Act as to (*a*) the registration of particulars under the Coal (Registration of Ownership) Act, 1937, and (*b*) the making of claims for compensation, must be satisfied within the limits of time specified in that schedule.

It seems to me that, if particulars in respect of a holding are registered, and a claim is made, by some person who has a proprietary interest in the holding, the requirements of the Acts are satisfied, and there is no obligation on other persons who may be interested to carry out these requirements —indeed, the duplication or multiplication of proceedings in respect of these matters is discouraged. It is evident to my mind that the object of the Acts was to secure that particulars should be sent in of every holding so that a proper valuation of all the relevant holdings could be obtained, and the Coal Commission were not to be troubled with the claims of the various persons who might be interested in the sum of compensation awarded in respect of a holding when that sum had been duly ascertained. There appears to be nothing in either of the relevant Acts to deprive a person with an interest of his right to share in the compensation awarded by reason of his failure to register particulars or to make a claim, and in order to deprive a person of his interest it is necessary to find some statutory provision for such a confiscatory act. Counsel for Sir Oswald Mosley called my attention to the provisions of the Coal Act, 1938, s. 37, enabling the time for registration to be extended, and pointed out the inconveniences of an unlimited period during which claims to share in the sum awarded could still be made. As he said, there must be finality sometime. But this court is not unfamiliar with cases in which parties who might be interested in a fund fail to put in their claims, and the court frequently gives trustees liberty to distribute on the footing of the claims that are known so that they are absolved from the risk of further liability. It is a temptingly simple solution in the present case to exclude at once all those who have neither registered particulars nor made a claim, but, in my opinion, it is not authorised by the provisions of these Acts.

I am, therefore, prepared to make a declaration that lessees and under-lessees are entitled to share in the compensation, whether or not they have made applications in due time for registration of particulars of ownership under the Act of 1937, and I have expressed the opinion that fifty per cent. of the compensation is the appropriate share of the freeholder, and the remaining fifty per cent. should go either to the lessees, or be divided, in some manner to be ascertained, between the lessees and the under-lessees (where there are under-lessees), in each case by reference to the area of the properties in the holding which are relevant.

[There followed discussion as to costs.]

DANCKWERTS, J. : The question how the costs of the summons should be dealt with depends on certain provisions of the Coal Act, 1938. Paragraph 22 (1) of sched. III to that Act (which has been amended by the Coal Act, 1943, s. 13) provides :

> " Subject to the provisions of this paragraph and of s. 39 of this Act, the commission shall pay the costs reasonably incurred by any person (*a*) in connection with the ascertainment of the person entitled to the compensation for a holding ; and (*b*) in a case in which the compensation for a holding is paid into court . . . or (*c*) in a case in which the compensation is paid otherwise than as aforesaid, in connection with any application to the court that

> may be requisite for the purpose of determining the manner in which the compensation ought to be held and disposed of."

It will be remembered that para. 21 (6) provides :

> "Subject as aforesaid the compensation for a holding and the income thereof shall be held and disposed of in such manner as to confer on the existing owners whose interests are comprised in the holding, their personal representatives or assigns, the like benefits, so far as may be, as they would have had from their respective interests in the premises in which the holding subsisted if those premises had not been acquired by the commission."

As has been pointed out by counsel for the National Coal Board (the successors of the Coal Commission), everything that is said in para. 22 is subject to the provisions of s. 39 of the Act, which provides :

> "The provisions of this Part of this Act and the provisions of the Registration Act with respect to the payment of costs by the commission (other than the provisions of s. 11 of this Act) shall have effect subject to the following limitation, namely, that their liability shall not extend to costs incurred after the date of the passing of this Act that are occasioned by any proceedings for the determination of disputes between adverse claimants, and in giving effect to the provisions of this section regard shall be had so far as practicable to the principles observed in giving effect to the corresponding provisions of s. 80 of the Lands Clauses Consolidation Act, 1845."

That section of the Lands Clauses Consolidation Act, 1845, contains very similar provisions about adverse litigation and has been often the subject of decisions of the court. Counsel for the National Coal Board referred me to *Re Bareham* (5), *Re English* (6), and *Re Longworth* (7), all showing the principles on which the provisions of the Lands Clauses Consolidation Act, 1845, have been applied in dealing with claims by parties to money which has been paid into court in respect of land taken compulsorily under the provisions of some special Act incorporating the provisions of s. 80 of that Act. It is well known that the promoters do not pay the costs which are occasioned by adverse litigation as construed in a case of that kind, but those cases do not, in my view, apply to the present case. Though it is quite true that there may be competing claims before the court in the present case, it is not, in my view, a case of adverse litigation. The application was not caused by the adverse claims because the position of the parties, before the Act affected their interests, was quite well known. The trouble has been caused by the obscurity of certain provisions of the Coal Act and questions as to the proper construction of those provisions. It seems to me, therefore, that this is a case in which the costs of the present application down to and including to-day ought to be paid by the National Coal Board.

Order accordingly.

Solicitors : *Kirby, Millett & Ayscough* (for the plaintiff) ; *Sharpe, Pritchard & Co.*, agents for *P. B. Dingle*, town clerk, Manchester (for Manchester Corporation) ; *Purchase* (*John B.*) *& Clark*, agents for *Roberts, Riley & Anderson*, Manchester (for Mrs. Shawe) ; *Grinling, Harris & Hale*, agents for *Marsh & Ferriman*, Worthing (for Sir Oswald Mosley) ; *R. S. S. Allen* (for the National Coal Board).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

KNAPP *v.* RAILWAY EXECUTIVE.

[Court of Appeal (Tucker, Singleton and Jenkins, L.JJ.), July 21, 22, 25, 1949.]

Railways—Level crossing—Gate not securely closed—Accident to engine driver—Accident partly due to negligence of motorist—Motorist liable for compensation to engine driver—Right to recover contribution from railway company—Statute 7 *and* 8 *Vict.* c. lxvii (*Brighton and Chichester Railway Act,* 1844), *s.* 274—*Law Reform* (*Married Women and Tortfeasors*) *Act,* 1935 (c. 30), *s.* 6 (1) (*c*). A

The statute 7 and 8 Vict. c. lxvii (the Brighton and Chichester Railway Act, 1844), was passed to enable the Brighton and Chichester Railway to be built, and, by s. 272, roads were not to be crossed on a level by the railway except as otherwise provided. Section 273 specified the roads which might be crossed at a level and by s. 274 : " . . . in all cases wheer the . . . railway shall cross any . . . public highway on a level the . . . company shall erect and at all times maintain good and sufficient gates on each side of such . . . public highway, where the . . . railway shall communicate therewith, and shall employ proper persons to open and shut such gates, so that the persons, carts, and carriages passing along such . . . public highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the . . . railway ; and such gates shall be kept constantly closed across each end of such . . . highway, except during the time when horses, cattle, carts, or carriages passing along such . . . highway shall have to cross such railway ; and such gates shall be . . . so constructed as when closed across the end of such . . . public highway to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway while the gates are closed . . . Provided always, that it shall be lawful for the Lords of the Committee of Her Majesty's Privy Council appointed for Trade and Foreign Plantations, in any case in which they are satisfied that it will be more conducive to the public safety that the gates on any level crossing . . . should be kept closed across the railway, to order . . . that such gates should be kept so closed, instead of across the road . . . except when engines or carriages passing along the . . . railway shall have occasion to cross the . . . road, in the same manner . . . as above directed with respect to the gates being kept closed across the . . . road . . ." B C D E

The provisions of s. 274 applied to a level crossing on a public highway from Lancing to Worthing, and an Order had been made under the proviso to the section directing that the gates should be kept closed across the railway except when engines or carriages passing along the railway should have occasion to cross the road. On approaching the level crossing in a motor car the plaintiff found the gate closed across the road and stopped his car about a car's length away, but, owing to the hand-brake being in some way released, the car moved slowly down the slope towards the level crossing and struck the gate. The gate was not securely fixed across the road as it should have been, with the result that it swung back across the railway line and was struck by a train which was approaching at high speed, the driver of the train being injured. The driver brought an action against the plaintiff, alleging that his injuries were caused by the plaintiff's negligence in allowing his car to strike the gate of the level crossing. The action was settled for £400 and the plaintiff brought an action against the railway company under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (*c*), alleging that they had contributed to the accident by failing to keep the gate securely closed, in breach of their duty under s. 274 of the Act of 1844.

HELD: on a true construction of the Act of 1844, the whole purport of s. 274 was merely to protect the road-using public against danger from the railway, and the words "conducive to the public safety" in the proviso meant the safety of the public using the highway and did not include persons who might be travelling on the railway. Therefore, the benefit of the section could not be claimed by a driver employed by the railway A company, and, as the driver had no right of action under the section, the plaintiff was not entitled to contribution from the railway company under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (*c*).

[AS TO LEVEL CROSSINGS, see HALSBURY, Hailsham Edn., Vol. 27, p. 50, para. 101, and pp. 86-89, paras. 172-176; and FOR CASES, see DIGEST, Vol. 38, pp. 309-317, Nos. *329-362*.]

B Cases referred to:

(1) *Buxton* v. *North Eastern Ry. Co.*, (1868), L.R. 3 Q.B. 549; 9 B. & S. 824; 37 L.J.Q.B. 258; 18 L.T. 795; 32 J.P. 661; 38 Digest 353, *584*.

(2) *Gorris* v. *Scott*, (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 42 Digest 759, *1853*.

C (3) *Parkinson* v. *Garstang & Knott End Ry. Co.*, [1910] 1 K.B. 615; 79 L.J.K.B. 380; 102 L.T. 234; 74 J.P. 204; 38 Digest 310, *334*.

(4) *Charman* v. *South Eastern Ry. Co.*, (1888), 21 Q.B.D. 524; 57 L.J.Q.B. 597; 53 J.P. 86; 38 Digest 310, *333*.

(5) *Atkinson* v. *Newcastle Waterworks Co.*, (1877), 2 Ex. D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 42 J.P. 183; 42 Digest 759, *1850*.

D APPEAL by the defendants, the Railway Executive, from a judgment of LEWIS, J., at Lewes Assizes, dated Apr. 4, 1949.

On approaching a level crossing at which the gates were closed across the road to allow a train to pass, the plaintiff accidently let his motor car strike the gate, which was not securely fixed as it should have been under the statute 7 and 8 Vict. c. lxvii (the Brighton and Chichester Railway Act, 1844), s. 274. As a E result, the gate swung back across the railway and was struck by an approaching train. The driver of the train was injured, and an action brought by him against the plaintiff claiming damages for negligence was settled for £400. The plaintiff thereupon brought an action against the defendants under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (*c*), claiming indemnity or, alternatively, such contribution as the court thought just, on the ground that F the defendants, or their predecessors, the Southern Railway Co., were guilty of a breach of statutory duty in failing to keep the gate securely closed. LEWIS, J., held that responsibility for the accident was due partly to a breach of statutory duty on the part of the Southern Railway Co., and partly to negligence on the part of the plaintiff, and he ordered the defendants to pay four-fifths of the damage and the plaintiff to bear one-fifth. The Court of G Appeal now held that s. 274 of the Act of 1844 was intended for the benefit of the users of the highway and that the driver had no right of action under the section, and, therefore, the plaintiff was not entitled to contribution under s. 6 (1) (*c*) of the Act of 1935. The facts appear in the judgment of SINGLETON, L.J.

H *Beney, K.C.*, and *Neil Lawson* for the Railway Executive.
Berryman, K.C., and *Harold J. Brown* for the plaintiff.

TUCKER, L.J.: I will ask SINGLETON, L.J., to deliver the first judgment.

SINGLETON, L.J.: A somewhat unusual accident happened at the level crossing at Lancing, Sussex, on July 23, 1947. Mr. Knapp, the plaintiff, was driving his Austin 7 h.p. motor car from Lancing to Worthing and he had to cross the level crossing at Lancing. Normally the gates are closed across the railway, but as he approached they were closed across the road, which indicated that a train was approaching. The plaintiff stopped his car about a car's length from the gates on his near side of the road. He remained there for an appreciable time, and then, in some way which was not explained, the hand-brake was released and the car commenced to move down the slope towards the gates on the crossing. The car, which moved very slowly, struck the gate on the near side and the gate moved some degree across the railway line. A train, coming at some speed, struck the gate and the driver of the train was injured. The driver brought an action against the plaintiff, alleging that he had sustained his injuries through the negligence of the plaintiff in driving his car against the gate of the level crossing or in allowing the car to strike it. That action was settled for £400 and £43 costs. The plaintiff then brought this action against the Railway Executive, alleging that they, or their predecessors, the Southern Railway Co., were guilty of a breach of statutory duty or of negligence, and claiming, under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, indemnity or, alternatively, contribution to such an extent as to the court should seem just.

The particulars of the breaches of duty and of negligence are set out in the statement of claim. Under the heading of "Breaches of statutory duty," the allegations are:

> "Failing to maintain good or sufficient gates across the said road; failing to maintain the said gates so as to fence the said railway; failing to keep the said gates closed to road traffic when a train was approaching."

The particulars of negligence are:

> "Failing to provide the gates of the said level crossing with any or any sufficient stops."

The other allegations in the particulars of negligence are directed to the gates and the closing of the gates rather than to individual negligence on the part of any employee of the railway company. The case was heard at the Lewes Assizes before Lewis, J., who, on Apr. 4, 1949, decided that the responsibility for the accident was due partly to a breach of statutory duty on the part of the Southern Railway Co., and partly to negligence on the part of the plaintiff. He ordered the defendants, as successors of the railway company, to pay four-fifths of the damage, and the plaintiff to bear one-fifth of it. Against that judgment the Railway Executive appeal.

As I have said, the level crossing gates are normally closed across the railway, and when a train is approaching a signalman turns a wheel which causes the gates to move across the highway from their normal position more or less at right-angles to the railway track. There are back-stops to prevent the gates going too far, and preceding those back-stops there are tumblers to prevent the gates, after striking the back-stops, from returning too far and on to the railway line. The back-stops and the tumblers should keep the gates in the proper closed position until the signalman moves them again. On the occasion in question the gate which the plaintiff's car struck had gone back over the tumblers so that, when it was struck by his motor car, there was nothing to stop it moving, and it went on into the track of the train which was approaching at a high speed. On the finding of the learned judge there was nothing wrong with the mechanism of the gates. He said that the device was as near perfection as could be contrived, and he added:

> "The only thing that can be said is that when the gates were swung back to an angle of ninety degrees so as to block the road, the gates came up against the back-stop with some force and bounced back clear of the tumbler, which was then, of course, not fixed, and the signalman did not observe that."

These general observations may be made. (i) The plaintiff relied in the action solely on breach of statutory duty by the railway company, and he did not allege personal negligence on the part of the signalman. (ii) The driver of the train had sued the plaintiff alone. If he had joined the Railway Executive as defendants and had alleged that the signalman was negligent, he would have been met by the defence of common employment. The case was conducted at Lewes on that basis. The pleadings were drawn, and the case was argued A in this court on that basis, but this morning counsel for the plaintiff pointed out to the court that everyone so far had overlooked the Employers' Liability Act, 1880, s. 1, which provides :

> " Where after the commencement of this Act personal injury is caused to a workman . . . (5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, B locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

C It does not seem to me necessary to consider that matter. The action by the driver of the train was not brought under the Employers' Liability Act, 1880, s. 1 (5), nor was the plaintiff's action, nor was that position ever considered in the course of the trial at Lewes. If there had been an action based on the Employers' Liability Act, 1880, there might have had to be considered the limit of time for the recovery of compensation set out in s. 4 of that Act, and D other considerations might have arisen. Although counsel for the plaintiff was right in bringing that matter to the notice of the court, it does not apply, so it seems to me, to this action in any degree. Again, if the driver had joined the railway company or the Railway Executive in his action as defendants and had alleged against them a breach of statutory duty, the same questions would have arisen for determination as fall to be determined on this appeal.

E The claim before LEWIS, J., was made under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, which provides:

> " (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) . . . (*c*) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether F as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having G regard to the extent of that person's responsibility for the damage . . ."

It is clear from the provisions of this section that the plaintiff was not entitled to succeed in his action against the railway company unless the driver of the train could have done so.

The statement of claim shows that when this action was commenced the H case for the plaintiff was based on the Railway Clauses Consolidation Act, 1845, s. 47. In reality the position is governed by the statute 7 and 8 Vict. c. lxvii, which is entitled:

> " An Act for making a railway from the Shoreham Branch of the London and Brighton Railway to Chichester."

That Act, which was passed in 1844—a year before the general Act—remains in force, and the statement of claim was amended accordingly. There is an important difference between those two Acts. Section 272 of 7 and 8 Vict.

c. lxvii provided that roads were not to be crossed on a level by the railway except as otherwise provided, and s. 273 provided that certain roads (of which this road was one) might be crossed on a level. It was under this section that the level crossing at which this accident happened was made. Section 274 provided what should be done where the railway was to cross any turnpike road or public highway on a level. The road which the plaintiff was using was a public highway leading from Lancing to Worthing, a highway existing A long before the railway was contemplated, and the provisions of s. 274 apply to that road. Section 274 reads:

> " And be it enacted, that in all cases where the said railway shall cross any turnpike road or public highway on a level the said company shall erect and at all times maintain good and sufficient gates on each side of such turnpike road or public highway, where the said railway shall communicate therewith, B and shall employ proper persons to open and shut such gates, so that the persons, carts, and carriages passing along such turnpike road or public highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railway ; and such gates shall be kept constantly closed across each end of such turnpike road or public highway, except during the time when horses, cattle, C carts, or carriages passing along such turnpike road or public highway shall have to cross such railway ; and such gates shall be of such dimensions and so constructed as when closed across the end of such turnpike road or public highway to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway while the gates are closed ; D and the person intrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts, or carriages shall have passed through the same, under a penalty of £5 for any default therein : Provided always, that it shall be lawful for the Lords of the Committee of Her Majesty's Privy Council appointed for Trade and Foreign Plantations, in any case in which they are satisfied that it will be more conducive to the public safety that the gates on any level crossing over E any such turnpike road or public highway should be kept closed across the railway, to order and direct that such gates should be kept so closed, instead of across the road, and in such last-mentioned case such gates shall be kept constantly closed across the railway, except when engines or carriages passing along the said railway shall have occasion to cross the said road, in the same manner and under the like penalty as above directed F with respect to the gates being kept closed across the said road . . ."

An order was made under the latter part of that section that the gates should be kept closed across the railway except when engines or carriages passing along the railway should have occasion to cross the road. Probably that was done because the railway traffic was not very heavy at that time and it was thought more conducive to public safety. G It is to be observed that the latter part of the section is not explicit as to what shall be done when the gates are across the road in such a case, but I assume, for the purposes of this judgment, that the requirements as to the gates apply in just the same way as if the normal position for them was across the road, as in the earlier part of the section.

The claim of the plaintiff against the Railway Executive was that the gate with which his car came into contact was not properly closed, and that, if it H had been, his slowly-moving small car would not have caused it to encroach on the railway track, and that in this way there was a breach of duty by the Railway Executive which contributed to the accident. The Railway Executive's answer to that was that the plaintiff was not entitled to succeed unless the driver had a claim against them, but the driver had no such claim for the simple reason that no duty under the section was owed to him, and, therefore, neither the plaintiff nor the driver could complain of any breach of duty under the section. There arises a question of the construction of s. 274 of the Act of 1844. On a matter of this kind decisions of the courts on other sections of other Acts of Parliament are not always helpful, but counsel for the Railway Executive drew the attention of the court to *Buxton* v. *North Eastern Ry. Co.* (1), where a question arose as to the liability of the railway company to a passenger who was injured through the train coming into contact with a bullock which had A got on to the line through a defective fence. The action was founded on the Railways Clauses Consolidation Act, 1845, s. 68, which begins:

> "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway . . ."

At the trial, after a direction from KELLY, C.B., the jury found a verdict for B the plaintiff with £800 damages, but a rule was obtained to enter a non-suit, and on the hearing of that BLACKBURN, J., said (L.R. 3 Q.B. 553):

> "It is clear that by s. 68 such an obligation is created with regard to the owners and occupiers of adjoining lands, but the proviso shows that the obligation is created with reference to owners and occupiers only; C for it enacts that if a bargain be made with them, the company shall be freed from that liability. The obligation, therefore, as to their passengers, to fence, is not imposed on the company by that section; and it is consequently necessary to consider the nature and extent of the company's duty at common law."

LUSH, J., said (*ibid.*, 554):

> D "It remains to consider whether his [the Chief Baron's] direction was correct. It is clear that he stated to the jury that if the company did not comply with the provisions of s. 68, they were guilty of a breach of duty towards the passengers. I think the Chief Baron was mistaken, and that the obligation imposed by s. 68 has nothing to do with the duty of a railway company towards their passengers; it exists solely between a E railway company and the owners and occupiers of the adjoining lands."

A new trial was ordered on other points arising in the case.

Counsel for the plaintiff referred us to the judgment of KELLY, C.B., in *Gorris* v. *Scott* (2), which is on quite a different subject, but in the course of it the learned Chief Baron used these words (L.R. 9 Exch. 128):

> F "The principle may be well illustrated by the case put in argument of a breach by a railway company of its duty to erect a gate on a level crossing, and to keep the gate closed except when the crossing is being actually and properly used. The object of the precaution is to prevent injury from being sustained through animals or vehicles being upon the line at unseasonable times; and if by reason of such a breach of duty, either in not G erecting the gate, or in not keeping it closed, a person attempts to cross with a carriage at an improper time, and injury ensues to a passenger, no doubt an action would lie against the railway company, because the intention of the legislature was that, by the erection of the gates and by their being kept closed individuals should be protected against accidents of this description."

H It is said that the learned Chief Baron must have been dealing with a case arising under the Railways Clauses Consolidation Act, 1845, s. 47, but he did not so say, nor is it clear that he was referring to a case of a passenger in a train, and still less could he have had in mind the case of an employee of the railway company. It was submitted by counsel for the plaintiff that, if the protection extended to a passenger, it covered an engine driver. Furthermore, the Order as to the way in which the gates should normally be kept was made on the ground that it was "more conducive to the public safety," and counsel for the plaintiff submitted that that was the main consideration of the section, from which it was argued that it would be illogical to read the section as covering one class only, namely, the users of the highway.

Our attention was also called to the words of PHILLIMORE, J., in *Parkinson* v. *Garstang and Knott End Ry. Co.* (3), where he said ([1910] 1 K.B. 620):

> "But it is important to observe that it has been decided that the duty of the company under s. 47 [of the Act of 1845] is a duty to every member of the public, and that even if a straying animal or a straying child of tender years gets on to the railway, owing to the gates not being kept closed, the company are liable if injury occurs."

Assuming that that sentence expresses the law correctly, and that it would apply in the case of an employee of the railway company, nevertheless it provides no guide to the present case. The Railways Clauses Consolidation Act, 1845, s. 47, is in general terms. It begins:

> "If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut such gates . . ."

To arrive at a decision in the present case one must look at the Act of 1844 as a whole and then at the terms of s. 274. The purpose of the Act was the making of a railway, as its title shows. It went on to say that roads should not be crossed on a level except in certain specified cases, of which this crossing was one, and that in those cases provision as to gates, etc., must be made:

> " . . . so that the persons, carts, and carriages passing along such turnpike road or public highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railway . . ."

To my mind, that shows quite clearly that the protection was intended to be for the users of the highway. The highway had been there from time immemorial, and, if the promoters wished to cross it on the level, they were to be allowed to do so only if they took proper precautions for the safety of the users of the highway. I do not think it can be said that the benefit of this section can be claimed by a driver employed by the railway company. The legislature was not concerned with that, in so far as s. 274 goes. In those days an employee was considered as undertaking the risks of his employment, including the risk of injury through negligence on the part of a fellow employee. The driver had no right of action against his employers under this section, and it follows that the plaintiff is not entitled to contribution. In my opinion, the appeal should be allowed.

JENKINS, L.J. : I agree. Having regard to the course taken by this litigation up to the present moment and to the form of the pleading and the argument before us, I think that the appeal must be regarded as turning simply on the question whether the engine driver was owed a statutory duty by the railway company under s. 274 of the private Act of 1844, 7 and 8 Vict. c. lxvii, in respect of a breach of which, arising when the plaintiff's car collided with the level crossing gate, the driver could have recovered damages from the railway company. As my Lord has said, the matter, therefore, resolves itself simply into a question of the true construction of s. 274 of the Act.

In considering actions in respect of breaches of statutory duty, two questions arise : (i) whether the plaintiff is a person to whom a statutory duty is owed ; and (ii) whether, if he is, the statute provides a remedy by way of penalty which was intended to be exhaustive. We have been referred in the course of the argument to some of the cases in which the imposition of a penalty by a section has been held, with other indications, to exclude any personal right

of action on the part of some person aggrieved. That question does not arise here, because it is plain from the decision in *Charman* v. *South Eastern Ry. Co.* (4) that a section such as s. 274 of the Act of 1844, or the corresponding s. 47 of the Railways Clauses Consolidation Act, 1845, is not one of those where the remedy is limited to the recovery of a penalty. Accordingly, anyone to whom a duty is owed by the railway company under s. 274 who can show
A that he has suffered damage through a breach of that duty may recover damages, but first he must show that he is a person to whom a duty is owed. Reading s. 274 in the context provided by the other sections of the Act, it seems to me that it is reasonably plain that this is a section designed to protect the public against the railway and not the railway against the public. It is one of the conditions under which the railway company, for the purposes of
B its undertaking, is to be allowed to carry its lines across the public highway, and the legislature permits that to be done only on condition that proper precautions are taken by means of the gates prescribed by the section to ensure that members of the public using the highway, either themselves or their carriages or animals, and so forth, are not injured by the passage of trains. It seems to me clearly that that is the object and intention of the section,
C and the duties, whatever they may be, of the railway company to its servants and to persons with whom it contracts to carry them or their goods on the line is an entirely different matter. The first part of s. 274 of the Act of 1844 provides that the railway company:

> " . . . shall employ proper persons to open and shut such gates, so that the persons, carts and carriages passing along such turnpike road
> D or public highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railway . . ."

In those words it seems to me that the section defines the class of person to whom the company owes a duty. If it had been intended to include passengers on the railway, or servants of the company driving or travelling on a train, the section inevitably would have gone on to add : " and so that carriages
E or engines passing along the railway shall not be exposed to any danger or damage by the passing of persons, carts and carriages along the turnpike road or public highway." In my judgment, the insertion of additional words of that kind into the section would be contrary to all the principles of construction. I think it is clear that no such words ought to be read into the section.

The conflict of interest with which the legislature is here dealing is clearly
F a conflict between the road-using public, on the one hand, and the railway company, on the other hand, and the whole purport of the section is to protect the road-using public against the railway company, it being assumed that the railway company, having got its power of running over the railway, will so manage its affairs that its traffic can proceed in safety. Counsel for the plaintiff placed some reliance on the expression " conducive to the public
G safety " in the provisions dealing with the circumstances in which the normal routine with regard to keeping the gates shut across the road may be varied by substituting the routine of normally keeping the gates shut across the railway, but I think the words " public safety " there mean the safety of the public using the highway and do not include persons who may be travelling on the railway. I do not think persons travelling on the railway fall within the category of
H " the public " for the purposes of this section. They are persons who have entered into contacts with the railway company to be conveyed as passengers, and it is not with their safety that the section is concerned.

I think that a close parallel is really to be found in s. 68 of the Railways Clauses Consolidation Act, 1845, which was dealt with in *Buxton* v. *North Eastern Ry. Co.* (1) to which SINGLETON, L.J., has referred. The language of the two sections is by no means exactly the same, but there is a close resemblance and I think that the principle which was applied in *Buxton's* case (1) is to be applied in considering s. 274 of the private Act of 1844. If I may add a word about *Gorris* v. *Scott* (2), I confess that on a first reading of the passage cited from the judgment of KELLY, C.B., (L.R. 9 Exch. 128), I was left under the impression that the hypothetical passenger, whom the learned Chief Baron assumed to be injured, was intended by him to be a passenger in a train. If the passage were so read, it would be an expression of a view directly contrary to the one which I have adopted. But when the A passage is looked at again, I agree that it is really quite plain that the hypothetical situation with which the Chief Baron was dealing there was the case of someone attempting to cross with a carriage, with passengers in the carriage, at an improper time, and that the injured person, whom he describes as a passenger, was intended by him to be a passenger in the carriage crossing the level crossing on the highway, and not a passenger in a railway carriage. B So read, the passage accords with the conclusion I have formed, *viz.*, that a statutory duty is owed to the users of the road, who are the persons which the section is designed to protect, and not to the users of the railway, who, if injured by the negligence of the railway company, must pursue such remedies as they have on other grounds. For these reasons, I agree that the appeal should be allowed. C

TUCKER, L.J. : I agree with the interpretation which has been put on s. 274 of the Act of 1844 by my brethren, and I am strengthened in that conclusion by an examination of the Act as a whole. I can find no indication in it that it was designed for the protection or the benefit of passengers on the railway. I think that in interpreting this Act it is helpful to bear in mind D what was said by LORD CAIRNS, L.C. (2 Ex. D. 448) in *Atkinson* v. *Newcastle Waterworks Co.* (5):

> " I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the court have to deal is not an Act of public and general E policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works."

In the present case we have arrived at a decision different from that to which the learned trial judge came, but, as so often happens, the case has been argued F on rather different lines from those on which it was dealt with in the court below. This point was clearly taken, but a number of other points were also taken and the authorities which were cited did not include any of those which have been cited to the court on the present occasion. Therefore, LEWIS, J., did not, I think, have his attention directed to s. 274 of the Act of 1844 to such an extent as we have had ours, nor did he have the benefit of considering G the authorities to which we have been referred, although it is perfectly true that none of those authorities is very directly in point. In dealing with this matter, after referring to the submissions that had been made by counsel for the Railway Executive, the learned judge said :

> " I venture to think that that is an argument to which I should not accede. One can think of all sorts of cases. If there are level crossing H gates which are not fastened but are across the highway and a slight gust of wind blows one gate across the line and causes a railway accident and damage to persons in the train, is it to be said that, because the duty of the Railway Executive in regard to level crossing gates is only to people using the highway, the Railway Executive would be absolved from liability, the only negligence being if they do not put up a proper gate ? I doubt it. I do not accede to the suggestion that this action is not maintainable

in that the duty owed by the Railway Executive is not a duty to anybody in the train."

With regard to that, the submission that was made in the present case, and with which we agree, is that this section, which imposes an absolute obligation on the railway company, was not designed for the protection, and is not couched in language apt to include the protection, of passengers on the railway, but, A of course, it does not in the least follow, and there can be no doubt whatever, that, if a passenger in a railway train is injured by the improper manipulation of a gate at a level crossing, the Railway Executive would be liable either on the ground of the individual negligence of one of their servants or on the ground that their system was at fault, and it is difficult to envisage a case of the kind referred to by the learned judge in which the Railway Executive could escape B liability. Here we are dealing with quite a different matter, *viz.*, the absolute obligation imposed under s. 274 of the Act of 1844. For the reasons stated, I agree that this appeal succeeds.

Appeal allowed with costs here and in the court below.

Solicitors : *H. F. Burt* (for the Railway Executive) ; *Joynson-Hicks & Co.*, agents for *Robert Breach & Co.*, Hove (for the plaintiff).

C [*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

JACOBSON *v.* LEE.

D [CHANCERY DIVISION (Harman, J.), July 11, 1949.]

Practice—Master's certificate—Discharge or variation after expiration of time limited—"Special circumstances"—Change of solicitors—Illness of solicitor's managing clerk—R.S.C., Ord. 55, r. 71.

By R.S.C., Ord. 55, r. 71 : "The judge may, if the special circumstances of the case require it, upon an application by motion or summons for the E purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties."

In a partnership action an account was ordered and was referred to an official referee who gave his decision on Feb. 22, 1949, his certificate, which was treated as the master's certificate, being filed on Mar. 1, 1949. The plaintiff intended to apply for the certificate to be discharged or varied, F but failed to do so within the eight days allowed by R.S.C., Ord. 55, r. 70, for the reasons that on Feb. 7 he had changed his solicitors, the new solicitors were not in possession of all the papers until Feb. 24, and, just at that time, their managing clerk fell ill and was away from work for a fortnight. On Mar. 29, 1949, the plaintiff took out a summons asking for an extension of time to apply and for the discharge and variation of the official referee's G certificate. The summons was heard by the master on Apr. 12, but was dismissed on the ground that there were no special circumstances warranting an extension of time, and on May 11, an application by the plaintiff for the matter to be adjourned into court was refused by the master. The plaintiff thereupon brought a motion under R.S.C., Ord. 55, r. 71, on the ground that the change of solicitors and the illness of their managing H clerk were "special circumstances" within the meaning of the rule.

HELD : the change of solicitors did not constitute "special circumstances" within the meaning of R.S.C., Ord. 55, r. 71, and, although there might be some hardship in the illness of the managing clerk, mere hardship was insufficient to justify an application under R.S.C., Ord. 55, r. 71, and, therefore, the application must be refused.

Dunn v. *Beausire*, (1885), (unreported), *followed.*

Re Love (Gregory) & Co. ([1916] 1 Ch. 203), *distinguished.*

[For R.S.C., Ord. 55, r. 71, see THE ANNUAL PRACTICE, 1948, p. 1249.]

Cases referred to :

(1) *Dunn* v. *Beausire*, (1885), unreported [referred to in The Annual Practice, 1948, p. 1249].

(2) *Briant* v. *Tebbut*, (1869), 20 L.T. 62.

(3) *Reeve* v. *Reeve*, [1871], W.N. 52.

(4) *Re Martin*, [1884] W.N. 112 ; Digest, Practice, 746, *3246*. A

(5) *Re Love (Gregory) & Co.*, [1916] 1 Ch. 203 ; 85 L.J.Ch. 281 ; 114 L.T. 395 ; Digest, Practice, 746, *3247*.

Motion under R.S.C., Ord. 55, r. 71, to discharge or vary a certificate of the master filed on Mar. 1, 1949.

In a partnership action, an account, ordered on June 6, 1947, was referred to the official referee by an order dated June, 22, 1948. The official referee's B decision was given on Feb. 22, 1949, and his certificate, which was treated as the master's certificate, was filed on Mar. 1, 1949. The plaintiff intended to apply for the certificate to be varied or discharged, but he did not do so within the eight days allowed for that purpose by R.S.C., Ord. 55, r. 70, for the following reasons. On Feb. 5, 1949, he had changed his solicitors and notice of the change was filed on Feb. 7, but there was delay in forwarding the papers to the new C solicitors who were not in possession of them until Feb. 24. Meanwhile, on Feb. 22, a bill of costs amounting to £2,500 (untaxed) was sent by the original solicitors to the new solicitors and required several days' study, and at that time the managing clerk to the new solicitors who dealt with the matter was away from work for fourteen days owing to illness. As a result, the summons asking for an extension of time to apply and for the discharge and variation of the certificate D filed on Mar. 1, 1949, was not issued until Mar. 29, 1949. It was heard on Apr. 12, 1949, and was dismissed by the master on the ground that there were no special circumstances warranting an extension of time. Counsel for the plaintiff was in court at the time, and, therefore, he was unable to be present at the hearing before the master, but he was represented by a pupil. No request was made to the master at the hearing to adjourn the matter into court. The managing clerk to E the plaintiff's solicitors tried to remedy this omission on the following day, but he was told that the application must be made by counsel. The application was then made by counsel on May 3 when the master directed that it should be heard in the presence of the defendant's counsel. On May 11 the application was again made to the master in the presence of counsel for the defendant and it was refused. The plaintiff then brought this motion under R.S.C., F Ord. 55, r. 71, and Harman, J., dismissed it with costs.

Aronson, K.C., and *L. Halpern* for the plaintiff.
J. L. Arnold for the defendant.

HARMAN, J. : This is a motion to vary the master's certificate filed on Mar. 1, 1949, and is admittedly out of time. The question for consideration is G whether the special circumstances of the case bring it within R.S.C., Ord. 55, r. 71, which reads :

> " The judge may, if the special circumstances of the case require it, upon an application by motion or summons for the purpose, direct a certificate to be discharged or varied at any time after the same has become binding on the parties." H

[His Lordship reviewed the facts and continued :] On Apr. 12 the plaintiffs failed to follow the usual practice of asking the master to adjourn the matter into court, and the application did not come before the master until May 3 when he directed that it should be heard in the presence of the defendant's counsel. On May 11 the application was heard by the master in the presence of counsel for both parties, and was dismissed. I refuse to prejudice the plaintiff's application because of these delays, but a more formidable obstacle arises under R.S.C., Ord. 55, r. 71. Are there any special circumstances which would justify me in varying the order of the official referee? It is important that litigants should not be shut out from their rights, but it is equally important that a litigant who has obtained a judgment in his favour should not have it taken away from him except in very special circumstances. It is in the public interest that there should be an end of litigation. In *Dunn* v. *Beausire* (1) the Court of Appeal held that mere mistake and hardship were insufficient to justify an application under R.S.C., Ord. 55, r. 71. The question is whether there was here anything more than mere mistake and hardship. I have been referred to *Briant* v. *Tebbut* (2), *Reeve* v. *Reeve* (3), and *Re Martin* (4), and, finally, to *Re Love* (*Gregory*) *& Co.* (5), which is the high-water-mark of the plaintiff's case. In *Re Love* (*Gregory*) *& Co.* (5), however, the position was quite different from the position here, as in that case the application was made by a new liquidator in the winding-up of a company and the matter had never been considered *inter partes* whereas in the present case there has been a long hearing before the official referee. The special circumstances are said to be the change of solicitors and the illness of the managing clerk. The change of solicitors does not constitute "special circumstances," and, although there may be some hardship in the illness of the managing clerk, I have come to the conclusion that in the present case there are no special circumstances within the meaning of R.S.C., Ord. 55, r. 71. Accordingly, the motion will be dismissed with costs.

Motion dismissed with costs.

Solicitors: *Lesser & Co.* (for the plaintiff); *Canter Hellyar & Co.* (for the defendant).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

R. *v.* CENTRAL PROFESSIONAL COMMITTEE FOR OPTICIANS. *Ex parte* BROWN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Stable, JJ.), July 21, 22, 1949.]

National Health Service—Ophthalmic services—Ophthalmic optician—Qualification—Advisory committee—Duties and powers—Scope and method of investigation — National Health Service (Executive Council) Regulations, 1947 (*S.R. & O.*, 1947, No. 889), *reg.* 19 (2).

By para. 19 (2) of the National Health Service (Executive Council) Regulations, 1947, it is provided: "The qualifications required by an ophthalmic optician for the purpose of Part IV of and sched. VII to the Act and these regulations shall be that . . . (*c*) he had been in practice as an ophthalmic optician, for fifteen out of the previous twenty years, including five years between Oct. 1, 1930, and Sept. 30, 1937, . . . and that he shall, to the satisfaction of the Minister, acting on the advice of a committee to be recognised by him for the purpose of approving such qualifications, have had adequate, including recent, experience as an ophthalmic optician."

In or about August, 1948, the applicant applied to the appropriate committee under the regulations to approve his professional qualifications so as to enable him to provide ophthalmic services under the National Health Service Act, 1946. There was some delay by the committee due, first, to an admitted misdirection by the Minister, and subsequently to inquiries which the committee caused to be made on its behalf by a local committee into such matters as the accommodation and equipment which the applicant could provide, and the nature of the records which he kept. After leave to move for *mandamus* was given by the court, the applicant was asked by the committee to attend a hospital for a test of his ability to carry out the duties of an ophthalmic optician. He refused this request. It was contended on his behalf that the delay of the committee in dealing with his application was equivalent to a refusal to do so.

HELD: that the duty of the committee under the regulations was not to sit and hold a judicial or semi-judicial enquiry, but to give advice to the Minister, and that, to perform that duty, they were entitled to obtain any information they desired in any manner they wished, including a practical test of an applicant's ability. The investigations which they caused to be made by a local committee were germane to their duty of finding out whether the applicant had adequate recent experience, and were not outside the ambit of the regulations. There was no delay amounting to a wilful refusal to deal with the application, and, further, the applicant's refusal to undergo the test requested by the committee was a compelling reason for the refusal of an order of *mandamus*.

MOTION for *mandamus*.

On May 17, 1947, the applicant obtained leave to apply for an order of *mandamus* directed to the Central Professional Committee for Opticians, requiring them to consider and determine an application for approval of his professional qualifications as an ophthalmic optician. The ground of the application was that there had been unreasonable delay amounting to a refusal to determine his application. The application was dismissed. The facts appear in the headnote and in the judgment of LORD GODDARD, C.J.

Caplan for the applicant.

Littman (*H. L. Parker* with him) for the respondents.

LORD GODDARD, C.J.: In this case counsel for the applicant obtained leave to move for an order of *mandamus* directed to the Central Professional Committee for Opticians, requiring them to consider and determine an application for approval of professional qualifications to entitle the applicant to provide supplementary ophthalmic services. The grounds on which the relief was sought were (*a*) that the application was made to the committee in or about January, 1948; (*b*) that the applicant personally and by his agents, since the said application was made, had continually written to the committee requesting it to consider and determine the application; (*c*) that the committee had failed and continued to fail to consider and determine the application; and (*d*) that, because of the failure of the committee to consider and determine the application, the applicant had been, and continued to be, deprived of the chance of providing supplementary ophthalmic services under the National Health Service Act, 1946. I am satisfied that there has been no failure by the committee to consider the application. Although there may have been delay, there has certainly not been such delay or such conduct on the part of the committee as can amount to a refusal.

The matter arises under s. 41 of the National Health Service Act, 1946, and the regulations made thereunder. The scheme of the section is that, under the Act, certain supplementary services can be given, among them, ophthalmic services. In other words, insured persons can get their eyes tested by opticians and obtain spectacles from them. To enable this service to be provided, the Minister has made the National Health Service (Executive Council) Regulations, 1947, reg. 19 (2) of which provides:

> "The qualifications required by an ophthalmic optician for the purpose of Part IV of and sched. VII to the Act and these regulations shall be that (*a*) he was in possession of one of the following diplomas or certificates..."

There are then set out certain diplomas and certificates from bodies who the Minister recognises are competent to give diplomas. Then it is provided that a person who :

> "(*b*) . . . was immediately before the appointed day an optician on the list of the Ophthalmic Benefit Approved Committee constituted under the National Health Insurance Act, 1936"

may be one of the people to be registered, and the last class of persons to be registered are those who :

> "(*c*) . . . had been in practice as an ophthalmic optician for fifteen out of the previous twenty years, including five years between Oct. 1, 1930, and Sept. 30, 1937."

There follows this clause, which applies to all these people :

> "and that he shall, to the satisfaction of the Minister acting on the advice of a committee to be recognised by him for the purpose of approving such qualifications, have had adequate, including recent, experience as an ophthalmic optician."

The duty, therefore, of a committee which the Minister has set up to advise him—we are concerned with the London Optical Committee in this case—is, among other things, to advise the Minister whether the applicant for registration has had adequate and recent experience as an ophthalmic optician. That means that if a person is reported on by this committee as qualified for registration, he will get on the register and be entitled to treat insured persons. It is, therefore, of the utmost importance that before the Minister allows an applicant to be put on the register, he should be satisfied that he is one to whom the welfare, so far as the eyes are concerned, of insured persons can safely be entrusted. Before the committee give their advice, therefore, it is desirable and necessary that they should make the fullest and most careful enquiry to satisfy themselves that the applicant has adequate and recent experience as an ophthalmic optician.

The London Optical Committee began work by asking a local optician committee to make some enquiries on their behalf. It seems to me that it was quite within their power to do so. Under the regulations, the committee are not to sit and hold a judicial or semi-judicial inquiry. They have to give advice to the Minister. Before they can give advice to the Minister they must satisfy themselves as to the sort of advice they are to give, and, in preparing themselves to give advice, they can seek what information they like and in any way they like. It is necessary to enable them to give proper and honest advice that they should satisfy themselves as to the adequacy of the experience of the ophthalmic optician who is the applicant, and it seems to me it is open to them to accept any advice or assistance they can get in coming to that conclusion.

One complaint that is made here is that the London Optical Committee were asked to enquire into the following questions : "What accommodation does the applicant provide ?" "What equipment has the applicant ? Give a list if possible." "What type of records does the applicant keep ? Are they adequate ?" "Can he satisfactorily undertake an ordinary routine eye examination ? (the applicant should be asked to carry this out on one of the persons visiting him)." Then there is a space for "Remarks." All those seem to be perfectly legitimate questions. They are matters of enquiry in determining whether the person has adequate and recent experience. It may be that he has no consulting room of his own, and that he has no equipment of his own. It is easy for him to explain that by saying, if it be the fact : "I have no consulting room of my own at the present time because I have always worked for an employer who provided the consulting room, but if I am put on the list I shall get a consulting room." It is also possible for him to say : "I have no equipment because I have always used my employer's equipment." That would be a satisfactory answer though the committee might want to be satisfied that, if he was put on this list, he would be able to provide himself with these things. Otherwise it would be impossible to say that he was a genuine practising ophthalmic optician.

In my opinion, the enquiries which the committee were endeavouring to carry out were germane to the duties which they had to perform, germane to the duty of finding out whether the applicant had adequate recent experience, and I cannot think that, in any of the questions they asked, they went outside the ambit of the regulations. It is true they might have done other things. It is true they might have written to the various referees whose names the applicant had given on his first application, but, because they might have done something else, it does not follow that what they did was wrong or was a cause of any unreasonable delay. In the circumstances we now know, there was nothing that can be attributed to the committee as a wilful delay that would amount to a refusal to get to work.

One compelling reason why this court should refuse an order for *mandamus* is that after leave was obtained from the court to move the committee wrote to the applicant's solicitor asking that he should go to the London Refraction Hospital so that they could give him an interview and a test. What better thing could the committee offer than that ? Having to satisfy themselves as to the applicant's experience, which means his capabilities, they said : "Come to this London Refraction Hospital and show us that you are capable of carrying out the duties of an ophthalmic optician." He refused to go, and said: "You have no right to examine me." I do not agree. I think the committee have every right in any case to examine anybody they like. If they want to find out whether a man has adequate experience, there is no better way than by his giving a practical demonstration to show that he has adequate experience. The applicant refused to go, and, therefore, he has no ground whatever for asking this court to issue a *mandamus* to the committee. In my opinion, the right order to make is that the motion be dismissed with costs, but, in view of the fact that no answer was sent to repeated letters, I feel that there was some ground for the applicant applying to the court. Therefore, I think that on the taxation of costs, he should be allowed to set off the costs which were incurred by him in making the application to the court.

OLIVER, J. : I agree. I think the committee have not only the right, but the very serious public duty, to make the closest investigation to ascertain that every applicant for a position on this list has had adequate, including recent, experience. Provided that the committee restricts its investigations to those points, I think they may make any enquiry they choose, including the invitation to an applicant to demonstrate. If they do so, I do not think that any criticism of their conduct is justified.

STABLE, J. : I agree, but, as this matter is of obvious public importance, I should like to add a few words to the judgments that have already been given. The Minister is entrusted with the duty of ensuring that opticians to whom insured persons resort under the National Health Service Act, 1946, are competent. Under the Act of Parliament the Minister has prescribed the qualifications for admission to the list. The regulations which have been referred to set out the various qualifications, and conclude: "and that he shall, to the satisfaction of the Minister acting on the advice of a committee to be recognised by him for the purpose of approving such qualifications, have had adequate, including recent, experience as an ophthalmic optician." It is important to point out that it is to the satisfaction of the Minister. I observe this statement in the letter that the applicant received from the Ministry of Health, dated Dec. 10, 1948 : "The responsibility for drawing up that list, involving as it does purely professional considerations, rests wholly with the Central Professional Committee for Opticians." It seems to me plain, however, that the only duty of the committee is to advise the Minister. It is not altogether easy to construe the words in the regulation which I have read, but, in my judgment, the proper meaning is that the applicant must show that he has adequate and recent experience, to the satisfaction of the Minister acting on the advice of the committee. The duty of the committee is this. In dealing with each case they must satisfy themselves that the applicant has got the qualification he claims to have. In the present case that does not arise because the applicant bases his application on the ground that he has been in practice as an ophthalmic optician for fifteen out of twenty years. He says : "I am entitled to come on this list, because, although I have not a professional qualification degree, I am a thoroughly competent man who has earned his bread and butter in that way for many years." The committee must satisfy themselves of that. I do not see how they can satisfy themselves that the applicant's experience is adequate unless they satisfy themselves that he has profited by the experience he has had. Therefore, it seems to me that it is the duty of the committee to subject an applicant, who bases his application on his competence as a practitioner, to some legitimate and suitable test.

In my opinion, the committee have to be careful to keep in mind precisely what is their function. It is, in my judgment, exactly as I have stated it. I do not want to say too much, but inasmuch as the applicant answered this question in full, if I had been investigating whether or not a man really had practised as an ophthalmic optician for a period of years, going back to 1911, I should have applied to the persons to whom he had referred in the application. It was, perhaps, a little unfortunate that this committee proceeded to investigate what accommodation and what equipment the applicant had got, more particularly as it is obvious from his application that he had never acted as a principal but had always been employed. A man may be a perfectly competent practitioner although he has not an expensive establishment where he sees his patients and not the necessary apparatus, which, he says, has been supplied by his employers. The applicant was mistaken in refusing to subject himself to the test. One hopes that all this time and money has not been wasted, and that the result of it will be that an early investigation will be made to ascertain whether the applicant really has the qualifications he claims he has got and, if he has, that he will be put on the register.

Motion dismissed.

Solicitors : *Cecil Altman* (for the applicant) ; *Solicitor to the Ministry of Health* (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

HARRIS AND ANOTHER *v.* ROWLEY.

[Court of Appeal (Sir Raymond Evershed, M.R., Somervell and Denning, L.JJ.), July 26, 27, 1949.]

Rent Restriction—Possession—Dwelling-house required for employee—Certificate by county agricultural committee—Death of farm worker referred to in certificate—Another farm worker engaged—No new certificate obtained—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), *sched. I, para. (g)* (ii).

The plaintiffs, who were farmers, bought a cottage in which the defendant lived in the hope of installing one of their farm workers in it. They obtained from the county agricultural committee a certificate under para. (*g*) (ii) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which stated that the "farm worker for whose occupation the cottage . . . is required is employed on work necessary for the proper working of the [plaintiffs'] agricultural holding." After the certificate had been granted this farm worker died, and the plaintiffs engaged another man who was ready to undertake the work if he could have possession of the cottage. The plaintiffs, without getting any further certificate, claimed possession of the cottage. The defendant contended that the certificate applied only to the farm worker who had died, but this objection was overruled by the county court judge who made an order for possession. On appeal,

Held: the identity of the individual to be employed was not a material part of the certificate, the object of which was to certify that the landlord was in need of an agricultural worker of a particular type, and so the fact that the man who was about to do the work when the case came before the court was different from the man who was doing it when the certificate was granted did not deprive the certificate of its efficacy, and the county court judge was entitled to make an order for possession if satisfied that it was reasonable to do so.

Pickford v. *Mace* ([1943] 2 All E.R. 321), *applied.*

[As to Possession required for Landlord's Employee, see HALSBURY, Hailsham Edn., Vol. 20, p. 331, para. 395; and for Cases see DIGEST, Vol. 31, pp. 580, 581, Nos. *7292-7297.*]

Case referred to:

(1) *Pickford* v. *Mace*, [1943] 2 All E.R. 321; [1943] K.B. 623; 112 L.J.K.B. 564; 169 L.T. 161; 2nd Digest Supp.

Appeal by the defendant from an order of His Honour Judge Pratt, sitting at Exeter County Court, dated Apr. 4, 1949, granting the plaintiffs, who were farmers, possession of a cottage of which the defendant was the tenant. The plaintiffs had bought the cottage for one of their own farm workers. The Court of Appeal, after considering the defendant's objection to a certificate issued by the county agricultural committee, dismissed the appeal. The facts appear in the judgment of Denning, L.J.

Raeburn, K.C., and *Pain* for the defendant.
L. A. Blundell for the plaintiffs.

SIR RAYMOND EVERSHED, M.R.: I will ask Denning, L.J., to give the first judgment.

DENNING, L.J.: The plaintiffs are farmers in Devon and need a man to help them on the farm. As is usually the case, they cannot get a man unless they have a cottage for him, so, in 1947, they bought the cottage in which the defendant had been living for many years, hoping to get possession of it. Having engaged one Wicks, they applied to the county agricultural committee for a certificate under para. (*g*) (ii) of sched. I to the Rent and Mortgage Interest

Restrictions (Amendment) Act, 1933, and on Sept. 8, 1948, the committee gave a certificate in this form pursuant to the Defence (Agriculture and Fisheries) Regulations, 1939 (S.R. & O., 1939, No. 1303), as amended by S.R. & O., 1943, No. 582:

> "The executive committee hereby certifies that a general farmworker for whose occupation the cottage or dwelling-house at 3, Alexandra Terrace, Broadclyst, is required by F. Harris & Son, landlords, is employed on work necessary for the proper working of the agricultural holding known as South Whimple Farm, Honiton Clyst, near Exeter."

After that certificate had been given, however, Wicks died, and the plaintiff engaged another man in his place who was ready to undertake the work if he could get a cottage. Without getting any further certificate the plaintiffs applied to the county court judge for possession of the cottage, and the defendant objected that the certificate was inapplicable because it applied only to Wicks. The county court judge overruled the objection, and the defendant has appealed.

Counsel for the defendant conceded, as I think he was bound to do, that, if the certificate had been in the form, "is or is to be employed on work necessary for the proper working of the holding," it would be a good certificate applicable in that situation, but he says that as the words "is to be" were omitted it was an inapplicable certificate. The answer to this objection, it seems to me, is that the committee are not concerned with the identity of the individual who is to do the work. They are only concerned with whether the agricultural holding is in need of an agricultural worker of a particular kind. Once they are satisfied of the necessity, they give their certificate and it is then for the court to satisfy itself that such a worker is, or is to be, employed, that the house is reasonably required for him, and that it is reasonable to make an order for possession. That, I think, follows from the judgment of LORD GREENE, M.R., in *Pickford* v. *Mace* (1) ([1943] 2 All E.R. 321). The identity of the individual is, therefore, not a material part of the certificate, so the failure to insert the words "or is to be" is a failure on a matter which is immaterial. It is familiar law that a mistake in an immaterial part of a document does not affect its validity. *A fortiori*, a failure to provide for an unforeseen immateriality does not affect its validity. In my opinion, the decision of the county court judge was right, and the appeal must be dismissed.

SOMERVELL, L.J.: I agree. LORD GREENE, M.R., in *Pickford* v. *Mace* (1) summed up his conclusions in these words:

> "It is, therefore, for the county court judge to be satisfied on evidence in the ordinary way that the house is required for a person who is, or is to be, employed, and he has to be satisfied by the certificate as to the nature of the work on which that person is to be employed, and it matters not that when the certificate was obtained no person was in contemplation because it is sufficient when the farmer comes before the county court judge for him to prove that he has a person for whom the house is required and that the work on which he proposes to employ him is so-and-so."

In that case, at the time the certificate was given, no individual was in contemplation. In one sense the present case is different in that, at the time when the certificate was given, a general farm worker was doing the work, but the fact that the certificate was drawn up with regard to those circumstances does not, in my view, deprive it of its efficacy in satisfying the county court judge as to the nature of the work on which the person for whom the cottage is required is to be employed. For these reasons I think the appeal fails.

SIR RAYMOND EVERSHED, M.R.: I agree. As I follow *Pickford* v. *Mace* (1) the effectiveness of the certificate, which relates to the nature of the work to be done, is not affected by the circumstance that, at the time when the certificate was given, a particular man was doing the work, but had ceased to do it when the case came before the court, and some other individual was then about to do it. The work to be done remains the same, and the effect of the certificate was that that work was, within the terms of the paragraph, necessary for the proper working of the holding.

Appeal dismissed with costs. A

Solicitors: *W. H. Thompson* (for the defendant); *Ellis & Fairbairn* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

B

EDGWARE ESTATES, LTD. *v.* COBLENTZ.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Denning, L.JJ.), July 22, 25, 26, 1949.]

Rent Restriction—Standard rent—Premises let under headlease at £300 *per annum —Sub-let in breach of covenant at* £225*—Waiver of breach of covenant—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (*c.* 17), *s.* 12 (1) (*a*). C

On Oct. 12, 1926, a dwelling-house to which the Rent and Mortgage Interest Restrictions Act, 1939, applied was let under a lease for 21 years at a yearly rent of £300. The lease contained a covenant against sub-letting without the written consent of the landlord. At the same date the premises were sub-let in breach of this covenant at a rent of £225 per annum. In 1943 the breach of covenant was waived and the sub-tenancy became lawful. On an application to fix the standard rent for the dwelling-house, D

HELD: on Sept. 1, 1939, the material date for the determination of the standard rent, the sub-tenant was not entitled to the protection of the Rent Acts because the premises had not been lawfully sub-let to him; the waiver in 1943 of the breach of covenant had no retro-active effect; and, therefore, in ascertaining the standard rent, the sub-tenancy had to be disregarded and the standard rent was the rent reserved in the head-lease, *viz.*, £300. E

Glossop v. *Ashley* ([1922] 1 K.B. 1), *distinguished.*

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. *7117-7132.*] F

Cases referred to:

(1) *Norman* v. *Simpson*, [1946] 1 All E.R. 74; [1946] K.B. 158; 115 L.J.K.B. 107; 174 L.T. 279; 2nd Digest Supp. G

(2) *Glossop* v. *Ashley*, [1922] 1 K.B. 1; 90 L.J.K.B. 1237; 125 L.T. 842; 85 J.P. 234; 31 Digest 565, *7125.*

(3) *Carter* v. *S.U. Carburetter Co.*, [1942] 2 All E.R. 228; [1942] 2 K.B. 288; 111 L.J.K.B. 714; 167 L.T. 248; 2nd Digest Supp.

(4) *Gover* v. *Field*, [1944] 1 All E.R. 151, 417, *n.*; 113 L.J.K.B. 129; 170 L.T. 73; *sub nom.*, *Field* v. *Gover*, [1944] K.B. 200; 2nd Digest Supp. H

(5) *Phillips* v. *Copping*, [1935] 1 K.B. 15; 104 L.J.K.B. 78; 152 L.T. 175; Digest Supp.

(6) *Regional Properties, Ltd.* v. *Oxley*, [1945] 2 All E.R. 418; [1945] A.C. 347; 114 L.J.K.B. 473; 173 L.T. 201; 2nd Digest Supp.

(7) *Watson* v. *Saunders-Roe, Ltd.*, [1947] K.B. 437; [1947] L.J.R. 563; 176 L.T. 521; 2nd Digest Supp.

APPEAL by the landlords from a decision of His Honour JUDGE NEAL, sitting at Willesden County Court, dated Mar. 31, 1949.

An application was made by the tenant to determine the standard rent of a dwelling-house which was let on Sept. 1, 1939, at a rent of £300 per annum, and sub-let, in breach of covenant, at a rent of £225 per annum. In 1943 the breach of covenant was waived. The learned registrar fixed the rent at £300. On the tenant's appeal the county court judge varied the order and fixed the rent at £225. The Court of Appeal now allowed the landlords' appeal and restored the registrar's order. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

Heathcote-Williams, K.C., and *Bibby-Trevor* for the landlords.
Stranders for the tenant.

SIR RAYMOND EVERSHED, M.R.: This is an appeal by the landlords, the freehold owners of certain property, 7, Bank Parade, Edgware, against a decision of the learned county court judge, His Honour JUDGE NEAL, who fixed the standard rent of these premises at £225 per annum.

The matter originated in an application by the tenant, a Mrs. Coblentz (who is the widow, and, I assume, personal representative, of Mr. Coblentz hereafter mentioned, and who is the occupying tenant of the premises) under s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923. The county court registrar had found in favour of the landlords, fixing the standard rent at the higher figure for which they contended, £300, but his view was reversed by the county court judge. There is no doubt that the premises are within the ambit of the Rent Acts, and, to use the language of s. 12 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sched. I, there is no doubt that the premises were let on Sept. 1, 1939, as a dwelling-house. There were, however, two lettings on that date, and the question which now arises is by reference to which of those two lettings ought the standard rent to be fixed.

The first material letting was by a lease by the predecessors in title of the landlords to a company known as W. White & Sons (Cricklewood) Ltd., dated Oct. 12, 1926. That lease was for 21 years, and the rent, which was progressive, was at all material times £300 per annum. By cl. 2 (8), of the lease it was provided:

> "That the lessees will not assign underlet or part with the possession of the premises or any part thereof or of these presents without the consent in writing of the lessor provided that such consent shall not be unreasonably withheld in the case of a respectable and responsible assignee or underlessee."

There was also the usual remedy of forfeiture and re-entry on breach of the covenants. That lease has now expired, and W. White & Sons (Cricklewood) Ltd., have taken no part in the present proceedings.

In 1934, the original lessors granted a licence in writing to White, Ltd., to sub-let the premises for one year only to Mr. Isaac Coblentz, the rent charged being £225 per annum. Mr. Coblentz remained in possession of the premises after the expiry of the year. It has been conceded in argument that the licence only authorised one year's letting so that thereafter the possession of Mr. Coblentz as tenant from year to year, and his possession on Sept. 1, 1939, was one which was not authorised or licensed by the lessors and constituted a breach of covenant on the part of the lessees, White, Ltd. On that date, therefore, unless there was some waiver on the part of the lessors, the sub-tenancy was not "lawful" within s. 5 (5), and s. 15 (3) of the Act of 1920, that is, to use the language used by MORTON, L.J., in *Norman* v. *Simpson* (1) ([1946] 1 All E.R. 76) by reason of the sub-letting the head landlord had, at the material date,

" a subsisting right of re-entry " in respect of the premises. The county court judge found that there had been a breach of covenant, but that a Mr. Cross, who succeeded the original lessors and from whom the present landlords derived title, in 1943 by his conduct waived his right of re-entry so that thereafter the sub-letting became, and was at the date of the determination of the lease of White, Ltd., and of the present proceedings, a lawful sub-letting within the two sub-sections to which I have referred.

Counsel for the tenant first took the point before us that there was no evidence on which could be justified the finding that there was a breach of covenant at the material date, namely, Sept. 1, 1939, and he said that this court ought to hold that the sub-letting to Mr. Coblentz on that date and at all material times was lawful. It is true that the learned county court judge stated that he suspected that the original lessors may well have known about Mr. Coblentz's tenancy at the time, but on the evidence and the admissions which were made before him and the learned registrar he reached the conclusion that there was a breach of covenant. It is, in my judgment, impossible for us to hold otherwise than in accordance with the findings of the learned county court judge.

Counsel for the landlords argued that the court cannot pay regard to what was at the material date, *viz.*, Sept. 1, 1939, an unauthorised sub-letting, defeasible at the suit of the owners of the property, a sub-letting which, as we must assume from the finding, was unknown to the landlords and not binding on them. Counsel said that were it otherwise very strange results would follow—for example, notwithstanding that a landlord might have protected himself by a covenant against sub-letting without his consent, still the standard rent might be fixed at a figure contained in, and by reference to, a sub-letting of which he, at the material date, was entirely ignorant and which constituted a breach of the covenant contained in the lease. In that event it might happen that the rent which he (the landlord) was charging under the headlease might prove to be excessive so that he would be liable to satisfy a claim against him for recovery of the over-payment. On the other hand, counsel for the tenant has said that in contrast to s. 5 (5) and s. 15 (3) of the Act of 1920 there is no reference in s. 12 (1) (*a*) of the Act of 1920 to " lawfully " let. He says, and says truly, that on the evidence this was a *bona fide* letting at a genuine rent for the purpose of occupation. He says that the intention of the Act is to protect the occupying tenant from eviction and from increases of his rent, and that the intention of s. 12 (1) (*a*) in particular is to fix the standard rent by reference to the rent payable by the occupier. Counsel further says that, in any event the waiver in 1943 prevents the landlords now from asserting that the sub-tenancy to Coblentz on Sept. 1, 1939, was not a lawful sub-letting. Counsel for the landlords in the course of his argument at one time argued that the state of affairs as they were on Sept. 1, 1939, can in no circumstances be affected by events subsequent to that date. That is putting it far too high. Things might happen after that date as a result of which a landlord might well be estopped from asserting otherwise than that a tenancy existing on Sept. 1, 1939, was a lawful tenancy, and it is possible to imagine that had the facts in this case been more fully gone into such an estoppel might possibly have been raised, but we have to deal with this case on the facts as proved and as found by the learned county court judge.

The case is one of difficulty, but on the whole I have reached a conclusion favourable to the argument of counsel for the landlords. In the first place, it is to be noted that s. 12 (1) (*a*) appears to contemplate one letting. It simply refers to the rent at which the dwelling-house was let. Of course, the effect of the definition in para. (*g*) is that you have to read into para. (*a*) " sub-let" as well as " let " at the relevant date, but on the face of para. (*a*) as it stands I would not expect to find any reference to " lawfully " or " unlawfully " let. Secondly, some limitation must be placed on the words " was let " at the material date. For example—as has been held in this court—the letting must be a genuine letting. A transaction devised merely to create a standard rent of a particular figure would be disregarded for the purposes of this paragraph. Further, and more important, the letting must be a letting for the purposes of the Act. It has been a matter for decision in these courts that a letting of the dwelling-house furnished would not be effective for the purpose of para. (*a*) because such a letting would not be a letting for the purposes of the Act. It would be a letting outside the general scope of the Act. Thirdly, once you introduce into the picture the conception of the purposes of the Act, it seems to me vital to have in mind that it is not every sub-tenant whom the Act is designed to protect. It has been decided that by virtue of s. 5 (5) and s. 15 (3) of the Act of 1920 an occupying sub-tenant is protected and is entitled to remain in possession provided that at the relevant date—which *prima facie* would be when proceedings are started for possession—he can show that he is a lawful sub-tenant in the sense in which that term has been interpreted by MORTON, L.J., in *Norman* v. *Simpson* (1).

On Sept. 1, 1939, Mr. Coblentz was a sub-tenant not entitled to the protection of the Act. At that date he was, within the meaning of the Act, an unlawful sub-tenant. In my view, the fact that at a later stage the landlords waived their rights to re-enter cannot operate retrospectively to make Mr. Coblentz a lawful sub-tenant within the meaning of the Act on Sept. 1, 1939. Therefore, it seems to me to follow that, in considering what is the relevant rent, the sub-letting to Coblentz, cannot be regarded because it was not a sub-letting for the purpose of the Act any more than a letting or sub-letting furnished would be a letting for the purpose of the Act.

Considerable reliance was placed both here and below on *Glossop* v. *Ashley* (2) in which there were two competing lettings, both of which were within the scope of the Act and were for the purpose of the Act. In other words, the sub-tenancy was not in breach of covenant and, therefore, was not an unlawful sub-tenancy. The question was, to which of the competing lettings regard should be had for the purpose of determining the standard rent. This court held that regard must be paid to the sub-tenancy because the emphasis in the circumstances must be placed on the position of the occupier. BANKES, L.J., said ([1922] 1 K.B. 7):

> " . . . the standard rent is the rent which that tenant was paying at that date [Aug. 3, 1914] because he is the person whom the legislature was intending to protect when it fixed the standard rent."

SCRUTTON, L.J., observed (*ibid.*, 8):

> " The object of the legislation was to protect the tenant in occupation and allow him to remain in possession as long as he pays the rent he was paying in August, 1914."

Finally, ATKIN, L.J., said (*ibid.*, 10):

> " In my view it is the tenant's right that is protected, and when I consider s. 15 (3), and its obvious intention to secure the sub-tenant as far as possible in the position he would have occupied if his relation to his former landlord had continued, I cannot reconcile that sub-section with the argument for the appellants [the head landlords]."

As I read those passages the *ratio* in that case was that the sub-tenant was a person whom the Act was designed to protect, and, therefore, the rent he paid was to be regarded as the material rent for fixing the standard rent. Once, however, you arrive at the conclusion that the sub-tenant in occupation at the material date was not entitled to the protection of the Act the basis of the reasoning is destroyed. *Glossop* v. *Ashley* (2) is applicable only where you have two competing tenancies both of which are within the scope and protection of the Act as being lawful tenancies. That conclusion also answers another point raised in argument. It was said: "Assume that the sub-tenancy to Coblentz on Sept. 1, 1939, must be disregarded for the purpose of fixing the standard rent, nevertheless, Coblentz actually was in occupation. At the material date (Sept. 1, 1939) there was, therefore, no letting to an occupying tenant, and one must retrace one's steps beyond that date. If that is done, one arrives at the licensed sub-letting to Coblentz in 1934," and that was the A sub-letting at a rent of £225 a year. It seems to me, however, that an argument of that kind, which is based on the decision in *Glossop* v. *Ashley* (2), only comes into play when you have got competing lawful tenancies. In the present case, if the sub-tenancy is unlawful, one is left with a lawful tenancy by the landlords or their predecessors to Whites, Ltd., which was a letting which falls within the language of para. 12 (1) (*a*) as a letting of the premises as a dwelling-house. B In the circumstances, that is the letting by reference to which the standard rent ought to be fixed. The result is one which favours the landlord because it so happens, and it is by no means common, that the rent payable under the head lease is in excess of the rent payable under the underlease. It may very well be that the result in other cases would be the other way round, and would be favourable to the tenant. Those, however, are not considerations C which ought to influence the decision of the court. The question is what on the facts is the effect of the provision of para. (*a*) of s. 12 (1) of the Act of 1920, and I conclude, for the reasons I have stated, that the standard rent must be fixed by the letting at £300 per annum from the landlords' predecessor in title to White, Ltd.

SOMERVELL, L.J.: Although this appeal raises questions of some D nicety and we are disagreeing with the learned judge, there is nothing I can usefully add to the judgment which has been delivered by the Master of the Rolls, which completely expresses my own reasons in coming to the conclusion that this appeal succeeds.

DENNING, L.J.: Speaking generally, the Rent Restrictions Acts now in force have two primary objects. The first is to stabilise rents at the 1939 level; E the second, to protect occupiers from eviction. The first object is achieved by prescribing a "standard rent" which, in most cases, is the rent at which the house was let, on Sept. 1, 1939, to the occupying tenant: *Glossop* v. *Ashley* (2). The standard rent is the maximum which can be charged not only during any statutory tenancy of the house, but also during any contractual tenancy: *Carter* v. *S.U. Carburettor Co.* (3); *Field* v. *Gover* (4). It is not only the maximum F as between the occupying tenant and his immediate landlord, but also between a mesne tenant and his superior landlord: *Carter* v. *S.U. Carburettor Co.* (3). It is a maximum which binds not only the persons who were interested in the house on Sept. 1, 1939, but all those who acquire an interest after that date, and it is the sum which every tenant or sub-tenant can be required to pay if he stays in possession by virtue of the statute irrespective of any prior contractual G terms as to the amount: *Phillips* v. *Copping* (5); *Regional Properties* v. *Oxley* (6). By reason of those qualities the standard rent is said to operate *in rem*. This does not mean that a decision between two persons as to its *quantum* is a decision *in rem* which is binding on persons who were not parties to the decision, but it does mean that the correct amount is binding on all persons interested in the house, whenever and however their interest was acquired. H The second object is achieved by prohibiting the court from making any order for possession unless certain specified conditions are satisfied.

In the present case we have a head landlord, a mesne tenant, and a sub-tenant. So far as possession is concerned, the Act makes it clear that the only sub-tenants who are protected from eviction after the head tenancy comes to an end are sub-tenants to whom the premises have been lawfully sub-let: see s. 5 (5) and s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, but the Act is not so specific so far as the standard rent is concerned. In my opinion, the only sub-tenancies which can be regarded for the purpose of ascertaining the standard rent are lawful sub-tenancies, that is, sub-lettings which are not in breach of any term of the head lease. It is impossible to suppose that a mesne tenant could, by unlawfully sub-letting the house in August, 1939, saddle the landlord with a standard rent which was lower than the head rent. On discovery of the breach the head landlord could plainly forfeit the head lease and eject the unlawful sub-tenant. It cannot be supposed that, after strong action of that kind, he would, nevertheless, be bound by the figure contained in the unlawful sub-letting.

The difficult question is, however : What is the effect of the head landlord accepting rent after knowledge of the unlawful sub-letting ? So far as possession is concerned, it is clear that if the head landlord, during the subsistence of the contractual head lease, waives the forfeiture, the sub-letting thenceforward becomes a lawful sub-letting : *Norman* v. *Simpson* (1) ; *Watson* v. *Saunders-Roe, Ltd.* (7). The material date for determining whether it is unlawful for that purpose is the date of the determination of the contractual tenancy, but, so far as the standard rent is concerned, the material date is Sept. 1, 1939, and the lawfulness or unlawfulness of the sub-letting must be determined as at that date. As GODDARD, L.J., said in *Field* v. *Gover* (4) ([1944] 1 All E.R. 157), " the standard rent attaches from the moment when the house is brought under control." Take a case like the present where there was no waiver of the forfeiture until 1943. If an application had been made in 1941 to determine the standard rent the figure would have been £300. The head landlord would not be tied down to the figure contained in the unlawful sub-letting of which *ex hypothesi* he knew nothing. Suppose, then, after the waiver in 1943 another application was made to fix the standard rent, can it be supposed that the £300 would be replaced by £225 ? Clearly not. A subsequent waiver is, therefore, of no effect on the standard rent.

In the present case, on the facts found by the county court judge, the sub-tenancy which existed on Sept. 1, 1939, was unlawful. It is, therefore, to be disregarded for the purpose of ascertaining the standard rent. The only relevant letting at Sept. 1, 1939, was the letting at £300 a year, and that is, therefore, the standard rent. I agree the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors : *Kenneth Brown, Baker, Baker* (for the landlords) ; *Matthew Trackman & Co.* (for the tenant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CARR *v.* MERCANTILE PRODUCE CO., LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Stable, JJ.), July 19, 27, 1949.]

Factory—Dangerous machinery—Evidence—Machine capable of causing injury—Injury suffered by operator—No presumption of danger—Factories Act, 1937 (*c.* 67), *s.* 14 (1).

A macaroni extruding machine consisted of a hopper with two hollow cylinders, in the lower of which was a rotating worm. Above this worm and between the two cylinders was a metal plate, intended as a guard, formed of two concentric rings. Dough, used in the manufacture of the macaroni, was fed into the hopper by the operator of the machine. It was not possible for the operator's fingers to touch the worm unless her hand was pushed through a space in the metal plate, which was not an easy thing to do. The operator, to dislodge some dough stuck on the side of the hopper, put her hand through the space in the metal plate while the worm was rotating and the tips of two of her fingers were cut off by the worm. On the hearing of an information under s. 14 (1) of the Factories Act, 1937, the magistrate found that the worm was not a dangerous part of the machinery, that the machine was securely fenced, and that the operator had not acted reasonably by inserting her hand while the worm was rotating as she could easily have switched off the motor or dislodged the dough with some implement. He accordingly dismissed the information. On appeal,

Held : the facts that the machine was capable of causing injury and that injury had happened to the operator was not conclusive proof that it was dangerous within s. 14 (1) of the Factories Act, 1937 ; the question whether the machine or any part of it was dangerous was one of degree, and, therefore, of fact ; there was abundant evidence on which the magistrate could reach his conclusion and he had not taken into account any facts which he ought not to have taken into account ; and, therefore, the appeal failed.

Higgins v. *Harrison* (1932) (25 B.W.C.C. 113), *followed.*

Sutherland v. *James Mills, Ltd.* (*Executors*) ([1938] 1 All E.R. 283), *discussed.*

[As to Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, para. 1130 ; and for Cases, see DIGEST, Vol. 24, pp. 908, 911, Nos. *62-81*.]

Cases referred to:

(1) *Hindle* v. *Birtwistle*, [1897] 1 Q.B. 192 ; 76 L.T. 159 ; 61 J.P. 70 ; *sub nom.*, *Birtwistle* v. *Hindle*, 66 L.J.Q.B. 173 ; 24 Digest 909, *71*.
(2) *Lauder* v. *Barr & Stroud*, [1927] S.C. (J.) 21 ; Digest Supp.
(3) *Walker* v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170 ; Digest Supp.
(4) *Higgins* v. *Harrison*, (1932), 25 B.W.C.C. 113 ; Digest Supp.
(5) *Sutherland* v. *James Mills, Ltd.* (*Executors*), [1938] 1 All E.R. 283 ; Digest Supp.
(6) *Chasteney* v. *Nairn* (*Michael*) *& Co., Ltd.*, [1937] 1 All E.R. 376 ; Digest Supp.

Case Stated by a Metropolitan magistrate.

At a court of summary jurisdiction sitting at North London magistrate's court on Nov. 30, 1948, an information was preferred by the appellant, an inspector of factories of the Ministry of Labour and National Service, charging the respondents as the occupiers of a factory within the meaning of the Factories Act, 1937, at 3-5, Brewery Road, N.7, in the metropolitan borough of Islington, with having, on Oct. 18, 1948, contravened the provisions of s. 14 (1) of the Act, thereby rendering themselves liable to a fine under s. 133, by failing to fence securely a dangerous part of certain machinery, *viz.*, the worm of a macaroni extruding machine, in consequence of which one Agnes Crowder had suffered bodily injury. The information was heard on Dec. 20, 1948. The machine consisted of a hopper, comprising two hollow cylinders, the upper one being funnel shaped, 6¼ inches deep and five inches in diameter at the base, and the lower one attached to it being five inches deep. In a trough at the bottom of the lower cylinder was a rotating worm, and between the two cylinders was a metal plate comprising two concentric rings, respectively five and 1⅝ inches in diameter. The person attending the machine fed dough into the hopper and it fell on to the worm. It was difficult to put the whole hand through the plate, but Agnes Crowder sustained her injury in so doing while the worm was rotating in order to dislodge dough sticking to the side of the lower cylinder. The respondents contended that no person could reasonably have been expected to act in the way in which Agnes Crowder had acted, that the machine was not a dangerous machine, and that the rotating worm was securely fenced. The magistrate upheld these contentions and dismissed the information. The appellant appealed, and the Divisional Court now dismissed the appeal.

MacKenna for the appellant.
Sachs, K.C., and *Pearl* for the respondents.

Cur. adv. vult.

July 27. **LORD GODDARD, C.J.**, read the following judgment. This is a Case stated by a metropolitan magistrate before whom the respondents were charged as occupiers of a factory, with a contravention of s. 14 (1) of the Factories Act, 1937, in that a certain dangerous part of the machinery, namely, the worm of a macaroni extruding machine, was not securely fenced, and in consequence of this contravention one Agnes Crowder suffered bodily injury. The magistrate dismissed the information, holding that the machine was not a dangerous machine within the meaning of the Act, by which he clearly meant that the worm was not a dangerous part of the machinery. He held also that the machine was securely fenced, that the circumstances which in fact occurred immediately before the accident were such as the said Agnes Crowder could or should have reasonably expected to occur and that she did not act in a way in which anyone operating the machine might reasonably be expected to act.

The machine in question consisted of a hopper into which the dough used in the manufacture of macaroni was fed by the person who attended on the machine. The hopper consisted of two parts. The upper was funnel-shaped 6¼ inches deep and the lower part was five inches deep. In between the two parts was a circular metal plate which was thus five inches above the rotating worm which was at the bottom of the lower half of the hopper. The metal plate consisted of two concentric rings, the diameter of the outer ring being five inches and of the inner 1⅝ inches. It was possible for the fingers of the operator to pass through these spaces, and if a person only put his or her fingers through, then it is obvious they would not have come into contact with the worm. It was only possible for fingers to touch the worm if the hand was also pushed through this space in the plate, and, after inspection of the plate both by the learned magistrate and by this court, it is obvious that this was not an altogether easy thing to accomplish. When the machine is working, dough from time to time sticks to the side of the lower part of the hopper, and on the day when the accident happened the injured woman appears to have put her hand through the metal plate, which was intended as a guard, for the purpose of dislodging some dough while the worm was rotating, with the result that the extreme tips of two of her fingers were caught by the rotating worm and cut off, fortunately without injury to the bone. She had been working the machine for five weeks before the accident, and that machine had been used for three years without mishap, and no complaint had ever been made about it by any factory inspector who had visited the factory while it was installed. The magistrate considered that it was unreasonable of the young woman to attempt to dislodge the dough while the worm was rotating. She could without difficulty have switched off the motor or done nothing at all. He considered that it was unreasonable of her to attempt to dislodge the dough with her fingers while the worm was rotating and that she could without difficulty have dislodged the dough with a stick or any other implement. He does find that on other occasions the injured girl and other women employed at the premises had put their fingers through the open spaces of the plate to release dough adhering to the side of the hopper, but there is no finding either that the respondents knew of this or that any accident had ever happened in consequence.

Counsel for the appellant argued that the magistrate had no option but to find that this machine was dangerous. As I understood his submissions they were that, if the machine was one capable of causing injury and that injury did happen to a person who was employed to work on the machine and was injured while working it, that was conclusive. Counsel for the respondents, on the other hand, contended that whether or not a machine or a part of the machine was dangerous within the meaning of the section is a question of fact, and that the question could not be resolved merely by showing that it was possible for an accident to happen and that one did in fact happen. In the course of a careful argument, he submitted that recent cases in this court have departed from the earlier principles which had been laid down to guide courts in coming to a conclusion whether a machine was dangerous or not, and that in every case the magistrate had to make up his mind on the whole of the evidence whether the machine was in fact dangerous, and that in each case it was a question of degree.

The first case on which he relied was *Hindle* v. *Birtwistle* (1), in which WILLS, J., said ([1897] 1 Q.B. 195):

> "It seems to me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger may be reasonably anticipated from the use of them without protection. No doubt it would be impossible to say that because an accident had happened once therefore the machinery was dangerous. On the other hand, it is equally out of the question to say that machinery cannot be dangerous unless it is so in the course of careful working. In considering whether machinery is dangerous, the contingency of carelessness on the part of the workman in charge of it, and the frequency with which that contingency is likely to arise, are matters that must be taken into consideration. It is entirely a question of degree."

R. S. WRIGHT, J., in concurring, also emphasised that it is a question of degree and of fact in all cases whether the tendency to fly out (it was a case of a flying shuttle) is a tendency to fly out often enough to satisfy a reasonable interpretation of the word "dangerous."

That case was expressly cited with approval in *Lauder* v. *Barr and Stroud* (2). The Court of Justiciary adopted exactly the same test, holding that it was a question of degree in each case. Accordingly, the law was laid down in the same way on both sides of the border. DU PARCQ, J., treated the matter in exactly the same way in *Walker* v. *Bletchley Flettons, Ltd.* (3) ([1937] 1 All E.R. 175, 6), where he said:

> ". . . . a part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act in circumstances which may be reasonably expected to occur . . . nobody expects human beings to be so extravagantly careless as to touch some part of the machine which it is not only not difficult to avoid, but which it is actually difficult to get near."

That seems to be very much the position in the present case, but that it is a question of fact is also clear from the decision of the Court of Appeal in *Higgins* v. *Harrison* (4), and that case is of particular value because it shows the considerations which a court should bear in mind, or, at least, some of them, when they have to decide when a machine is dangerous or not. The facts in *Higgins* v. *Harrison* (4), indeed, appear to me really to be indistinguishable from the present case. That was a case of a girl who put her hand into a machine while it was working. It is true that it was no part of her actual duty to do it. She had been told to clear up some capsules which she thought meant to clear up any that she could find anywhere, and seeing some in a machine which was in motion, she put her hand into it and suffered injury.

It is true that there is the distinction that in *Higgins*' case (4) the girl was not employed to work on the machine while in this case she was, but the girl was the servant of the employers and they owed a duty to her as an employee in a factory, and one of the duties that they owed was to fence dangerous parts of any machinery. SCRUTTON, L.J., said (25 B.W.C.C. 118):

> "The first question is, was the machine dangerous? I have looked A at the photographs; I have considered the way in which the girl usually worked the machine; I have considered the fact that on those four machines there had been no accident for sixteen years, although they were unfenced. I have considered the fact that the inspector of the government had frequently seen those machines and had never required them to be fenced, and I have come to the conclusion, having the same opportunity B of judging as the learned judge in the court below had . . . that that was not a dangerous machine. Of course it was dangerous if you went and put your hand into it; every machine is dangerous if you go and put your hand into it whilst it is working."

Later he said:

> C "She does not suggest that anybody told her to pick up that particular thing; the suggestion is that 'Nobody told me not to.' Nobody told her not to go and stand on her head in the middle of the machine, but it did not follow that, if she did so, the employer would be liable for negligence because he had not provided for that unexpected manoeuvre."

GREER, L.J.'s judgment was to the same effect. Now, it is perfectly true that D that judgment was given in a civil action and the case we are considering is a criminal prosecution, but where it is a case of the true construction of a section and of what in relation to a particular section it is necessary to prove to show a breach of the factory owner's obligations, in our opinion a judgment of the Court of Appeal is as binding on this court though we may be considering a criminal prosecution just as much as though we were trying a civil action. E To hold otherwise would be to make a serious inroad on the rule of *stare decisis* on which so much of English jurisprudence depends.

A good illustration of the second line of case to which counsel for the respondents referred is *Sutherland* v. *Executors of James Mills, Ltd.* (5). I think that case could well be supported on the ground that the facts were so overwhelming that it was difficult to see how any court could come to a F decision that the machine was not dangerous, but I am bound to say that I think some of the *dicta* in the case go beyond the decisions in the cases to which I have referred. Certainly the court refused to take into account certain matters which were considered as of importance by the court in *Higgins* v. *Harrison* (4), as, for instance, that no complaint had ever been made by a factory inspector. LORD HEWART, C.J., said ([1938] 1 All E.R. 285):

> G ". . . nor ought it to be necessary to point out that the burden is not shifted by the Factory and Workshop Act upon the factory inspector,"

and there have to my own knowledge been other cases, not all reported, in which the learned Lord Chief Justice refused to consider the fact that no complaint had ever been made by the factory inspector. That fact is, of course, H not conclusive, but, with all respect, it seems to be a point that ought to be taken into account, as indeed the Court of Appeal said in *Higgins* v. *Harrison* (4). After all, factory inspectors are not only trained experts, but are wholly independent officials. Their duty is to inspect factories and the machinery therein to see, among other things, that machines are adequately fenced. The fact that they have passed a machine not only once but on several occasions without comment or requiring anything to be done is at least some evidence that in the opinion of a duly qualified person no accident is reasonably likely to occur provided workpeople act in a way in which they may be reasonably expected to act.

Chasteney v. *Michael Nairn & Co., Ltd.* (6), was, again, a case in which there was no question that the machine was dangerous to workmen greasing it unless it was stopped. There was no sufficient fencing and the court held that merely to put up a notice saying that workmen were not to put their hands in the machinery while it was in motion was no answer in a case where the machine was undoubtedly dangerous and no one could really contend otherwise. In our opinion, it is important that we should re-affirm in no uncertain terms that in each case the magistrate is entitled to and must decide in the first place whether the machine or part of it is dangerous and that is a question of degree, and, therefore, of fact, in every case. The learned magistrate, who obviously bestowed considerable care on the case and inspected the machine for himself, has, as the case shows, taken into account all the matters which *Higgins* v. *Harrison* (4) said ought to be taken into account. He has in no way misdirected himself or considered matters which were immaterial or improper for arriving at a decision. To say, as counsel for the appellant was, I think, driven to say, that in these circumstances his decision was perverse is quite impossible. Indeed, I think I may say that, were we to come to a contrary decision to that at which he has arrived, it might well be said that the perversity is ours and not his. I am content to say that, in my opinion, this is a question of degree, and, therefore, of fact, that there was abundant evidence on which the magistrate could come to the conclusion at which he arrived, that he has not taken into account any facts which he ought not to have taken into account, and consequently this appeal should be dismissed.

OLIVER, J. : I agree, and I feel that I cannot usefully add a word to the judgment which has just been delivered.

STABLE, J. : I have had the opportunity of reading the judgment of the Lord Chief Justice with which I am in entire agreement. I wish to add a few words only to remove a possible ambiguity in the findings of the magistrate. The passages to which I refer are as follows:

> "(1) I was of opinion that the said machine was not a dangerous machine within the meaning of the said Act. (2) That the said machine was securely fenced within the meaning of the said Act."

The apparatus in question on the material date consisted of the hopper, the guard, and the rotating worm which my Lord has already described. As I understand it, the guard performed no function in the working of the machine and was there as a guard and nothing else. It appears to me that these findings may mean either that, even in the absence of the guard, the worm was not dangerous, or that the worm, situated as it was at the time of the accident beneath the guard, was not a dangerous part of the machine for the reason that though, without the guard, it would have been dangerous, the guard rendered it innocuous, or, in other words, a dangerous part of the machine was securely fenced.

To avoid any possible ambiguity in future cases, in my judgment, the proper approach where there is a machine with a guard is first to enquire whether in the absence of the guard any part of the machine could properly be described as dangerous. If the answer is "No," the adequacy or otherwise of the guard as a protection against a hypothetical but non-existent danger does not arise. It is only if the first question is answered in the affirmative that the second question arises, namely, Was the dangerous part securely fenced in accordance with the Act ? In the present case, if the magistrate had held that the worm in the absence of the guard was not dangerous, without expressing any concluded opinion on the point, I might have had some difficulty in supporting this finding. I do not think, however, that he intended to hold more than that the apparatus with the guard provided was safe in every part, or, in other words, that the dangerous part of the machine was securely fenced. If I am right in thinking that the latter is what he held, inasmuch as he applied, as my Lord has pointed out, the right tests and omitted none of the matters which he ought to have considered, for myself I should have been slow to interfere with his finding of fact. However, if it is within my province sitting in this court to say so, I go further and wish to express my entire agreement with it.

In expressing my conclusions I do not seek to detract in any way from the expressions of opinion in this and other courts emphasising the categorical nature of the duty and the high standard required. The Factories Act is there not merely to protect the careful, the vigilant, and the conscientious workman, but, human nature being what it is, also the careless, the indolent, the inadvertent, the weary, and even, perhaps, in some cases, the disobedient. The duty, as has been said, is not to fence "somewhat securely" but "securely," but there must be some limit placed on the word "securely," and a fence does not necessarily cease to be secure because by some act of perverted and deliberate ingenuity the guard can be forced or circumvented and the safeguards provided thereby rendered nugatory.

Appeal dismissed with costs.

Solicitors: *The Solicitor, Ministry of Labour and National Service* (for the appellant); *Aukin, Courts & Co.* (for the respondents).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Distinguished. ABBEY MALVERN WELLS LD. *v.* MIN. OF LOCAL GOVT. AND PLANNING [1951] 1 Ch. 728

OXFORD GROUP *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Tucker, Cohen and Singleton, L.JJ.), July 6, 7, 8, 28, 1949.]

Income Tax—Exemption—Charity—Oxford Group—"Advancement of Christian religion"—Support and development of group movement "in every way"—Income Tax Act, 1918 (*c.* 40), *s.* 37 (*a*) (*b*)—*Finance Act,* 1921 (*c.* 32), *s.* 30 (1) (*a*).

By s. 37 of the Income Tax Act, 1918, exemption from income tax is granted in respect of rents, interest, and other annual payments forming part of the income of a body of persons established for charitable purposes only, and by s. 30 (1) (*a*) of the Finance Act, 1921, exemption is granted in respect of lands owned and occupied by a charity.

The memorandum of association of the Oxford Group, a company limited by guarantee, set out the following as the objects of the company:— "3 (A) The advancement of the Christian religion, and, in particular, by the means and in accordance with the principles of the Oxford Group Movement, founded in or about the year 1921 by Frank Nathan Daniel Buchman. (B) The maintenance, support, development and assistance of the Oxford Group Movement in every way . . . (C) (9) To establish and support or aid in the establishment and support of any charitable or benevolent associations or institutions, and to subscribe or guarantee money for charitable or benevolent purposes in any way connected with the purposes of the association or calculated to further its objects. (10) To do all such other things as are incidental, or the association may think conducive, to the attainment of the above objects or any of them." The company sought exemption from income tax on the ground that it was a body of persons established for charitable purposes only. It was admitted by the Crown that, if object A of the objects clause of the company's memorandum of association stood alone, the company would be established for charitable purposes only.

Held : (i) the words in cl. 3 (B) of the memorandum of association, " the maintenance, support, development and assistance of the Oxford Group Movement in every way," extended beyond purely religious activities, permitted the company to engage in secular activities, and authorised the expenditure of its funds on matters which were not charitable, and, therefore, the company could not be said to be formed for charitable purposes only.

(ii) although a religious body might, without losing its religious character, engage in a number of subsidiary activities which were not purely religious, a trust which was so worded as to permit the expenditure of income by such a body in such subsidiary activities was not a good charitable trust.

(iii) the objects set forth in cl. 3 (C), paras. (9), (10), of the memorandum of association were not merely ancillary to the main objects expressed in sub-cll. (A) and (B), but themselves conferred powers on the company which were so wide that they could not be regarded as charitable.

[As to Charitable Purposes, see HALSBURY, Hailsham Edn., Vol. 4, pp. 111-127, paras. 147-168 ; and for Cases, see DIGEST, Vol. 8, pp. 241-265, Nos. *1-267*.]

Cases referred to :

(1) *Ellis* v. *Inland Revenue Comrs.*, (1949), decided July 27.

(2) *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Comrs.*, [1932] A.C. 650 ; 101 L.J.K.B. 459 ; 147 L.T. 161 ; 17 Tax Cas. 27 ; *affmg.* [1931] 2 K.B. 465 ; 100 L.J.K.B. 596 ; 145 L.T. 320 ; Digest Supp.

(3) *Re Thackrah*, [1939] 2 All E.R. 4 ; Digest Supp.

(4) *Chichester Diocesan Fund and Board of Finance* (*Incorporated*) v. *Simpson*, [1944] 2 All E.R. 60 ; [1944] A.C. 341 ; 113 L.J.Ch. 225 ; 171 L.T. 141 ; 2nd Digest Supp.

(5) *Farley* v. *Westminster Bank, Ltd.*, [1939] 3 All E.R. 491 ; [1939] A.C. 430 ; 108 L.J.Ch. 307 ; 161 L.T. 103 ; Digest Supp.

(6) *Re Amalgamated Syndicate*, [1897] 2 Ch. 600 ; 66 L.J.Ch. 783 ; 77 L.T. 431 ; 10 Digest 822, *5357*.

(7) *Cotman* v. *Brougham*, [1918] A.C. 514 ; 87 L.J.Ch. 379 ; 119 L.T. 162 ; 9 Digest 78, *286*.

(8) *Re Hood*, [1931] 1 Ch. 240 ; 100 L.J.Ch. 115 ; 143 L.T. 691 ; Digest Supp.

(9) *Dunne* v. *Byrne*, [1912] A.C. 407 ; 81 L.J.P.C. 202 ; 106 L.T. 394 ; 8 Digest 294, *718*.

(10) *Tennant Plays, Ltd.* v. *Inland Revenue Comrs.*, [1948] 1 All E.R. 506.

Appeal by the taxpayers from a decision of Croom-Johnson, J., dated Jan. 13, 1949, whereby he affirmed a decision of the Special Commissioners that the taxpayers' claim to exemption from income tax under s. 37 of the Income Tax Act, 1918, and s. 30 (1) (*a*) of the Finance Act, 1921, had been rightly refused by the Commissioners of Inland Revenue. The Court of Appeal dismissed the appeal.

Christie, K.C., and *N. C. Armitage* for the taxpayers.
Pennycuick, K.C., *J. H. Stamp* and *R. P. Hills* for the Crown.

Cur. adv. vult.

July 28. The following judgments were read.

TUCKER, L.J. : On Aug. 15, 1939, a company limited by guarantee called " The Oxford Group " was incorporated. In due course it applied to the Commissioners of Inland Revenue for exemption from income tax under s. 37 of the Income Tax Act, 1918, in respect of rents, interest and annual payments made under covenant and under s. 30 (1) (*a*) of the Finance Act, 1921, in respect of property owned and occupied by it. It is common ground that to obtain such exemption it was incumbent on the company to prove that it was a body of persons established for charitable purposes only. It is not disputed that, if it is such a body, its income was applied to such purposes only. The sole question for decision on this appeal is, therefore, whether, on the documents and oral evidence adduced before the Special Commissioners on the company's appeal from the refusal of the Commissioners of Inland Revenue to grant the exemption sought, it is proved that the company was established for charitable purposes only. The only charitable purpose relied on was the advancement of religion. The company's appeal was dismissed by the Special Commissioners whose decision was upheld by CROOM-JOHNSON, J. From this decision the company appeals to this court.

The question falls to be determined mainly, if not entirely, on the construction of the company's memorandum of association. Clauses 1, 2, and 3 (A) and (B) thereof read as follows:

> "(1) The name of the company (hereinafter called 'the Association') is 'The Oxford Group.' The association does not claim to possess any official connection with the University of Oxford or the Oxford Society. (2) The registered office of the association will be situate in England. (3) The objects for which the association is established are: (A) The advancement of the Christian religion, and, in particular, by the means and in accordance with the principles of the Oxford Group Movement, founded in or about the year 1921 by Frank Nathan Daniel Buchman. (B) The maintenance, support, development and assistance of the Oxford Group Movement in every way, and, in particular, (subject to the provisions of s. 14 of the Companies Act, 1929), by holding, administering and dealing with property, including all or any of the property which at the date of the incorporation of the association was held by trustees or nominees for the Oxford Group Movement."

It is conceded on behalf of the Crown that the object set out in cl. 3 (A) is a good charitable purpose. It is further common ground that the objects referred to in cl. 3 (A) and (B) are both "main" objects. There follow a number of other matters described as objects set out in cl. 3 (C) to which I need not refer at this stage.

It is, I think, clear that sub-cl. (B) of cl. 3 is designed to extend the objects beyond that contained in sub-cl. (A) and that the language employed has succeeded in doing so to a considerable degree. Before considering the effect of this sub-clause it will, perhaps, be convenient to set out what I understand to be the principles which we have to apply in such cases. The authorities on this matter and the kindred question of trusts for charitable purposes have recently been considered by this court in *Ellis* v. *Inland Revenue Comrs.* (1) and an analysis of them is to be found in our judgment in that case. I will, accordingly, content myself with stating what I conceive to be the principles to be deduced therefrom so far as material to the questions arising on this appeal. They are as follows: (i) The advancement of religion means the promotion of the spiritual teaching of a religious body and the maintenance of the spirit of the doctrines and observances on which it rests or in which it finds expression: see ROWLATT, J. (17 Tax Cas. 33), in *Keren Kayemeth Le Jisroel, Ltd.* v. *Inland Revenue Comrs.* (2), approved in the Court of Appeal. (ii) A religious body may, and usually does, engage in a number of subsidiary activities which are not purely religious, but it does not thereby lose its religious character and a trust in favour of such a body *simpliciter* is a good charitable trust, but the income can only be applied to those activities of the body which are purely religious. (iii) A trust which is so worded as to permit the income to be used by a religious body in activities which are not purely religious is not a good charitable trust. (iv) In the case of a company or other association, if the main object or objects are solely for the advancement of religion the mere fact that the company or association is given certain powers, even though described as objects which are purely ancillary to the main objects, will not prevent the company or association being regarded as a body formed for religious purposes only, but tax exemption will be confined to such parts of its income as are applied to its strictly religious activities. (v) Where one of the main objects of a company or association permits for its attainment of activities which are not purely religious then the company or association cannot be regarded for tax purposes as being a body formed for religious purposes only.

Applying these principles to this memorandum, it seems to me plain that the words "the maintenance, support, development and assistance of the Oxford Group Movement in every way" extend far beyond purely religious activities and permit or even require for their attainment activities which may be secular or political. For these reasons, assuming the "Oxford Group Movement"—as distinct from the company, "The Oxford Group"—to be a religious body whose aims and objects as shown by the documents and oral evidence are exclusively religious, none the less I think that sub-cl. (B) permits of the company engaging in purely secular activities in maintaining, supporting, developing and assisting this religious movement. I am, therefore, of opinion that the company with which we are concerned and which is known as "The Oxford Group" is not a body of persons formed for charitable purposes only, and that on this ground alone this appeal would fail. I have, however, had the advantage of reading the judgment which Cohen, L.J., is about to deliver, and I agree with him for the reasons he gives that para. (9) and (10) of sub-cl. (C) of cl. 3 of the memorandum produce the same result.

COHEN, L.J. : The question for decision on this appeal is whether the taxpayers, the Oxford Group, are entitled to exemption from income tax under s. 37 of the Income Tax Act, 1918, and s. 30 (1) (*a*) of the Finance Act, 1921. Section 37 provides, among other things, that exemption shall be granted from tax under sched. C in respect of any interest, annuities, dividends or shares of annuities, and from tax under sched. D in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trusts established for charitable purposes only and so far as the same are applied to charitable purposes only. Section 30 (1) (*a*) of the Finance Act, 1921, confers a similar exemption in respect of income tax under sched. A in respect of lands, tenements, hereditaments and heritages owned and occupied by a charity with a limitation not material to the case before us. The taxpayers were incorporated on Aug. 15, 1939, under the Companies Act, 1929, exemption having been granted from using the word "limited" as part of their name pursuant to s. 18 of the Act.

The question before us is whether, on the true construction of the memorandum of association, the taxpayers can be said to have been established for charitable purposes only. If this point is decided in their favour, it is not disputed that the income in question was applied for the purposes for which they were established. Clause 3 of the memorandum of association defines the objects of the taxpayers. The clause is sub-divided into three main sub-divisions, (A), (B) and (C). Sub-clauses (A) and (B) have already been read by Tucker, L.J. It is clear, and, indeed, it is not disputed, that the objects here stated were the principal objects of the association. Sub-clause (C) describes the third object as "the exercise of all or any of the following powers." Then follow ten paragraphs. Some of them are plainly ancillary to the main objects stated under sub-cll. (A) and (B). Thus, under para. (1) the association may accept any gift of property, whether subject to any special trust or not, for any one or more of the objects of the association. Again, para. (8) is the

ordinary investment clause enabling the moneys of the association not immediately required for its purpose to be invested in such investments, securities or property as might be thought fit, but so that moneys subject or representing property subject to the jurisdiction of the Chairty Commissioners for England and Wales should only be invested in such securities and with such sanction (if any) as may for the time being be prescribed by law. Indeed,
A I think it would be fair to say that, with the exception of paras. (3), (9) and (10), all the paragraphs of cl. 3 (C) might fairly be described as ancillary powers. Paragraphs (3), (9) and (10) give rise to more difficulties, and are in the following terms:

> "(3). To print and publish any newspapers, periodicals, books or leaflets that the association may think desirable for the promotion of its objects.
> B (9). To establish and support or aid in the establishment and support of any charitable or benevolent associations or institutions, and to subscribe or guarantee money for charitable or benevolent purposes in any way connected with the purposes of the association or calculated to further its objects. (10). To do all such other things as are incidental, or the association may think conducive, to the attainment of the above objects
> C or any of them."

Then follow two provisos which are not, I think, material to the point we have to decide. Clause 4 provides that the income and property of the association whencesoever derived should be applied solely towards the promotion of the objects of the association as set forth in the memorandum of association. I
D do not think that anything turns on this clause as, whatever the word "objects" may refer to in cl. 3, in cl. 4 it clearly refers to all the objects of the association, including the exercise of the powers contained in cl. 3 (C). The only other provision of the memorandum of association that requires mention is cl. 9, which deals with what is to happen to the property of the association in the event of its winding-up and dissolution. Under that clause the property has
E to be transferred to some other institution or institutions having objects similar to the objects of the association and prohibiting in like manner the distribution of its income or property among its members, the institution or institutions to be determined by the members of the association at or before the time of dissolution, or, in default thereof, by a judge of the High Court of Justice having jurisdiction in regard to charitable funds. The clause ends
F with a provision that, if and so far as effect cannot be given to the previous provision in the clause, then the property is to go to some charitable object.

It will be observed that it is impossible to ascertain exactly what are the main objects of the association without enquiring into the means and principles of the Oxford Group Movement founded in or about the year 1921 by Dr. Buchman. The question whether that movement was charitable or not had
G arisen in 1939 when BENNETT, J., had to determine in *Re Thackrah* (3) whether a bequest to the secretary or other proper officer of the Oxford Group was a valid bequest. BENNETT, J., held that the bequest was invalid, and the commissioners regarded themselves as bound by the judge's conclusion in that case to find that the association was not established for charitable purposes only within the meaning of the Revenue Acts. When the matter came before
H CROOM-JOHNSON, J., he pointed out, and I respectfully agree with him, that the commissioners were wrong in holding that they were bound by BENNETT, J.'s decision as to the unincorporated body to reach a conclusion adverse to the association, an incorporated body. He said, and I adopt his words:

> "I think that BENNETT, J., was really concerned with a rather different problem, namely, as to whether there was really and truly in existence any such body as specified in the testatrix's will—with other questions—and neither the Crown nor the present association was before the court

> or were parties to the decision. It is true that some observations of Bennett, J., were directed to the question whether the aim of the association could be regarded as directed towards the promotion of religion, but there was nothing in his decision which bound the Special Commissioners in the present case."

Croom-Johnson, J., however, affirmed the decision of the Special Commissioners on other grounds. He was not troubled, nor are we, over the construction of A cl. 3 (A), since it was common ground between the parties that, if (A) were the sole object of the association, it would be a trust for the advancement of religion, and, therefore, clearly charitable. As regards sub-cl. (B), the learned judge refers to the words, " the maintenance, support, development and assistance of the Oxford Group Movement in every way," and points out that these words—and I entirely agree with him—are very vague, and that the expression B " in every way " would enable the association to do almost anything they liked. He thought that they were so vague that it was impossible to say that the association was confined to means which related only to the advancement of the Christian religion. He did not, however, decide the case on that footing. He based his decision on paras. (9) and (10) of cl. 3 (C). As regards para. (9) he pointed to the decision in *Chichester Diocesan Fund and Board of Finance* C (*Incorporated*) v. *Simpson* (4), where a distinction was made between those objects which are charitable and those objects which are benevolent, the latter being held to be non-charitable. He pointed out that in para. (10) the door was pushed wide open for the association to do things which could not by any stretch of imagination be regarded as charitable, and he came to the conclusion that there was nothing in the paragraphs in question which justified any D finding that they were only ancillary to the main objects.

I have come to the conclusion that Croom-Johnson, J., was right in his conclusion based on the sub-clauses to which I have just referred, but as both points were fully argued before us I think it is right that I should express my conclusions on the construction and effect of sub-cl. (B) as well as on sub-cl. (C) of cl. 3 of the memorandum of association. To make my meaning clear I must E first point out that, while under sub-cl. (A) only those principles of the Oxford Group Movement can be applied and only those means of that movement can be used which tend to the advancement of the Christian religion, under sub-cl. (B), the association is authorised to maintain, support, develop and assist the Oxford Group Movement in every way. To appreciate the full extent of sub-cl. (B) it will be necessary to look at the evidence relating to that movement to see F whether or not it comprises any other objects than the advancement of the Christian religion.

It will be convenient, however, before turning to the evidence, to state what I understand as being the charitable object of " the advancement of religion." For that purpose I am content to base myself on some observations made in the court below and in this court in the leading case of *Keren Kayemeth Le* G *Jisroel, Ltd.* v. *Inland Revenue Comrs.* (2). In that case the main object of the association was stated to be " to purchase, take on lease or to exchange or otherwise acquire any land, forests, rights of possession and other rights, easements and other immovable property in . . . Palestine, Syria, or other parts of Turkey in Asia and the Peninsula of Sinai for the purpose of settling Jews on such lands." Then followed twenty-one specified objects and powers which H included, among other things, a power to acquire, construct and manage tramways, railways, etc., and to purchase and sell, work and develop mines and mining rights, but all the twenty-one such objects and powers were stated to be subject to a proviso that they were to be exercised only in such a way as should, in the opinion of the association, be conducive to the attainment of its primary object. Counsel sought to satisfy the court that since, as he said, the restoration of the Jews to Palestine was a religious object among the Jews and that was the main object of Keren Kayemeth, that association was established for charitable purposes only. Rowlatt, J., in the lower court had rejected that argument, saying (17 Tax Cas. 33):

> " . . . the promotion of religion means the promotion of the spiritual teaching of the religious body concerned and the maintenance of the spirit of the doctrines and observances . . . if a religion enjoins the pursuit of some ulterior aim in itself secular that is not the promotion of religion."

This court affirmed his decision, Lord Hanworth, M.R., saying ([1931] 2 K.B. 477):

> " It is sufficient to say that as to ' religion,' I agree with the observations of Rowlatt, J., on that head. The promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it—not merely a foundation or cause to which it can be related."

With this definition in mind, and remembering that we are concerned, not with what the association, or, indeed, the Oxford Group Movement, has done in the past, but with what the association is authorised by its memorandum to do, it seems to me inevitably to follow that sub-cl. (B) of cl. 3 authorises the expenditure of the funds of the association on activities which are not charitable. As my Lord has pointed out, a religious body may, without losing its religious character, engage in a number of subsidiary activities which are not purely religious, but a trust which permits the expenditure of income on such subsidiary activities is not a good charitable trust. In the present case, assuming the Oxford Group Movement to have been and to be a religious movement, it seems plain that sub-cl. (B) authorises the application of the association's income in furthering subsidiary activities not in themselves charitable, the pursuit of which would assist the Oxford Group Movement. I, therefore, agree with my Lord that it cannot be said that the association is a body of persons formed for charitable purposes only.

Having reached this conclusion it is unnecessary for me to review the evidence in detail or to express a concluded opinion on the question whether the Oxford Group Movement was itself a movement whose sole purpose was the advancement of religion. I must, however, say that the argument of counsel for the respondents that it was really a social movement founded on Christian ethics rather than a movement for the advancement of religion derives some support from the evidence. I would refer, in particular, to (i) the statement of the founder made in 1934, which is set out at the beginning of Mr. Thornton-Duesbery's pamphlet The Oxford Group—a brief account of its principles and growth ; (ii) to the account at p. 24 of that pamphlet of the " You can defend America Programme " ; (iii) to the account of the work done by its workers in solving strikes and industrial problems in America, which appears on p. 120 of Mr. Peter Howard's book Innocent Men ; and (iv) to the evidence given by Mr. Thornton-Duesbery and others as to the conferences the group hold to discuss industrial problems. Before parting with this branch of the case I would add that I derive some support for my conclusion from the observations of Lord Atkin in *Farley* v. *Westminster Bank, Ltd.* (5). In that case the question was as to the validity of a gift in a will to the vicars of two specified parishes for parish work. Their Lordships held the gift to be invalid, Lord Atkin saying ([1939] 3 All E.R. 492) in relation to the words " for parish work " :

> " They are words of definition, it is quite true, but I think that they were used for the very purpose of defining what the testatrix meant as the purpose for which the money was to be applied, and ' parish work ' seems to me to be of such vague import as to go far beyond the ordinary meaning

> of charity, in this case in the sense of being a religious purpose. The expression covers the whole of the ordinary activities of the parish, some of which no doubt fall within the definition of religious purposes, and all of which no doubt are religious from the point of view of the person who is responsible for the spiritual care of the parish, in the sense that they are conducive, perhaps, to the moral and spiritual good of his congregation. However, that, I think, quite plainly is not enough ; and the words are A so wide that I am afraid that on no construction can they be brought within the limited meaning of ' charitable ' as used in the law."

Even if I had come to a different conclusion on this part of the case, I should have been of the opinion that Croom-Johnson, J., was right when he held that the objects set forth in paras. (9) and (10) were not merely ancillary to the main objects expressed in sub-cl. (A) and (B) of cl. 3 of the memorandum B of association.

Counsel for the appellants relied, in the main, on the substratum cases, for example, *Re Amalgamated Syndicate* (6). He said that where, as here, you have got no such provision as was found in *Cotman* v. *Brougham* (7), making each sub-clause of the objects clause a separate and independent main object, you must, when you have found the main object, construe the remainder as C ancillary thereto. Now, that may be true if you get no guidance from the various clauses themselves, but I think counsel for the Crown was right when he said that, although sub-cl. (C) is expressed to be only a collection of powers, the extent to which they must be construed as subsidiary to the main objects under sub-cll. (A) and (B) is defined in the sub-clauses themselves.

When I turn to para. (9) of sub-cl. (C) I find, first of all, that this paragraph D authorises the establishment and support of benevolent associations or institutions and the subscription of money for benevolent purposes. *Prima facie* this is not a charitable object, but it is said that the benevolent purposes must be connected with the purposes of the association and calculated to further its objects, and that, therefore, although *prima facie* non-charitable, it is ancillary to a charitable object and thus itself charitable. In this connection E counsel for the appellants relied on some observations of Lawrence, L.J., in *Re Hood* (8). In that case a testator, after reciting his belief in the universality of the Christian religion and that the remedy for all unrest and disorders of the body politic would be found in the application of Christian principles to all human relationships and also his belief that the drink traffic was one of the most subtle forces preventing the application of Christian principles, F declared it to be his wish that his estate and the income thereof should be applied in spreading the Christian principles before mentioned and in aiding all active steps to minimise and extinguish the drink traffic. This court held that the extinction of the drink traffic was in itself a charitable object, but Lawrence, L.J., said ([1931] 1 Ch. 252) that, even if he had taken a contrary view as to the drink traffic, he would think that the judge was right in holding G that the extinction of the drink traffic was not an independent additional object, but was merely introduced by the testator to point out one of the ways by which his main object could be attained and the trustees were only authorised to spend money in minimising and extinguishing the drink traffic in so far as they were thereby furthering the main purpose of the bequest which was the advancement of religion. I feel, however, a difficulty in reaching H a similar conclusion here, for the power given to apply money for benevolent purposes is not confined to benevolent purposes which further the advancement of religion, but to benevolent purposes in any way connected with the main object. I think an institution could be connected with the advancement of religion without being itself an institution for the advancement of religion.

Then, again, under para. (10) of sub-cl. (C), the association is empowered to do, not merely things which are incidental or conducive to the attainment of the main object, but also such things as the association may think conducive to it. In other words, the question which the court would have to decide, if any activity of the association was being challenged as being *ultra vires*, would be not whether, in the opinion of the court, the activity was conducive to the main object, but whether the association, in undertaking it, had thought it conducive. It seems to me that in this case the observations of Lawrence, L.J., in the *Keren Kayemeth* case (2), are directly in point. He said ([1931] 2 K.B. 482):

> "The company can exercise any or all of these powers whenever in its opinion such an exercise would be conducive to the attainment of the so-called primary object, which from a practical point of view means that it can exercise them whenever it is minded to do so, and whether such exercise is in fact conducive to the attainment of that object or not, as neither the court nor anyone else can control the company's opinion or otherwise interfere with the manner in which it chooses to carry out its objects. It would be difficult in any case to determine whether any particular enterprise undertaken by the company under its wide powers was or was not in fact conducive to the attainment of the primary object, but when the question whether it is or is not so conducive is left to the decision of the company itself I cannot avoid the conclusion that the objects mentioned in sub-cll. 2 to 22 can be carried out by the company just as freely as the object mentioned in sub-cl. 1, and that there is no substantial difference in degree between them."

The decision of the Privy Council in *Dunne* v. *Bryne* (9) reinforces my opinion that the inclusion of para. (10) of sub-cl. (C) makes it impossible to hold that the association was established for charitable purposes only. In that case a testator had bequeathed a legacy "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese." The Board held the gift to be invalid. Lord Macnaghten, in giving the opinion of the Board, said ([1912] A.C. 410):

> "It can hardly be disputed that a thing may be 'conducive', and in particular circumstances 'most conducive', to the good of religion in a particular diocese or in a particular district without being charitable in the sense which the court attaches to the word, and indeed without being in itself in any sense religious."

Counsel for the appellants relied in particular on a passage from Lord Tomlin's speech in the *Keren Kayemeth* case (2) where he said ([1932] A.C. 658):

> "But, whether that be well founded or not, there are other reasons why it seems to me the argument must fail. There are a great number of objects in this memorandum. They are all expressed to be ancillary to the main object, and I well appreciate the argument which says that if you once find that the main object is charitable you cannot destroy the charitable character of the main object, because the ancillary powers, which are incidental to it, are, some of them, in themselves, not charitable. That argument may indeed be well founded, but when the question is whether the primary object is itself charitable, it is legitimate, in reaching a conclusion upon that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable."

I do not, however, understand the learned Lord to be laying down any general principle that, because you come to a conclusion that an object specified in one or more of the earlier sub-clauses is the primary object of the association, you are, therefore, bound to hold that the remaining objects are merely incidental. I think Lord Tomlin would have agreed with me when I said in *Tennant Plays, Ltd.* v. *Inland Revenue Comrs.* (10) that it is a matter of construction in each case. I think Lord Tomlin's observations were primarily directed to such powers as are contained in paras. (1), (2), (4), (5), (6), (7) and (8) of sub-cl. (C) of cl. 3 of the memorandum of association in this case, and I am unable to hold that such wide powers as are given in paras. (9) and (10) of sub-cl. (C) are merely ancillary to the main objects specified in sub-cll. (A) and (B). For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Bircham & Co.* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

Distinguished. The Abbey, Malvern Wells, Ltd. *v.* Min. of T. and C. Planning. [1951] 2 All E.R. 154.

Re GARTSIDE. COOTE AND EYRE-KAYE *v.* LEES AND OTHERS.

[Chancery Court of the County Palatine of Lancaster (The Vice-Chancellor, Sir Leonard Stone), July 25, 26, 1949.]

Charity—Hospital—Gift of share of residue—Estate fully administered—Right to require transfer of funds—National Health Service Act, 1946 (c. 81), *s.* 60 (1), *s.* 79 (1).

On Dec. 18, 1901, the testator made a settlement on his daughter, B.G. and her issue, and it was declared that, if there should be no child or grandchild of the said B.G. who should attain a vested interest under the trusts therein declared, the trustees should stand possessed of the settlement funds upon trust for the testator, his executors or administrators. By his will, dated Feb. 17, 1904, the testator, who died on Nov. 12, 1906, after giving certain legacies, devised and bequeathed his real and personal estate to his trustees upon trust, after making provision for his wife, for his three daughters, M.A.W., E.A.C. and B.G., in equal shares and each share was settled. By cl. 21: "In case my said daughter B.G. shall die without having been married . . . my trustees shall stand possessed of her said share . . . and the income thereof or so much as shall not have been applied or disposed of . . . as to one equal half part of such share in trust for Owen's College Incorporated . . . and as to the other equal half part of such share in trust as to one third part thereof for the Manchester Children's Hospital Pendlebury Manchester as to one other third part thereof for the St. Mary's Hospital Oxford Road Manchester to be applicable in each case for the general purposes of such institutions" and as to the remaining one third part thereof to apply the same for providing public parks and recreation grounds within a prescribed area. The testator further declared that, in the event of the failure of all or any of the provisions of his will, the trustees should hold the property undisposed of in trust for Owen's College Incorporated. The testator's wife died on Mar. 29, 1910. B.G. died on Sept. 3, 1946, without having been married, and the settlement funds thereupon became part of the testator's residuary trust estate.

By pt. II of the National Health Service Act, 1946, which came into force on July 5, 1948, the Manchester Children's Hospital and St. Mary's Hospital became subject to the Act. The Manchester Children's Hospital was not designated as a teaching hospital and the Salford Hospital Management Committee (Group No. 12) was constituted to exercise functions with respect to the administration of hospitals in the area in which the Manchester Children's Hospital was situated. St. Mary's Hospital was designated as a teaching hospital and from July 5, 1948, its affairs were conducted by a board of governors. By s. 60 (1) of the Act : " Where property, other than property transferred to the Minister or to the board of governors of a teaching hospital or to a hospital management committee under s. 6 or s. 7 of this Act, is held on trust immediately before the appointed day, and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose of making payments, whether of capital or income—(*a*) in the case of a hospital designated as a teaching hospital or included in a group of hospitals so designated, to the board of governors of that teaching hospital ; (*b*) in the case of any other hospital, to the regional hospital board for the area in which the hospital is situated or to the hospital management committee for the hospital or for the group of hospitals in which it is comprised." By s. 79 (1) unless the context otherwise requires " property " includes rights.

On the death of B.G., the settlement trustees and the will trustees were the same persons, and, therefore, no transfer of the settlement funds had been made before July 5, 1948. It was contended by the committee and the board that the trustees were required to apply the capital and income of two one-sixth shares in the settled share of B.G. in the residuary trust estate and of two one-sixth shares in one-third of the settlement funds in making payments to the committee and the board respectively under s. 60 (1) of the Act. For the Attorney-General of the Duchy of Lancaster it was contended that the shares given to the two hospitals failed, and that, at any rate, s. 60 (1) of the Act did not apply to the shares in the settlement funds because on July 5, 1948, the settlement trustees held these funds on trust to pay them to the will trustees only.

HELD : the right of the will trustees to receive from the settlement trustees the whole of the settlement fund was a right which the will trustees could enforce by action to execute the trusts ; that right was " property " within s. 60 (1) ; the terms of the will required the trustees to apply the capital and income of the shares specified to the hospitals named, and, therefore, under s. 60 (1) two one-sixth shares in B.G.'s one-third settled share in the testator's residuary trust estate should be applied in making payments to the committee and the board, which were to apply the same, so far as practicable, for the general purposes of the Manchester Children's Hospital and St. Mary's Hospital respectively.

Re Kellner's Will Trusts ([1949] 2 All E.R. 43 ; [1949] Ch. 509 ; [1949] L.J.R. 1137), *distinguished.*

[FOR THE NATIONAL HEALTH SERVICE ACT, 1946, see HALSBURY'S STATUTES, Vol. 39, p. 515.]

Case referred to:

(1) *Re Kellner's Will Trusts, Blundell* v. *Royal Cancer Hospitals and Others*, [1949] 2 All E.R. 43 ; 1949 W.N. 255.

PETITION to determine *inter alia* whether, on the true construction of the will of the testator and of the National Health Service Act, 1946, and in the events which happened, the shares in the residuary trust estate of the testator given to the Manchester Children's Hospital and St. Mary's Hospital were payable (i) to the committee and the board respectively, or (ii) to His Majesty in right of his Duchy of Lancaster, or (iii) to Owen's College Incorporated or (iv) how otherwise the same ought to be dealt with.

Forrester for the plaintiffs (trustees of the will).

Ferns for the Salford Hospital Management Committee and the Board of Governors of St. Mary's Hospital.

Gandy, *George Maddocks*, *P. Ingress Bell* and *H. C. Easton* for other parties interested under the will.

R. C. Seddon for the Attorney-General of the Duchy of Lancaster and the King's Attorney and Serjeant within the County Palatine of Lancaster.

SIR LEONARD STONE, V.-C. : On Sept. 3, 1946, Beatrice Gartside died without ever having been married, and, as a result, her one-third share in the residuary trust estate of her father, John Henry Gartside, who died on Nov. 12, 1906, became divisible among certain charities. The will of the testator is dated Feb. 17, 1904, and it is cl. 21 which is material in the events which have happened:

> "Clause 21 : In case my said daughter Beatrice Gartside shall die without having been married or if the trusts hereinbefore declared concerning her share in my residuary trust estate shall fail in manner hereinbefore mentioned concerning the shares of my other two daughters then and in such case my trustees shall stand possessed of her said share as well as any share or shares accruing or added thereto by virtue of the last preceding paragraph hereof and the income thereof or so much as shall not have been applied or disposed of under the trusts or powers herein contained or by law vested in my trustees as to one equal half part of such share in trust for the Owen's College Incorporated by the Owen's Extension College Manchester Act, 1870, and the Owen's College Act, 1871, to be applied by the governors of the said college in manner directed by the said Acts concerning donations accepted by the governors And as to the other equal half part of such share in trust as to one third part thereof for the Manchester Children's Hospital Pendlebury Manchester as to one other third part thereof for the St. Mary's Hospital Oxford Road Manchester to be applicable in each case for the general purposes of such institutions."

As to the remaining one third part thereof the testator directed that the same should be applied for providing public parks, recreation grounds and other open spaces as therein mentioned. I should also refer to cl. 22 which declares:

> " . . . if all and every or any of the provisions of this my will shall at any time fail so that there would be an intestacy as to my estate or to any portion thereof then such estate or such portion thereof as to which but for this present provision there would be an intestacy shall be held by my trustees in trust for the Owen's College Manchester to be applied by the governors of the said college in manner directed by the aforesaid Acts relating thereto concerning donations accepted by the governors and I declare that the receipt of the treasurer or other proper officer for the time being of any institution interested under this my will shall be a sufficient discharge to my trustees in respect of the sum of money so paid to them by my trustees."

The testator's estate was a large one, and consisted of many investments, some of which were very difficult to dispose of, and this resulted in an administration order being made by this court on Mar. 21, 1907.

By a settlement dated Dec. 18, 1901, made by the testator in favour of his said daughter and her issue it was declared that, if there should be no child or grandchild of his said daughter who should attain a vested interest, the trustees should stand possessed of the trust funds upon trust for the testator, his executors or administrators, so that on Sept. 3, 1946, the settlement funds became part of the testator's residuary trust fund and divided into three equal parts, one of such parts being subject to the same trusts as Beatrice A Gartside's share in the testator's residuary trust estate. There can be no doubt that the testator's estate has long since been administered and that the office of executor has ceased. In fact, new trustees have from time to time been appointed. That was the state of affairs on July 5, 1948, the appointed day within the meaning of the National Health Service Act, 1946, and the first question I have to determine is what happens to the two one-B sixth shares of Beatrice Gartside's settled share in the residuary trust estate which are held in trust for the Manchester Children's Hospital, Pendlebury, Manchester, and for St. Mary's Hospital, Oxford Road, Manchester. Both these hospitals on July 5, 1948, became subject to s. 6 of the Act, *i.e.*, there was transferred to the Minister:

> " . . . all rights and liabilities to which any such governing body or C trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section."

D The Manchester Children's Hospital is not a teaching hospital within the meaning of the Act and it is controlled by a committee of management. On the other hand, St. Mary's Hospital is a teaching hospital, and is, therefore, controlled by a board of governors. No one suggests that s. 7, which deals with the endowments of voluntary hospitals, has anything to do with this E case, and the question centres around s. 60 (1) of the Act which, omitting a parenthetical exception not material to this case, is as follows:

> " Where property . . . is held on trust immediately before the appointed day, and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or F income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purposes of making payments, whether of capital or income—(*a*) in the case of a hospital designated as a teaching hospital or included in a group of G hospitals so designated, to the board of governors of that teaching hospital ; (*b*) in the case of any other hospital, to the regional hospital board for the area in which the hospital is situated or to the hospital management committee for the hospital or for the group of hospitals in which it is comprised."

Section 79, which is a definition clause and applies " unless the context other-H wise requires," defines " property " as including rights.

I ask myself the question whether the trustees of the testator's residuary trust estate held property, including rights, on trust immediately before July 5, 1948, and the terms of the trust instrument (the testator's will) required the trustees to apply any part of the capital or income of the trust property for the purposes of any hospital, and I feel no difficulty in giving an affirmative answer. The investments in the hands of the will trustees representing Beatrice Gartside's one-third share in the residuary trust funds are clearly property.

Nor should I have felt any difficulty with regard to the funds subject to the 1901 settlement which must be paid over by the settlement trustees to the will trustees. In fact, they are the same persons, but that is accidental and cannot affect the matter. On July 5, 1948, the will trustees had a right to receive the settlement funds and that right was held by them subject to the trusts of the testator's residuary trust estate.

Counsel for the Attorney-General of the Duchy of Lancaster and the King's Attorney and Serjeant within the County Palatine of Lancaster relies, however, on the recent decision of Harman, J., in *Re Kellner's Will Trusts* (1), and I have been provided with a shorthand transcript of the learned judge's judgment. The facts in that case were that the testatrix, who made her will on June 18, 1948, and died five days later, bequeathed a number of pecuniary legacies and devised and bequeathed all the rest of her property to her trustee on the statutory trusts for realisation and directed him to stand possessed of her residuary estate on trust to divide it equally between eight well-known charitable institutions, two parts going respectively to the Cancer Research Institute and the Royal Cancer Hospital (Free), Fulham Road. Probate of the will was not obtained until after the appointed day so that immediately before the appointed day there were not only no trustees who held property on any trusts but administration of the estate had not even commenced, and the learned judge, after referring to the definition of "property" in s. 79, said (p. 48, *ante*):

> "Now the rights of the residuary legatees are rights to have the estate of the testatrix administered according to law, either by the personal representatives or by the court, and on completion of the administration to have the balance remaining in the executor's hands distributed in due proportions. The residuary legatees, while the estate remains undistributed, have no right to any particular asset or item of property, but merely an equitable interest in the estate of the nature I have mentioned."

He goes on to hold that neither s. 7 of the Act, which deals with endowments, nor s. 6, which deals with certain limited interests, had any application. Turning to s. 60 he says (*ibid.*, 49) :

> "The context of this section requires that the word 'property' should not here include rights, for that which is dealt with is something to be applied for the benefit of (among others) a board of governors. The rights vested in the board of governors here cannot be applied by someone else for their benefit. In this section, therefore, the expression 'the trust property' means the residue of the estate, and the question is whether the terms of the trust instrument (*i.e.*, the will) require the trustees (*i.e.*, the plaintiff) to apply a part of the capital for the purposes of the Cancer Hospital. In my judgment, this language is wholly inappropriate, and the section has nothing to do with the case."

I do not read that passage as laying down any general proposition. Harman, J., was dealing with an unadministered estate, and, in view of what he had already said with regard to the rights of residuary legatees in an unadministered estate, I am forced to the conclusion that it was those rights which he held to be excluded by the context from the definition of "property" in s. 79. If it be not so, I should, with the greatest deference to the learned judge, feel unable to follow the reasoning founded on finding within s. 60 a context which excludes all rights. But the position in the case before me is very different. The right of the will trustees to receive from the settlement trustees, subject only to the retention of their costs, charges and expenses, the whole of the settlement funds is a right which the will trustees could enforce by action to execute the settlement trusts. In my judgment, s. 60

is to be read from the point of view of the trustees. I think this is demonstrated by the terms of the section itself : " . . . where property is held on trust . . . and the terms of the trust instrument . . . require the trustees . . . to apply any part of the capital or income of the trust property "—and, I add, including rights—" for the purposes of any hospital . . ."

I shall, therefore, declare that, according to the true construction of the testator's will and in the events which have happened, a one-sixth share of Beatrice Gartside's one-third settled share in the testator's residuary trust estate shall be applied in making payments to the respondent committee who have been constituted to exercise the functions with regard to the administration of hospitals in the area in which the Manchester Children's Hospital is situated and that the other one-sixth share shall be applied for the purpose of making payments to the respondent board of governors constituted to exercise functions with respect to the group of hospitals which include St. Mary's Hospital. The respondent committee and the respondent board of governors are, so far as may be practicable, to apply any sums paid to them for the general purposes of the Manchester Children's Hospital and St. Mary's Hospital respectively.

Order accordingly.

Solicitors : *Boote, Edgar & Co.*, Manchester (for the plaintiffs) ; *Sale, Lingards & Co.*, Manchester (for Manchester Children's Hospital) ; *A. & G. W. Fox*, Manchester (for St. Mary's Hospital) ; *Lawson, Coppock & Hart*, Manchester, agents for *Jackson & Sons*, Fordingbridge, *Costeker, Smitton & Co.*, Blackburn, and *Brett, Ackerley & Cooke*, Manchester (for other parties interested under the will) ; *Grover, Smith & Moss*, Manchester (for the Attorney-General of the Duchy of Lancaster).

[*Reported by* JAMES FITZHUGH, ESQ., *Barrister-at-Law.*]

Re DAVIDSON (*deceased*). NATIONAL PROVINCIAL BANK, LTD. *v.* DAVIDSON.

[CHANCERY DIVISION (Roxburgh, J.), July 27, 1949.]

Will—" Grandchildren "—Application of term to named persons not grandchildren.

In 1906 the testatrix married J.D., the former husband of her deceased sister who was survived by a son J.F.D. (a child of her marriage with J.D.), born in 1901. Of the testatrix's marriage with J.D. there was one child only, a daughter K.N.D. J.F.D. married E.M.D., and in the lifetime of the testatrix there were born two children of the marriage, N.M.D. and D.J.D. The testatrix's daughter K.N.D. remained a spinster. By her will, the testatrix provided : " (*a*) To my son J.F.D. the two large silver trophy cups . . . (*b*) To my grand-daughter N.M.D. my diamond ring with three large stones . . . (*c*) To my daughter-in-law E.M.D. my diamond ring with eight diamonds in it. I give and bequeath [certain property] on trust to pay the income . . . unto my said son J.F.D. during his life and from and after his death the . . . investments shall fall into . . . my residuary estate. I devise and bequeath all and singular my real and personal estate whatsoever and wheresoever not . . . otherwise specifically disposed of . . . on trust for such of my grandchildren as shall be living at my death and attain the age of 21 years or previously marry and if more than one in equal shares absolutely." The testatrix had no lawful grandchildren, and the question arose as to the construction of the residuary gift.

Held: the matter must be decided by reference to the language and context of the will and the consideration of the whole instrument; on the construction of the will as a whole the testatrix had chosen to use the word "grandchildren" in a sense peculiar to herself, but she had clearly indicated in her will that she employed it in reference to N.M.D. and D.J.D.; and, therefore, they were entitled under the residuary gift.

Dictum of Swinfen Eady, J., in *Re Cozens* ([1903] 1 Ch. 142), *applied.*

Smith v. *Lidiard* (1857) (3 K. & J. 252), *Wells* v. *Wells* (1874) (L.R. 18 Eq. 504), and *Re Winn* (1916) (86 L.J.Ch. 124), *not applied.*

[As to Description by Relationship, see HALSBURY, Hailsham Edn., Vol. 34, pp. 296-298, para. 348; and for Cases, see DIGEST, Vol. 44, pp. 807-826, Nos. *6603-6781.*]

Cases referred to:

(1) *Re Cozens,* [1903] 1 Ch. 138; 72 L.J.Ch. 39; 87 L.T. 581; 44 Digest 823, *6739.*

(2) *Smith* v. *Lidiard,* (1857), 3 K. & J. 252; 44 Digest 822, *6729.*

(3) *Wells* v. *Wells,* (1874), L.R. 18 Eq. 504; 43 L.J.Ch. 681; 31 L.T. 16; 44 Digest 823, *6736.*

(4) *Merrill* v. *Morton,* (1881), 17 Ch.D. 382; 50 L.J.Ch. 249; 43 L.T. 750; 44 Digest 823, *6737.*

(5) *Seale-Hayne* v. *Jodrell,* [1891] A.C. 304; 61 L.J.Ch. 70; 65 L.T. 57; *affg. Re Jodrell,* (1890), 44 Ch.D. 590; 59 L.J.Ch. 538; 63 L.T. 15; 44 Digest 821, *6720.*

(6) *Re Gue,* (1892), 61 L.J.Ch. 510; 67 L.T. 823; 44 Digest 823, *6738.*

(7) *Re Green,* [1914] 1 Ch. 134; 83 L.J.Ch. 248; 110 L.T. 58; 44 Digest 823, *6740.*

(8) *Re Winn,* (1916), 86 L.J.Ch. 124; 115 L.T. 698; [1916] W.N. 366; 44 Digest 823, *6741.*

Adjourned Summons to determine whether, on the true construction of the will of the testatrix, a gift of residuary estate to "my grandchildren" was effective to pass the benefit thereof to the children of the son of the husband of the testatrix by a former wife. The testatrix had no lawful grandchildren. Roxburgh, J., held that the gift was so effective. The facts appear in the judgment and are summarised in the headnote.

F. B. Alcock for the plaintiff bank, trustee of the will of the testatrix.

Peter Foster for the first and second defendants, John Foster Davidson and Nora Margaret Davidson, the son and the granddaughter of the husband of the testatrix.

R. J. S. Thompson for the third defendant, Donald John Davidson, the grandson of the husband of the testatrix.

L. R. Norris for the fourth defendant, Kathleen Nora Davidson, the daughter of the testatrix.

ROXBURGH, J.: The testatrix anticipated by a year or so the enactment of legislation enabling persons to marry their deceased wives' sisters. Though domiciled in England, she went to Sweden in 1906 and there married one John Davidson. John Davidson had previously married the sister of the testatrix, and this sister had died on Feb. 14, 1902. Accordingly, the testatrix was John Davidson's deceased wife's sister. It seems almost certain that the legislation passed in 1907 validated that marriage, but in the circumstances that question is immaterial.

John Davidson had already had a child by the testatrix's sister then deceased, whose name was John Foster Davidson. He was aged about five years at the time of the marriage in 1906 and there was evidence that John Foster Davidson informed Mr. Stephens, manager of the Bournemouth branch of the trustee department of the plaintiff bank, that the testatrix acted in the place of a mother to him and always regarded him and spoke of him as her son to everybody she met. That evidence is only relevant, if admissible, as showing that A the testatrix in her will was not guilty of *falsa demonstratio*. The evidence is completely silent about the testatrix's own family. It is only that:

> " There was issue of the said marriage of the testatrix and the said John Davidson one child only namely the defendant Kathleen Nora Davidson who informs our solicitors . . . that she has never been married."

A good deal more is known about the matter than that, but it is not in evidence B and must, therefore, be disregarded for the purposes of my judgment. John Foster Davidson married. There is some reason for thinking that the name of his wife is Elsie Margaret Davidson, but I do not think the fact is proved, but it is proved that two children were born of his marriage before the death of the testatrix, namely, the defendants Nora Margaret Davidson and Donald John Davidson.

C By her will, the testatrix provided:

> " (*a*) To my son John Foster Davidson the two large silver trophy cups which were won by his father. (*b*) To my granddaughter Nora Margaret Davidson my diamond ring with three large stones and the single diamond ring. (*c*) To my daughter-in-law Elsie Margaret Davidson my diamond D ring with eight diamonds in it. I give and bequeath [certain property on trust for sale and] on trust to pay the income or interest arising from such investments unto my said son John Foster Davidson during his life and from and after his death the said investments shall fall into and the bank shall hold such investments on trusts hereinafter declared concerning my residuary estate . . . I devise and bequeath all and singular my real E and personal estate whatsoever and wheresoever not hereby or by any codicil hereto otherwise specifically disposed of unto the bank on trust for such of my grandchildren as shall be living at my death and attain the age of 21 years or previously marry and if more than one in equal shares absolutely."

She had no lawful grandchildren living at her death or at any time during F her life. The defendant Kathleen Nora Davidson, her only child, was and still is a spinster. The testatrix has plainly, not once but two or three times, put John Foster Davidson and his family into an artificial position of relationship to herself. He was not her son, but she so describes him twice in the will. Nora Margaret Davidson was not her granddaughter, but she so plainly describes her once in the will. Elsie Margaret Davidson was not her daughter-in-law, G for she had no daughter-in-law, and I have little doubt that Elsie Margaret Davidson was the wife of John, though that is not proved. There is no question in my mind of any mistake in the use of language. She knew perfectly well that John Foster Davidson was not her son, but she did not call him her son by inadvertence. She called him her son because she chose to describe him by that designation and she did it, in my judgment, deliberately. Equally H well she knew that Nora was not her granddaughter, but she did not use the phrase by inadvertence. She deliberately chose to describe Nora as standing in that relationship to her. Apart from authority, to which I will refer in a moment, it seems to me that the testatrix has used the phrase " grandchildren " in a sense peculiar to herself but one which she has plainly indicated in her will. It seems to me impossible to exclude from the class of grandchildren Nora Margaret Davidson, who is described as her granddaughter, being the daughter of the person described as her son, and it seems to me equally impossible to exclude the other child, being the child of the same John Foster Davidson, described as her son, who is a brother of Nora.

It is, however, submitted that there is authority which debars me from reaching this conclusion, and at one moment I thought that there was. This matter seems to have been the subject-matter of no little judicial skirmishing. The nature of this skirmishing is indicated by a passage in the judgment of Swinfen Eady, J., in *Re Cozens* (1). That case related to a different description of relationship, but that is immaterial for the present purpose. Swinfen Eady, J., said ([1903] 1 Ch. 142):

> "It was contended on the one hand that the cases of *Smith* v. *Lidiard* (2), *Wells* v. *Wells* (3), and *Merrill* v. *Morton* (4) establish the proposition that the fact that a great-niece or a wife's niece has been previously called a niece will not enlarge the meaning of the word 'niece' in another part of the will. It was contended on the other hand that these cases were overruled by *Re Jodrell, Seale-Hayne* v. *Jodrell* (5)—see *Re Gue* (6)—and that the rule now is that where a legatee has once been referred to by an inaccurate description in a will, the same description in all other parts of the will must be treated as including that person, and all others in the same degree of relationship. In the case of *Re Jodrell* (5), in the Court of Appeal, Lord Halsbury repudiated entirely the notion of laying down any canon of construction which was to extend beyond the particular instrument that he was called upon to give an interpretation to . . . I am of opinion that both the propositions contended for were too widely stated. There is not any hard and fast rule that a gift to nieces does not include a great-niece, where in another part of the same will a great-niece is described as a niece; nor, on the other hand, is there any hard and fast rule that, whenever a great-niece has once been referred to in a will as a niece, the expression 'niece' must in all other parts of the will be taken to include great-nieces. The true rule is to determine by the language and context of each will, including the consideration of the whole instrument and any evidence properly admissible, the meaning of the expressions contained in it, and the persons who are entitled to share in the benefits thereby conferred."

Swinfen Eady, J., had no power to overrule *Wells* v. *Wells* (3), still less *Smith* v. *Lidiard* (2), but it seems to me that he was deliberately declining to treat as obligatory a principle seemingly established by those cases.

The next judge to deal with this controversy was Sargant, J., in *Re Green* (7), and I think he must be treated as having agreed with Swinfen Eady, J., that no binding rule was laid down by *Smith* v. *Lidiard* (2) and *Wells* v. *Wells* (3), because he says ([1914] 1 Ch. 137):

> "There is a good deal of authority on the point, and the cases of *Smith* v. *Lidiard* (2) and *Wells* v. *Wells* (3) would be conclusive against the larger construction if I were bound by them as authorities. But I have been referred to *Re Jodrell* (5), which is said to amount to a negation of all authority in a case like this, and I take it that I am cast at large as regards the interpretation to be put on the words used and am not bound by any reported decision, although I think I may derive assistance from the authorities cited to me."

Sargant, J., as the sequel shows, found assistance from *Smith* v. *Lidiard* (2) and *Wells* v. *Wells* (3), but none from *Re Jodrell* (5).

Eve, J., considered the problem in *Re Winn* (8) where he is reported ([1916] W.N. 366) to have said that:

> "Three instances of the use in the earlier part of the will of the words 'my niece' were pointed out where the testator referred to his wife's niece,

and two of these nieces were expressly included in the residuary devise. Upon that point there were two direct authorities which had been relied upon, *Smith* v. *Lidiard* (2) and *Wells* v. *Wells* (3), and the two learned judges who decided those cases expressed a clear and unqualified opinion that the mere fact that a testator had in the earlier part of his will attached to a legatee what was in fact a misdescription, did not operate to extend a residuary gift so as to include the class of persons so described in the earlier part of the will. Neither of these two cases had been overruled in *Re Jodrell* (5) and he was not going to be so presumptuous as to differ from the conclusions which Sir George Jessell, M.R., and Page-Wood, V.-C., had expressed. If those cases were to be overruled, it must be by some other court. His Lordship, therefore, held that the mere fact that the testator had described certain of his wife's nieces as 'my nieces' in the prior part of his will did not operate to bring all his wife's nephews and nieces within the residuary devise."

The position is, therefore, that two judges have thought themselves unfettered by authority on this matter and one has thought himself fettered. I prefer to go with the majority. I think the rule is correctly laid down by Swinfen Eady, J., in the passage which I have read ([1903] 1 Ch. 142):

> "The true rule is to determine by the language and context of each will, including the consideration of the whole instrument and any evidence properly admissible, the meaning of the expressions contained in it, and the persons who are entitled to share in the benefits thereby conferred."

There is no rule of construction which ought to induce a judge to depart from that principle or that line of approach. Accordingly, I feel free to reach the conclusion which I should have reached apart from all authority and which I have already stated.

Declaration accordingly. Costs of all parties to be taxed as between solicitor and client and paid out of the estate in due course of administration.

Solicitors: *Peacock & Goddard*, agents for *Lacey & Son*, Westbourne, Bournemouth (for all parties other than the first and second defendants); *Maude & Tunnicliffe*, agents for *Macdonald, Jacobs & Oates*, Portsmouth (for the first and second defendants).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

POTTS' EXECUTORS *v.* INLAND REVENUE COMMISSIONERS.

[Court of Appeal (Sir Raymond Evershed, M.R., Somervell and Denning, L.JJ.), July 15, 18, 22, 26, 1949.]

Income Tax—Settlement—Sums paid to settlor otherwise than as income—Body corporate connected with a settlement—Loans to settlor by body corporate—Payments made by company on behalf of settlor—Obligation of settlor to repay—Finance Act, 1938 (c. 46), *s.* 40 (3), (5) (*a*).

By the Finance Act, 1938, s. 40 (1), any capital sum paid, directly or indirectly, by trustees of a settlement to the settlor is to be treated as income of the settlor to the extent of the available income arising under the settlement. Section 40 further provides: "(3) For the purpose of this section, any capital sum paid to the settlor in any year of assessment by any body corporate connected with the settlement in that year shall be treated as having been paid by the trustees of the settlement in that year . . . (5) . . . in this section (*a*) the expression ‘ capital sum ’ means (i) any sum paid by way of loan or repayment of a loan ; and (ii) any other sum paid otherwise than as income, being a sum which is not paid for full consideration in money or money’s worth . . .”

On Mar. 31, 1939, P. made a settlement of a sum of money on his infant grandchildren, and on Apr. 25, 1939, the trustees of the settlement invested A the money in the purchase from P. or his nominees of the whole of the issued share capital, save one share, of a company of which P. was governing director and which was admitted to be a “ body corporate connected with the settlement ” within the meaning of s. 40 (3). P. had had for many years prior to the settlement, and continued to have after the date of of the settlement, an arrangement with the company whereby it paid various B accounts on his behalf, such as certain subscriptions, insurance, and tax, debiting his account in the company’s books with the sums so paid, and crediting his account with director’s fees and expenses due to him and payments which he made to the company in discharge of his indebtedness. In the tax years 1939-40 and 1940-41 the company made payments at P.’s request exceeding the available income of the settlement, and P.’s executors C (P. having since died) were assessed to surtax in respect of the amounts so paid. The question for the court was whether the sums paid by the company at P.’s request were capital sums within the meaning of s. 40 (5) (*a*), paid to the settlor within the meaning of s. 40 (3).

Held : having regard to the whole of pt. IV of the Act of 1938 and to para. 3 of pt. II of sched. III to the Act, the words “ paid to the settlor ” D in s. 40 (3) meant “ paid directly or indirectly to the settlor,” and the sums in question were, according to the ordinary use of language and according to the language of s. 40 (3) into which must be read the definition in s. 40 (5) (*a*) (i), “ paid by way of loan directly or indirectly to the settlor.”

Per curiam : the settlor’s promise or obligation to repay in full the E sums in question constituted full consideration in money or money’s worth, and, therefore, the sums were not within s. 40 (5) (*a*) (ii).

[For the Finance Act, 1938, s. 40 (3), (5), see HALSBURY’S STATUTES, Vol. 31, pp. 352, 353.]

Cases referred to: F

(1) *Partington* v. *A.-G.*, (1869), L.R. 4 H.L. 100 ; 38 L.J.Ex. 205 ; 21 L.T. 370 ; 42 Digest 736, *1603*.

(2) *Cuthbert* v. *Robarts, Lubbock & Co.*, [1909] 2 Ch. 226 ; 78 L.J.Ch. 529 ; 100 L.T. 796 ; 3 Digest 261, *788*.

Appeal by the Crown from a judgment of Singleton, J., dated July 26, G 1948, whereby he discharged assessments to surtax for the financial years 1939-40 and 1940-41 which had been confirmed by the Special Commissioners. The Court of Appeal now allowed the appeal, and restored the decision of the Special Commissioners. The facts appear in the judgment of Sir Raymond Evershed, M.R.

Pennycuick, K.C., and *R. P. Hills* for the Crown. H

Grant, K.C., *Talbot, K.C.*, and *D. C. Miller* for P.’s executors.

Cur. adv. vult.

July 26. **SIR RAYMOND EVERSHED, M.R.**, read the following judgment. This appeal raises a question of the application of the Finance Act, 1938, s. 40, to certain sums paid at the request of the deceased, Mr. G. W. Potts, by a company known as G. W. Potts, Ltd., in the financial years ended

Apr. 5, 1940, and Apr. 5, 1941. If the section does apply to these payments, then it is conceded that Mr. Potts' estate is now liable for surtax for those years in respect of the payments. The figures have been agreed and, after appropriate "grossing up," the assessments are respectively for £50,583 and £5,470.

The material facts as found by the Special Commissioners and stated by them in the Special Case may be summarised as follows. In March, 1939, Mr. Potts executed a settlement in favour of his infant grandchildren in the sum of £150,000. The trustees of the settlement were a company known as Carron Trust, Ltd., a company wholly owned by the settlor. Shortly after the date of the settlement, namely on Apr. 25, 1939, the trustees applied the settled moneys in the purchase from Mr. Potts of the whole of the issued share capital, save one share, that is 49,999 shares, in the company, G. W. Potts, Ltd., above mentioned, which I shall hereinafter refer to as "the company." The settlor was at the time the sole governing director of the company and he continued in that capacity at all relevant dates after the date of the purchase. It is conceded that the company is and was "a body corporate connected with the settlement" within the meaning of s. 40 (3) of the Act of 1938. By cl. 3 (i) of its memorandum of association the company was given power, in what is now a common form, to make advances to directors and others. The memorandum of association also contained cl. 3 (*w*), the usual clause empowering the company to carry on any activities which might conveniently be carried on in connection with its principal business. In fact, for many years prior to the two years in question and during such two years the settlor had, in effect, a current account with the company, the company making on his behalf and at his request numerous payments of various kinds and crediting him in the account with the fees and expenses to which he was entitled as director. A copy of the account in the company's books, which is called the "G. W. Potts, Esq., director's account," for the years ended Dec. 30, 1939, and Dec. 28, 1940, is annexed to the Special Case. During the first of those two years the payments made included a considerable number of payments to charities, subscriptions to clubs, motor insurance, weekly cash payments to the settlor and others, and last, but by no means least, payments in respect of income tax and surtax amounting to £13,800 odd. In the second of the two years, which opened with a debit balance of £8,850, the tax payments amounted to approximately £28,800. There were also a number of cash payments, and at the end of the year the debit balance of the settlor was £32,570 1*s.* 3*d.*, which the settlor discharged by his cheque on Dec. 23, 1940.

In these circumstances the conclusion of the Special Commissioners was as follows, so far as is material:

> "In our opinion, the question whether the payments in question constitute sums paid by way of loan is a question to be decided on the facts proved before us . . . On the facts before us we hold that the sums paid by the company at Mr. Potts' request are sums paid by way of loan. If the company was called on to justify its action in making the said payments reliance would have to be placed upon cl. 3 (i) of the memorandum of association (power to lend money). We, therefore, hold that the said payments constitute capital sums, and we further hold that capital sums have been paid indirectly to Mr. Potts, the settlor. The payments by the company direct to (for example) the Inland Revenue Commissioners for surtax are in substance merely a convenient method which avoided the necessity of the company paying to Mr. Potts and Mr. Potts then paying the Inland Revenue Commissioners. The capital sums paid by the company must be treated as paid by the trustees of the settlement (see s. 40 (3)) because the company is a body corporate connected with the settlement (see s. 41 (4) (*e*))."

Counsel for the executors has directed some criticism to this conclusion. He has said that there is no justification for concluding that the payments were made pursuant to cl. 3 (i) of the memorandum of association. He says, accordingly, that the inference that the sums paid should be treated as loans (an inference based, he contended, on the supposed application of cl. 3 (i) of the memorandum of association) is unsupported by proper evidence and should be rejected. The various sums paid, according to counsel's contention, were admittedly sums paid at the request of Mr. Potts, but Mr. Potts' liability to reimburse the company was not for money lent, but it rested on the footing of a promise to pay implicit in the request, a real and substantial distinction to be found in the old forms of action and the old forms of pleading: see, for example, BULLEN AND LEAKE, 3rd ed., pp. 839-846. For reasons which later appear, I do not think these criticisms are valid, nor do I think that the solution of the problem rests on the assumption that the company did or did not make payments in exercise of the particular power in cl. 3 (i) of the memorandum of association. The real question on the appeal is, of course, whether on the facts as I have stated them the case is or is not caught by the provisions of s. 40 of the Act of 1938. If it is, the financial result to Mr. Potts' estate is, no doubt, severe. The claim may or may not have surprised the executors of Mr. Potts, but, as SINGLETON, J., pointed out, we are not concerned with considerations of that kind. I follow the learned judge in citing and bearing in mind these observations of LORD CAIRNS, in *Partington* v. *Attorney-General* (1) (L.R. 4 H.L. 122):

> ". . . as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

It is also not to be forgotten, as has been said in this court before, that, if the complexity and artificiality of taxing statutes are sometimes regarded as matters of comment and criticism, the blame should be laid not so much on Parliament and the Parliamentary draftsmen as on those private persons who have employed their ingenuity in divising elaborate schemes for avoiding taxes which would otherwise fall on them.

I now turn to the relevant parts of s. 40. Sub-section (1) opens as follows:

> "Any capital sum paid directly or indirectly in any relevant year of assessment by the trustees of a settlement to which this section applies to the settlor shall—(*a*) . . ."

to the extent there stated be treated as the income of the settlor. Section 40 further provides:

> "(3) For the purpose of this section, any capital sum paid to the settlor in any year of assessment by any body corporate connected with the settlement in that year shall be treated as having been paid by the trustees of the settlement in that year . . . (5) This section applies to any settlement wherever made and whether made before or after the commencement of this Act, and in this section (*a*) the expression 'capital sum' means (i) any sum paid by way of loan or repayment of a loan; and (ii) any other sum paid otherwise than as income, being a sum which is not paid for full consideration in money or money's worth . . .

> (*c*) references to sums paid to the settlor include references to sums paid to the wife or husband of the settlor."

The question, therefore, having regard to the concession in reference to the company already stated, is whether the sums paid were capital sums paid to the settlor within the meaning of sub-s. (3). The learned judge thought they were not. He thought that, whatever the effect of the definition of a capital sum, they were not paid to the settlor. He said:

> " Bearing in mind the words of LORD CAIRNS, to which I have referred, I do not regard the payments of surtax, or other payments to third parties through the current account, as payments made to the settlor. In making payments of this kind, the company was carrying out an old practice, and a practice which existed long before the settlement came into existence. It was not making payments to the settlor. The making of the payments for surtax caused a debit against Mr. Potts on the current account, and he paid that before the end of 1940. The position created was much the same as that of banker and customer. If a bank pays a subscription on a bankers' order when the customer already has an overdraft, the result is to increase the overdraft, but it is not a payment to the customer. It is rather a payment to someone else at the request of the customer or for his benefit. Section 40 (3) only deals with a capital sum paid to the settlor."

The learned judge, however, indicated his opinion, in case he should be wrong on his main conclusion, that the sums in question were not capital sums paid by way of loan within sub-s. (5) (*a*) (i), but would have fallen within sub-s. (5) (*a*) (ii). With all respect to the learned judge, I have formed on these matters a different opinion.

Counsel for the Crown's first point was that the formula " paid to the settlor " in sub-s. (3) must in its context be read as meaning " paid directly or indirectly to the settlor." I think, as I read his judgment, that on this point, the learned judge declined to read in the words " directly or indirectly " into sub-s. (3), though a decision on this point may not have been strictly necessary for his conclusion. In my opinion, however, counsel's argument on this point is correct. My first impression was, I confess, the other way. If there were no other context than that provided by sub-ss. (1) and (3), I should conclude that the omission of the words " directly or indirectly " within the latter was, notwithstanding the change in the construction of the sentence, deliberate, with the result that sub-s. (3) would be more limited in this respect than sub-s. (1). Nor do I think that reference to the definitions in sub-s. (5), which, of course, apply equally to sub-ss. (1) and (3), would be sufficient to tip the balance in favour of the Crown's argument, for the effect of the definition sub-section is that wherever you find the words " capital sum " in sub-ss. (1) or (3) you must read in the full definition supplied. This process does not seem to me necessarily to produce the result contended for by the Crown, but there are other indications. I think it is true to say, as counsel for the Crown put it, that direct and indirect payments are both species of the genus " payments to the settlor." In other words, the phrase " paid to the settlor " is one capable in itself of covering payments of both kinds. If it is to be limited to direct payments only, then the result seems to depend on the absence of the alternative formula in sub-s. (3) which is present in sub-s. (1).

Counsel for the Crown referred us to sub-s. (2) which provides:

> " For the purpose of the last foregoing sub-section, the amount of income available up to the end of any year shall, in relation to any capital sum paid as aforesaid, be taken to be the aggregate amount of income arising under the settlement in that year and any previous relevant year

> which has not been distributed, less (*a*) the amount of any other capital sums paid to the settlor in any relevant year before that sum was paid . . ."

In the opening lines it is, of course, quite obvious that the words "paid as aforesaid" mean and cover payments both direct and indirect, but it is also equally manifest that the words "paid to the settlor" in para. (*a*) must mean payments both direct and indirect. Finally, counsel for the Crown referred to the language of para. 3 of pt. II of sched. III to the Act. This Part of the A schedule is related to a different taxing section—s. 38 in the same pt. IV of the Act. By that section the income arising under certain settlements is treated for tax purposes as income of the settlor. By sub-s. (7) (*c*) the section is applied to settlements made before Apr. 27, 1938, subject to the provisions of pt. II of sched. III. Paragraph 3 is as follows:

B

> "The foregoing provisions of this Part of this schedule shall not apply to any settlement if, in any year to which this Part of this schedule applies, any capital sum within the meaning of s. 40 of this Act has been paid to the settlor directly or indirectly by the trustees of the settlement or any body corporate connected with the settlement in that year."

It is plain from the final words of this paragraph that Parliament conceived C that for the purposes of s. 40 payments made to the settlor directly or indirectly by a body corporate connected with the settlement were no less liable to be caught by that section than payments made to the settlor directly or indirectly by the trustees of the settlement.

In my judgment, it is in the present case legitimate, in construing s. 40 (3), to have regard to the whole of pt. IV of the Act, including the schedule to which D I have referred. So to do does not seem to me to invoke any "equitable construction" within the meaning of Lord Cairns' words in the passage I have quoted in his speech. In my view, taking account of all the considerations to which I have alluded, the phrase "paid to the settlor" in sub-s. (3) must, on a fair interpretation, include payments to him both direct and indirect. This conclusion still leaves the question to which, as I have indicated, most E of the argument of counsel for the executors was directed, whether the payments here in question were paid to the settlor at all, whether direct or indirect. I confess that, if the question had to be determined apart from the definition sub-s. (5), I should feel much attracted to counsel's argument, but, in my judgment, the question cannot be so determined, and if the definition in sub-s. (5) (*a*) (i) is incorporated, as it must be, into the language of sub-s. (3), F then the question becomes: "Were the sums with which we are here concerned paid by the company by way of loan directly or indirectly to the settlor?" Though I think the expression "by way of" may in some contexts involve a somewhat wider meaning than the single word "as," I am prepared to assume that in the present case no material significance can be attached to them. Nevertheless, it seems to me that, on the facts of this case, the sums here in G question were—according to the ordinary use of language, no less than according to the language of the section—"paid by way of loan directly or indirectly to the settlor." It does not seem to me in such a context that any weight can be attached to the old distinction, reflected in the old forms of pleading, between money lent and money paid by request. Whether or not the company must be taken to have acted in exercise of its powers under cl. 3 (i) of the H memorandum of association, it is, I think, abundantly plain, as the Special Case found and as the judge below also stated, that the company acted for practical purposes exactly in the office of the settlor's banker. On Jan. 1, 1939, the account was in credit to the extent of £1,316 7*s*. 4*d*., but on Jan. 18, £1,350 7*s*. 4*d*. was transferred to the settlor's private banking account and thenceforward the settlor's account with the company was continuously overdrawn (that is, throughout the whole financial year 1939-40 and thereafter till Dec. 23, 1940). In the ordinary case of banker and customer, where the former gives credit to the latter by meeting the cheques from time to time drawn by the customer on the banker, the resulting overdraft is always regarded as money lent by the banker to the customer : see, for example, the language of LORD COZENS-HARDY, M.R., in *Cuthbert* v. *Robarts, Lubbock & Co.* (2), where he says ([1909] 2 Ch. 233):

> " If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."

In the same way, as it seems to me, the various payments made by the company throughout the period in question ought fairly to be regarded as money paid directly or indirectly by way of loan to Mr. Potts within the meaning of the sub-section. The problem is, I think, largely one of first impression and I do not attempt to improve on my conclusion by elaboration. In my judgment, the Crown succeeds in showing that the sums for which it is sought to tax the settlor are within the scope of the section which the Crown invokes.

In the circumstances, it is strictly unnecessary for me to express an opinion on the scope of para. (ii) of the definition sub-s. (5) (*a*), but since the matter has been argued, my own view is that the sums in question do not fall within its ambit. Counsel for the Crown did not himself at all attempt to justify the view to which the learned judge felt himself inclined—that a promise to repay was not money or money's worth within the meaning of the paragraph because the last two words indicated goods or property. He sought rather to say that, in the absence of a charge for interest, that is a charge for the use of the sums advanced, there was no " full " consideration. I cannot for myself accept that argument. The formula " full consideration for money or money's worth " is common enough and is generally used to exclude, for example, the marriage consideration, but, in my view, the settlor's promise or obligation to repay in full the sums paid on his behalf constitutes full consideration in money or money's worth within the meaning of the paragraph in question. The result, however, in my judgment, is that the appeal succeeds.

SOMERVELL, L.J. : I agree that the appeal succeeds for the reasons which have been given by the MASTER OF THE ROLLS.

DENNING, L.J. : I also agree.

Appeal allowed with costs.

Solicitors : *Solicitor of Inland Revenue* ; *Allen & Overy* (for the executors).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

VENN *v.* MORGAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Stable, JJ.), July 27, 1949.]

Street Traffic—Careless driving—Notice of intended prosecution—Specification of nature of alleged offence—" Offence against s. 12 *of Road Traffic Act,* 1930 " *—Road Traffic Act,* 1930 (*c.* 43), *s.* 12 (1), *s.* 21 (*c*). A

The respondent was charged with careless driving contrary to s. 12 (1) of the Road Traffic Act, 1930. In pursuance of s. 21 (*c*) of the Act a notice of intended prosecution had been served on him wherein it was stated : " . . . it is intended to institute proceedings against you for an offence against s. 12 of the Road Traffic Act, 1930, namely, that you did drive a motor car on the Cambridge-Linton Road, Babraham, at B approximately 4.25 p.m., on Saturday, Jan. 29, 1949." The words of s. 12 describing the offences thereunder, *viz.*, driving " without due care and attention," or " without reasonable consideration for other persons using the road," were omitted from the notice, and the respondent objected that the notice was bad. The justices upheld his objection and dismissed the information. C

HELD (STABLE, J., dissenting) : that s. 21 (*c*) only required the nature of the alleged offence to be specified in the notice, and did not require the offence itself to be specified ; the notice informed the respondent that he was to be prosecuted for an offence against s. 12, and the only offence against that section was that compendiously known as " careless driving " ; and, therefore, the notice sufficiently complied with the requirements of the section. D

[FOR THE ROAD TRAFFIC ACT, 1930, s. 12 (1) and s. 21 (*c*), see HALSBURY'S STATUTES, vol. 23, pp. 621, 626.]

Case referred to:

(1) *Milner* v. *Allen*, [1933] 1 K.B. 698 ; 102 L.J.K.B. 395 ; 149 L.T. 16 ; E 97 J.P. 111 ; Digest Supp.

CASE STATED by Cambridgeshire justices.

At a court of summary jurisdiction, sitting at Linton, an information preferred by the appellant, a police inspector, against the respondent that he drove a motor car on the Cambridge-Linton Road without due care and attention, F contrary to s. 12 (1) of the Road Traffic Act, 1930, was dismissed on Mar. 23, 1949. The justices, without hearing evidence, were of opinion that the notice of intended prosecution served on the respondent did not comply with the requirements of s. 21 (*c*) of the Act. The Divisional Court now held that the notice was sufficient, allowed the appeal, and remitted the case for the defence to be heard. The facts appear in the judgment of LORD GODDARD, C.J. G

R. E. Seaton for the appellant.

Baerlein for the respondent.

LORD GODDARD, C.J. : This is a Case stated by justices for the county of Cambridge before whom the respondent was charged with unlawfully driving a motor vehicle on the Cambridge-Linton Road without due care and H attention, contrary to the provisions of s. 12 (1) of the Road Traffic Act, 1930. It appears that the respondent's car was involved in an accident and that he was not warned at the time of an intended prosecution, and, therefore, the provisions of s. 21 (*c*) of the Act had to be complied with. These provisions are as follows:

> " Where a person is prosecuted for an offence under any of the provisions of this Part of this Act relating respectively to the maximum speed at

> which motor vehicles may be driven, to reckless or dangerous driving and to careless driving he shall not be convicted unless either (*a*) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration ; or (*b*) within fourteen days of the commission of the offence a summons for the offence was served on him ;
> A or (*c*) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him . . ."

The object of that section has been explained by this court in *Milner* v.
B *Allen* (1), where the respondent was charged with careless driving and a notice had been served on him stating that he had been reported for the question of prosecution to be considered in respect of dangerous driving. When he was summoned only for the lesser offence he took the point that he had never been warned regarding the offence for which he was summoned nor had he been given a notice specifying the offence for which he was summoned. The court
C held that the notice was good since it sufficiently specified " the nature of the offence " which the respondent was alleged to have committed.

In considering whether a notice purported to be given under s. 21 is sufficient we ought to use a modicum of commonsense. In the present case the notice that was sent was in these terms:

> D " In pursuance of the provisions of s. 21 of the Road Traffic Act, 1930, I, the undersigned, do hereby give you notice that it is intended to institute proceedings against you for an offence against s. 12 of the Road Traffic Act, 1930, namely, that you did drive a motor car on the Cambridge-Linton Road, Babraham, at approximately 4.25 p.m. on Saturday, Jan. 29, 1949."

E The words "without due care and attention" or "without reasonable consideration for other persons using the road " were omitted from the notice, but it informed the respondent that he was going to be prosecuted for an offence under s. 12, and there is only one offence under that section, that is to say, the offence which is compendiously referred to in s. 21 as " careless driving." Section 21 uses that compendious expression because the marginal
F note to s. 12 is : " Careless driving."

In my opinion, this is a perfectly good notice because it calls the attention of the respondent, who was involved in an accident on that particular day, to the matter in such a way that he knows what he is to be prosecuted for. He could only be prosecuted for one of two offences, dangerous driving or careless driving, and when he is told that the alleged offence is under s. 12
G he can ascertain what is the offence under that section. I do not think that the justices came to the right conclusion. It is clear that the notice was adequate, because the section only requires the nature of the alleged offence to be specified, and the nature of the alleged offence here is careless driving, the only offence with which s. 12 deals. I do not think the case would have been arguable if the words " namely, that you did drive a motor car " had
H been left out, because then the notice would have read : " . . . it is intended to institute proceedings against you for an offence against s. 12 of the Road Traffic Act, 1930, on the Cambridge-Linton Road, Babraham, at approximately 4.25 p.m., on Saturday, Jan. 29, 1949." The omissions from the notice were a slip on the part of the person who drafted it, but I think it gave the respondent all the information as to what it was intended to prosecute him for, namely, an offence under s. 12. The objection to the notice, therefore, fails, and the case must go back to the justices to hear the defence, if any.

OLIVER, J. : I am of the same opinion. A notice under s. 21 (*c*) should not be considered as a formal document like a summons or a conviction. The object of the notice is to call the attention of the driver of the motor car to the time and circumstances in respect of which he may be charged so as to give him, as my Lord has said, an opportunity, in good time while memories are still fresh, to prepare his defence. This notice is carelessly drawn, but, in my opinion, it contains enough to satisfy the section. It says that it is intended to institute proceedings against the respondent for an offence under s. 12 of the Road Traffic Act, 1930, and the time and place are mentioned. I am much impressed with the language of s. 21 (*c*) which is not that the alleged offender is to have fourteen days' notice of an intended prosecution specifying the alleged offence, but that he is to have a notice "specifying the nature of the alleged offence." The reference to s. 12 in the notice in the present case, as my Lord has said, gives the respondent notice that he is going to be summoned either for driving a motor vehicle on a road without due care and attention or driving a motor vehicle on a road without reasonable consideration for other persons using the road. Those are two separate offences. In the descriptive note beside s. 12 they are summarised as "careless driving," and in s. 21 those two offences are grouped together under the head of "careless driving." That confirms me in the impression that the notice is sufficient if it merely alludes to the nature of the offence without setting out the offence in detail.

STABLE, J. : I am not surprised that the justices came to the conclusion that they did in this case, because it is the conclusion to which I should have come myself. In *Milner* v. *Allen* (1) the notice served on the respondent gave him adequate notice of the essential facts. It gave him sufficient notice of an intended prosecution and it specified the nature of the alleged offence and the time and place where it was alleged it had been committed. This is a criminal proceeding, and it is a condition precedent to a conviction that a notice of the intended prosecution specifying the nature of the alleged offence should be given within the prescribed time. In my judgment, a notice saying "it is intended to institute proceedings against you for an offence against s. 12 of the Road Traffic Act, 1930, namely,"—and I emphasise the word "namely"—"that you did drive a motor car on the Cambridge-Linton Road, Babraham, at 4.25 p.m. on Saturday, Jan. 29, 1949," is not only not a specification of the nature of the alleged offence, but is hopelessly misleading. I think that it is important today, having regard to the tremendous complication of the law—by statute, orders-in-council and rules and orders—that, when an Act of Parliament stipulates that the nature of the offence must be stated, it should be stated in terms which the ordinary layman can understand. I would only add that, in the finding of the justices, there is no reference to an accident having taken place. They refer to some incident, but what the incident was I do not know.

Case remitted. Appeal allowed with costs.

Solicitors : *Field, Roscoe & Co.*, agents for *Ennions*, Newmarket (for the appellant) ; *Amery-Parkes & Co.*, agents for *Wild & Hewitson*, Cambridge (for the respondents).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

WRIGHT AND ANOTHER *v.* MACADAM.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), July 26, 27, 1949.]

Landlord and Tenant—Implied grant—Tenancy agreement—Right enjoyed with land at time of agreement—Coal shed—Shed being used by tenant, with landlord's permission, at date of agreement—Law of Property Act, 1925 (*c.* 20), *s.* 62 (1).

By the Law of Property Act, 1925, s. 62 (1): "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures . . . easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof." By s. 62 (4) the section applies subject to a contrary intention expressed in the conveyance. By s. 205 (1) (ii) "conveyance" includes (*inter alia*) a lease and every other assurance of property or of an interest therein. By s. 205 (1) (ix) "land" includes (*inter alia*) "buildings or parts of buildings."

By a tenancy agreement dated Nov. 2, 1940, Mrs. W. became the tenant for one week of two rooms of a flat on the top floor of a house, and she remained in occupation as a statutory tenant until Aug. 28, 1943. With the permission of the landlord she used a shed in the garden for storing her coal. On Aug. 28, 1943, the landlord granted a new tenancy for one year of the top floor flat (including an extra room) to Mrs. W. and her daughter, and, at the expiration of the year, the tenants remained in occupation of the flat on the terms stated in the agreement. The agreement, which was under hand, contained no reference to the coal shed, but the tenants continued to use it, without payment, until 1947. In May, 1947, the landlord suggested that the tenants should pay 1*s.* 6*d.* a week for the use of the shed, but the tenants refused to do so. The landlord then denied the tenants' right to use the shed, but the tenants contended that they were entitled to do so under the Law of Property Act, 1925, s. 62 (1).

HELD: (i) as the letting under the document of Aug. 28, 1943, was for a term not exceeding three years, under the Law of Property Act, 1925, s. 52 (2) (*d*) and s. 54 (2), the document, though expressed as an agreement and though under hand only, passed to the tenants the legal estate in the property for the term contemplated, and, therefore, there was a "conveyance of land" within the meaning of s. 62 (1) and on the expiration of the term the tenants had held over on the same terms.

(ii) a right which is, in fact, enjoyed with property, even though enjoyed only by permission, passes on a conveyance of the property by virtue of the grant to be read into the conveyance under s. 62 (1), provided (*a*) that the right is one capable of being granted at law, *i.e.*, was a right known to the law, and (*b*) that it is not merely a temporary right. In this case the right to use the coal shed to store such coal as might be required for the domestic purposes of the flat was a right which the law would recognise, and, as no limit had been set to the time during which the shed could continue to be used, it was not a merely temporary right, and, therefore, at the date of the letting on Aug. 28, 1943, the right to use the shed was a right enjoyed with the top floor flat within the meaning of s. 62 (1), and, as no contrary intention was expressed in the document of Aug. 28, 1943, the right must be regarded as having passed under that letting. That the right to use the coal shed was not appurtenant to the flat was immaterial, as s. 62 (1) applied not merely to rights or advantages appurtenant to the premises, but also to a right or advantage which had been, in fact, enjoyed with the premises.

International Tea Stores Co. v. *Hobbs* ([1903] 2 Ch. 165), *applied.*

Burrows v. *Lang* ([1901] 2 Ch. 502), and *Birmingham, Dudley and District Banking Co.* v. *Ross* (1888) (38 Ch.D. 295), *distinguished.*

(iii) the right to use the shed must be regarded as carrying with it the necessary means of access. A

(iv) assuming that there had been a later agreement to pay 1*s*. 6*d*. a week for the use of the shed, it would have been an agreement with no consideration to support it, because under s. 62 (1) the tenants became entitled to use the shed on Aug. 28, 1943.

[As to Inclusion in Conveyance of Rights Enjoyed *de facto*, see HALSBURY, Hailsham Edn., Vol. 11, pp. 282, 283, para. 518 ; and for Cases, see DIGEST, Vol. 19, pp. 37, 38, Nos. *193-196*.] B

Cases referred to:

(1) *International Tea Stores Co.* v. *Hobbs*, [1903] 2 Ch. 165 ; 72 L.J.Ch. 543 ; 88 L.T. 725 ; 19 Digest 37, *193*.

(2) *Burrows* v. *Lang*, [1901] 2 Ch. 502 ; 70 L.J.Ch. 607 ; 84 L.T. 623 ; 19 Digest 37, *189*. C

(3) *Lewis* v. *Meredith*, [1931] 1 Ch. 571 ; 82 L.J.Ch. 255 ; 108 L.T. 549 ; 19 Digest 37, *194*.

(4) *White* v. *Williams*, [1922] 1 K.B. 727 ; 91 L.J.K.B. 721 ; 127 L.T. 231 ; 19 Digest 198, *1505*.

(5) *Birmingham, Dudley and District Banking Co.* v. *Ross*, (1888), 38 Ch.D. 295 ; 57 L.J.Ch. 601 ; 59 L.T. 609 ; 19 Digest 47, *261*. D

(6) *Broomfield* v. *Williams*, [1897] 1 Ch. 602 ; 66 L.J.Ch. 305 ; 76 L.T. 243 ; 19 Digest 36, *183*.

(7) *Bartlett* v. *Tottenham*, [1932] 1 Ch. 114 ; 101 L.J.Ch. 160 ; 145 L.T. 686 ; Digest Supp.

(8) *Godwin* v. *Schweppes, Ltd.*, [1902] 1 Ch. 926 ; 71 L.J.Ch. 438 ; 86 L.T. 377 ; 19 Digest 37, *190*. E

Appeal by the landlord from an order of His Honour Deputy Judge Sir Norman Edgley, K.C., at Wandsworth County Court, dated Apr. 5, 1949.

The tenants of a top floor flat claimed (*a*) a declaration that their tenancy of the flat included the right to use a coal shed in the garden of the premises, (*b*) an injunction to restrain the landlord from trespassing or otherwise interfering with their lawful use of the shed, and (*c*) damages limited to £10. The tenants contended that they were entitled to the use of the shed under the Law of Property Act, 1925, s. 62 (1), but the county court judge held that s. 62 (1) did not apply as the right to use the shed was merely a temporary licence and was not a right or advantage appurtenant to the flat. The Court of Appeal now held that the right to use the shed was a right enjoyed with the flat at the time of the conveyance within the meaning of s. 62 (1) and, therefore, it was to be regarded as passing under the letting, and they allowed the appeal. The landlord had taken down the shed after the hearing before the county court judge, but the court did not think it right, in the circumstances of the case, to make a mandatory injunction compelling him to restore the shed, but they awarded the tenants £10 by way of damages. The facts appear in the judgment of Jenkins, L.J. F G H

Brundrit for the tenants.
Borders for the landlord.

TUCKER, L.J. : I will ask Jenkins, L.J., to deliver the first judgment in this case.

JENKINS, L.J. : This is an appeal by the plaintiffs, Mrs. and Miss Wright, who are mother and daughter, against a judgment of His Honour DEPUTY JUDGE SIR NORMAN EDGLEY, K.C., at Wandsworth County Court, dated Apr. 5, 1949, which decided, in effect, that the plaintiffs, as tenants of the top floor of No. 13, Mount Ararat Road, Richmond, in respect of which the defendant, Mr. Macadam, is the landlord, were not entitled to the use of a certain coal shed in the garden of those premises. Originally two rooms of the top floor flat in question, with the use of the bathroom and so forth, were let to Mrs. Wright alone for one week certain by a tenancy agreement dated Nov. 2, 1940. She remained in occupation after the expiration of that week on the same terms, as she was entitled to do by virtue of the Rent Restrictions Acts. According to her evidence, an arrangement was made with Mr. Macadam, the landlord, about the use of the disputed coal shed at the time when that tenancy agreement was entered into. The learned judge did not accept that version, but accepted the landlord's evidence, which was to the effect that he gave Mrs. Wright permission to use the coal shed, not at the time of the agreement, but early the next year, *i.e.*, early in 1941. So far, therefore, the position was that Mrs. Wright was a statutory tenant of the two rooms on the top floor, and, by permission separately granted, was using the shed in the garden for the storage of her coal. That state of affairs continued until Aug. 28, 1943. On that date the landlord granted a new tenancy of the upper flat including an additional room, and this tenancy was granted, not to Mrs. Wright alone, but to both the plaintiffs, mother and daughter. The document is under hand only and the relevant part of it is contained in para. 1:

> "The landlord shall let and the tenants shall take all that top floor flat situate in 13, Mount Ararat Road, Richmond, in the county of Surrey together with the fixtures therewith for the term of one year commencing on Aug. 28, 1943, at an annual rental of £52 payable monthly in advance on the 28th of each month."

Since Aug. 28, 1943, the plaintiffs have remained in occupation of the flat on the terms stated in that agreement. For the present purpose the important point about it is that it contains no reference to the coal shed, nor any indication of intention one way or the other whether the mother and daughter, the tenants under this new letting, were to continue to enjoy the use of the coal shed. In fact, they did continue to use the coal shed until October, 1947, without charge. In May, 1947, the landlord made representations to Mrs. Wright to the effect that an extra 1*s*. 6*d*. a week ought to be paid for the use of the coal shed, to which proposal she purported to agree, but that arrangement was strenuously objected to by the daughter and the 1*s*. 6*d*. was never, in fact, paid. Matters seem to have come to a head about that in or about October, 1947, when the daughter recorded a decided objection to the arrangement that 1*s*. 6*d*. a week should be paid.

In the present litigation the tenants claimed an injunction to restrain the landlord from trespassing or otherwise interfering with their lawful use of the coal shed, a declaration that their tenancy of the flat included the right to use the coal shed, and damages limited to £10. I may mention that, as matters stand at present, the last of those claims appear to be the only relevant one inasmuch as we were informed in the course of the hearing that the landlord has, in fact, pulled down the coal shed. The question, therefore, is simply whether the plaintiffs, as tenants of the top floor flat at 13, Mount Ararat Road, were entitled to the use of the coal shed in question. It is argued for the tenants that they were so entitled by virtue of the Law of Property Act, 1925, s. 62, which replaces the Conveyancing Act, 1881, s. 6, and provides by statute the general words which it was formerly customary to insert in full in the parcels of conveyances and other dispositions of land. The tenants claim that this section covers the case. The landlord, on the other hand, claims that, although the coal shed was admittedly used, it was used under no sufficiently definite arrangement ; that it was used purely as a matter of personal licence and precariously ; and that the arrangement under which it was used could not be said to confer a right in any way appurtenant to the flat. but was an arrangement of a kind to which s. 62 of the Act of 1925 had no application. The learned judge decided the question in favour of the landlord, and his reasons are thus stated in a very short note of his judgment: A

> " Plaintiffs' suit dismissed with costs Scale B. (Defendant's evidence is accepted regarding the initial terms of the tenancy and the various interviews which took place. The question raised under the Law of Property Act, 1925, s. 62, decided in favour of the defendant. The right to use the coal shed was merely a temporary licence which might be withdrawn at any time and was in fact withdrawn. The evidence shows that this was never a right or advantage appurtenant to the flat, which on a previous occasion had actually been let without this advantage)." B

It is now necessary to refer to s. 62 of the Law of Property Act, 1925. The sub-sections bearing on this point are sub-sections (1) and (2). Sub-section (1) relates to " a conveyance of land." Sub-section (2) relates to " a conveyance of land, having houses or other buildings thereon." By the definition contained in s. 205 (1) (ii): C

> " ' Conveyance ' includes a mortgage, charge, lease, assent, vesting declaration . . . and every other assurance of property or of an interest therein . . ." D

It follows that the document of Aug. 28, 1943, if it is a lease within the meaning of that definition, is a " conveyance " for the purposes of s. 62. It will be remembered that the letting was for a term of one year only. I think it follows from the Law of Property Act, 1925, s. 52 (2) (*d*), read in conjunction with s. 54 (2) that this document, though expressed as an agreement, and though under hand only, is a " lease " within the meaning of the definition. E Section 52 provides:

> " (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed. (2) This section does not apply to . . . (*d*) leases or tenancies or other assurances not required by law to be made in writing." F

Section 54 (1) lays down the general rule that interests in land created by parol shall have the force and effect of interests at will only. By s. 54 (2):

> " Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine." G

The document here in question, therefore, was adequate to pass to the tenants the legal estate in the property for the term contemplated and since the expiration of that term they have been holding over on the same terms. Accordingly, s. 62 applies inasmuch as the transaction under consideration is a H " conveyance " within the meaning of the section. It is, moreover, a conveyance of land although it comprises only the upper floor of a house, inasmuch as the definition of " land " in s. 205 (1) (ix) provides that " land " includes, among other things, " buildings or parts of buildings."

This is, therefore, a conveyance of land within the meaning of s. 62 (1), and I think that is the appropriate sub-section rather than sub-s. (2), which deals with a conveyance of land " having houses or other buildings thereon." The relevant parts of both sub-sections are, however, for all purposes material to this case, the same. Section 62 (1) is in these terms:

> "A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, apper- A taining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof."

By s. 62 (4) the section applies subject to a contrary intention expressed in B the conveyance.

The question in the present case, therefore, is whether the right to use the coal shed at the date of the letting of Aug. 28, 1943, was a liberty, privilege, easement, right or advantage appertaining, or reputed to appertain, to the land, or any part thereof, or, at the time of the conveyance, demised, occupied or enjoyed with the land—*i.e.*, the flat—or any part thereof. It is enough for C the tenants' purposes if they can bring the right claimed within the widest part of s. 62 (1), *i.e.*, if they can show that the right was at the time of the material letting demised, occupied or enjoyed with the flat or any part thereof. The predecessor of s. 62 of the Act of 1925, in the shape of s. 6 of the Act of 1881, has been the subject of a good deal of judicial discussion, and I think the effect of the cases can be thus summarised. First, the section is not D confined to rights which, as a matter of law, were so annexed or appurtenant to the property conveyed at the time of the conveyance as to make them actual legally enforceable rights. Thus, on the severance of a piece of land in common ownership, the *quasi* easements *de facto* enjoyed in respect of it by one part of the land over another will pass although, of course, as a matter of law, no man can have a right appendant or appurtenant to one part of his property E exercisable by him over the other part of his property. Secondly, the right, in order to pass, need not be one to which the owner or occupier for the time being of the land has had what may be described as a permanent title. A right enjoyed merely by permission is enough.

The leading authority for that proposition is *International Tea Stores Co.* v. *Hobbs* (1), a decision of FARWELL, J., as a judge of first instance. It was F a case in which the defendant, who owned two houses, let one of them for business purposes and there had been a practice of giving permission to the successive managers of the property let to pass and re-pass with their servants, and so forth, across a yard which was part of the property and remained in the defendant's occupation. The part of the property which had been let was later sold to the tenants, nothing being said in the conveyance G about the right of way. The purchasers claimed to exercise the right of way by virtue of s. 6 (2) of the Act of 1881. That claim was disputed, and the point was taken that it could not be a right which would pass under the implied general words inasmuch as it was only precariously enjoyed. The learned judge held that the fact that the way was permissive only was irrelevant for this purpose and that by virtue of s. 6 of the Act of 1881 the grant included H a corresponding right of way in fee simple. Dealing with the question of licence or permission, FARWELL, J., said ([1903] 2 Ch. 171):

> "Unless I am prepared to say that in no case can a tenant obtain under the Conveyancing Act, 1881, a right of way unless he has enjoyed it as of right, I must hold in this case that the fact of licence makes no difference. In all these cases the right of way must be either licensed or unlicensed. If it is unlicensed it would be at least as cogent an argument to say, 'True you went there, but it was precarious, because I could have

> sent a man to stop you or stopped you myself any day.' If it is by licence, it is precarious of course in the sense that the licence, being *ex hypothesi* revocable, might be revoked at any time; but if there be degrees of precariousness, the latter is less precarious than the former. But, in my opinion, precariousness has nothing to do with this sort of case, where a privilege which is by its nature known to the law—namely, a right of way—has been in fact enjoyed. *Lord Coleridge's* argument [for the A defendant] was founded upon a misconception of a judgment of mine in *Burrows* v. *Lang* (2), where I was using the argument of precariousness to show that the right which was desired to be enjoyed there was one which was unknown to the law—namely, to take water if and whenever the defendant chose to put water into a particular pond; such a right does not exist at law; but a right of way is well known to the law." B

International Tea Stores Co. v. *Hobbs* (1) has been followed or cited with approval in subsequent cases, in particular, in *Lewis* v. *Meredith* (3), ([1913] 1 Ch. 579) where NEVILLE, J., said:

> "I come to the conclusion that at the date of the grant the water was being and had for a long time been used for the tan pit and the mason's C yard. Easement or right in the strict sense there could not be, for the common ownership precluded the acquisition of any right or easement by the occupiers, but *International Tea Stores Co.* v. *Hobbs* (1) shows that 'a right' permissive at the date of the grant may become a legal right upon the grant by force of the general words in s. 6 of the Conveyancing Act, 1881. From this point of view the circumstances under which the *quasi* right was D enjoyed become immaterial so long as it was actually enjoyed and was of a nature which could be granted, that is to say, a right known to the law: see *Burrows* v. *Lang* (2)."

Again, in *White* v. *Williams* (4), YOUNGER, L.J., cited with apparent approval the *International Tea Stores* case (1). The relevant passage in his judgment ([1922] 1 K.B. 740) is this: E

> "I doubt whether we can enter upon this question in view of the finding of the county court judge; but even if no more than an intermittent and temporary user had been exercised, the right would nevertheless in my opinion be included within these words in s. 6, because it is a right known to the law and, that being so, it matters not, so far as s. 6 of the Con- F veyancing Act is concerned, whether the user is continuous and permanent or permissive and precarious: *International Tea Stores* v. *Hobbs* (1)."

There is, therefore, ample authority for the proposition that a right in fact enjoyed with property will pass on a conveyance of the property by virtue of the grant to be read into it under s. 62 of the Act of 1925, even although down to the date of the conveyance the right was exercised by permission G only, and, therefore, was in that sense precarious.

The next proposition deducible from the cases is the one laid down in *Burrows* v. *Lang* (2), which has been referred to in some of the passages I have already read. It is that the right in question must be a right known to the law. In *Burrows* v. *Lang* (2) it was held that a so-called right to take, for the purposes of watering cattle, so much water, if any, as might happen to be left in an H artificial watercourse after the owner of the watercourse had taken what he required for his own purposes was not such a right. A certain amount of confusion has been introduced into the discussion on this aspect of the case by the circumstance that some of the learned judges have used the word "precarious" in describing rights of a kind unknown to the law, and, in particular, the expression was so used by FARWELL, J., in *Burrows* v. *Lang* (2), but in this context the precariousness enters into the character of the right as distinct from the title to the right. The right is precarious in the sense that, to take the example of the surplus water, there may be no water at all, and the right is in itself liable to be defeated in that way. It is necessary to keep clearly in mind the distinction between "precariousness" in the sense in which it is used in relation to *quasi* rights of that description, and precariousness of title as used in relation to a permissively exercised right. For the purposes of s. 62 it is only necessary that the right should be one capable of being granted at law, or, in other words, a right known to the law. If it is a right of that description, it matters not, as the *International Tea Stores* case (1) shows, that it has been, in fact, enjoyed by permission only. The reason for that is clear, for, on the assumption that the right is included or imported into the parcels of the conveyance by virtue of s. 62, the grant under the conveyance supplies what one may call the defect in title and substitutes a new title based on the grant.

There is one other point to be mentioned. A further exception has been recognised in cases in which there could in the circumstances of the case have been no expectation that the enjoyment of the right could be other than temporary. That exception was recognised by COTTON, L.J. (38 Ch.D. 307) in *Birmingham, Dudley and District Banking Co.* v. *Ross* (5). The learned lord justice was dealing with a situation of this kind. There had been a building scheme under which an area of land was to be developed and built up. Someone took a lease of one of the houses at a time when on the adjoining plot there were only old buildings of less height than those contemplated by the scheme, but it was well known that the intention was, and the building scheme demanded, that this plot should be built on to a greater height. The question for the court was whether the vendor of houses would be permitted a derogation from grant in building on the adjoining plot inasmuch as the effect of that would be to obscure to some extent the light enjoyed by the lessee of the building already erected next door. It was held in those circumstances, as one might expect, that there was no derogation from grant and there was no such enjoyment of the light over the vacant plot as would bring s. 6 of the Act of 1881 into operation. COTTON, L.J., said (38 Ch.D. 307):

> "Therefore, I think it could not be said that the light coming over that low building to these windows could be considered as enjoyed with it within the meaning of this section. The light did in fact at the time come over that building; but it came over it under such circumstances as to show that there could be no expectation of its continuance. It had not been enjoyed in fact for any long period; and in my opinion it was enjoyed under such circumstances, known to both parties, as could not make it light enjoyed within the meaning of that section."

The learned lord justice, I think, meant no more than that it was knowledge common to both parties that the existing building was going to be replaced by a higher one, and, that being so, the fortuitous access of extra light to the lessee's building while the scheme was being carried to completion could not be regarded as an enjoyment of light which would pass to the lessee a right to have it continued in the same degree.

I think those are all the cases to which I can usefully refer, and, applying the principles deducible from them to the present case, one finds, I think, this. First, on the evidence the coal-shed was used by Mrs. Wright by the permission of the landlord, but the *International Tea Stores* case (1) shows that that does not prevent s. 62 of the Act of 1925 from applying, because, permissive as the right may have been, it was, in fact, enjoyed. Next, the right was, as I understand it, a right to use the coal-shed in question for the purpose of storing such coal as might be required for the domestic purposes of the flat. In my judgment, that is a right or easement which the law will clearly recognise, and it is a right or easement of a kind which could readily be included in a lease or conveyance by the insertion of appropriate words in the parcels. This, therefore, is not a case in which a title to a right unknown to the law is claimed by virtue of s. 62. Nor is it a case in which it can be said to have been in the contemplation of the parties that the enjoyment of the right should be purely temporary. No limit was set as to the time during which the coal-shed could continue to be used. The landlord simply gave his permission, that permission was acted on, and the use of the coal-shed in fact continued until Aug. 28, 1943, and thereafter down to 1947. Therefore, applying to the facts of the present case the principles which seem to be deducible from the authorities, the conclusion to which I have come is that the right to use the coal-shed was, at the date of the letting of Aug. 28, 1943, a right enjoyed with the top floor flat within the meaning of s. 62 (1) of the Law of Property Act, 1925, with the result that (as no contrary intention was expressed in the document) the right in question must be regarded as having passed by virtue of that letting, just as it would have passed if it had been mentioned in express terms in cl. 1 which sets out the subject-matter of the lease.

Counsel for the landlord sought to rely on the fact that there was no precise evidence as to the mode in which the right was to be enjoyed. The particular point he took was that there was no evidence as to the means of access by which the tenants were to go to and from the coal-shed when they had occasion to put coal in or take coal out. In my judgment, that has no effect on the conclusion. The landlord admitted in his evidence that he gave permission for the coal-shed to be used, and he admitted that it was still being used in fact on Aug. 28, 1943. In my judgment, the right must be regarded as carrying with it the necessary means of access, and it must be assumed that at all times down to Aug. 28, 1943, Mrs. Wright enjoyed the use of the coal-shed together with the necessary access to it and from it.

Finally, there is the question of the 1*s.* 6*d.* per week. Counsel for the landlord suggested that there was evidence on which the court could hold that there was in 1947 a new agreement superseding any right which might previously have existed under which the tenants were to be entitled to use the coal-shed for a payment of 1*s.* 6*d.* a week. In my judgment, that contention cannot prevail for two reasons. First, the evidence is that the only agreement as to the payment of 1*s.* 6*d.* a week was made with Mrs. Wright and not with Miss Wright, and that Miss Wright, when apprised of it, expressed her dissent in no uncertain terms. It has not been shown to my satisfaction that Mrs. Wright was the agent of Miss Wright for this purpose. That would in itself be sufficient to dispose of this point, but, secondly, it seems to me that, on the footing that by virtue of s. 62 (1) the tenants became entitled on Aug. 28, 1943, to use the coal-shed, then the alleged agreement to pay 1*s.* 6*d.* a week would, even if otherwise free from objection, be an agreement to make a payment with no consideration to support it. Counsel for the landlord invited us to collect from the evidence indications that there was some consideration in the form of allowing the shed to be kept locked and so forth, but, in my judgment, there is no sufficiently clear evidence to show that there was really any such consideration.

For these reasons I am of opinion that the learned judge came to a wrong conclusion when he held that s. 62 of the Law of Property Act, 1925, had no application. He said that the right to use the coal-shed was merely a temporary right. That, as I have said, is no sufficient ground for excluding the operation of s. 62, having regard to the principle laid down in the *International Tea Stores* case (1). Further, he said that this was never a right or advantage appurtenant to the flat, but it is not only rights or advantages that are appurtenant to given premises that pass under s. 62. It is enough, as I have already said, that the right or advantage should, in fact, be enjoyed with the premises.

Accordingly, it seems to me that the learned judge was wrong in excluding the operation of s. 62. It is plain, however, that he did not have the assistance of nearly so full an argument as has been presented to us in this court, and, that being so, it is not surprising that in this rather difficult case he came to a conclusion different from mine. For these reasons I would allow the appeal and direct that, inasmuch as the coal-shed is now no longer in existence, judgment should be entered for the tenants for the sum of damages claimed.

TUCKER, L.J.: On Aug. 28, 1943, the landlord and the tenants thought it would be desirable to put into writing in a more formal manner their legal position with regard to the tenancy of this top floor flat which Mrs. Wright had previously held as a weekly tenant under an informal agreement. I have no doubt that when they entered into this agreement, which is quite a full one, setting out ten sub-clauses showing the tenant's liability, they thought that they were satisfactorily putting down their rights in black and white and regulating their position, but they were apparently unaware of s. 62 of the Law of Property Act, 1925, and the result is that, having got at loggerheads with each other, they have embarked on litigation in the county court and now find themselves in the Court of Appeal, where the case has taken a day to hear and a substantial number of authorities have been cited to help us to elucidate this problem. During the argument I had felt some difficulty in reconciling *International Tea Stores Co.* v. *Hobbs* (1) and *Burrows* v. *Lang* (2), but I find myself in complete agreement with the analysis of the cases which has been made by JENKINS, L.J., and of the principles to be extracted from them, and as to the meaning of the word "precarious." We are told that the landlord, since the hearing before the county court judge, has taken down the shed. I do not think it would be right in a case of this kind—rather a trivial sort of quarrel—to make a mandatory injunction compelling him to restore it. If he had, in fact, taken down the shed before the hearing in the county court, the position might have been very different, but he succeeded in the county court and he took down the shed. It is quite true that he did it at his peril, but I think that in the circumstances of this case justice will be done by awarding the tenants the sum of £10 by way of damages.

SINGLETON, L.J.: I agree.

Appeal allowed with costs in the Court of Appeal and in the county court.

Solicitors: *Henry N. H. Bransom* (for the tenants); *Ridsdale & Son*, agents for *Dale & Newbery*, Feltham (for the landlord).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

INDUSTRIES & GENERAL MORTGAGE CO., LTD. *v.* LEWIS.

[KING'S BENCH DIVISION (Slade, J.), June 29, 30, July 8, 11, 1949.]

Commission—Secret commission—"Bribe"—Payment to agent—Presumption of corrupt motive—Presumption of damage—Measure of damages—Loan procured by company—Fee shared with borrower's agent.

When arranging with the plaintiff company to obtain a loan for the defendant, one V. stipulated that he should be paid half the procuration fee which the defendant would be charged for the company's services. The company knew that V. was to receive from the defendant a share of the profits on the re-sale of property to be purchased with the money lent and that he was acting as agent for the defendant, but they had no dishonest intention to cause him to persuade the defendant to accept the rate of commission demanded or to urge the defendant to act disadvantageously to his own interest. Neither V. nor the company informed the defendant of the payment to V.

HELD: for the purposes of the civil law a "bribe" meant nothing more than the payment of a secret commission and proof of a corrupt motive on the part of the payer was unnecessary; once it was established that one party to a contract had made a secret payment to the agent of the other party the law would presume that he had acted corruptly, that A the agent had been influenced by the payment to the detriment of his principal, and that the principal had suffered damage at least to the amount of the bribe; in the present case the payment by the plaintiffs to V. constituted a bribe and its amount was recoverable by the defendant from the plaintiffs as damages or money had and received.

Dicta of ROMER, L.J., *in Hovenden & Sons* v. *Millhoff* (1900) (83 L.T. 43) B *and* SCRUTTON, L.J., *in Re A Debtor* (*No.* 229 *of* 1927) ([1927] 2 Ch. 376), *applied.*

[AS TO RECEIPT OF BRIBE BY AN AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 251-254, paras. 425, 426; and FOR CASES, see DIGEST, Vol. 1, pp. 480-486, Nos. *1601-1647*.] C

Cases referred to:

(1) *Hovenden & Sons* v. *Millhoff*, (1900), 83 L.T. 41; 1 Digest 485, *1641*.

(2) *Re A Debtor* (*No.* 229 *of* 1927), [1927] 2 Ch. 367; 96 L.J.Ch. 381; 137 L.T. 507; Digest Supp.

ACTION by the plaintiffs for commission claimed to be due under a contract, and counterclaim by the defendant for damages alleged to be due in respect D of the payment of a secret commission and for money had and received.

The defendant, Mr. Cecil Lewis, an estate agent and surveyor, was concerned on behalf of others in the purchase of a leasehold interest in property at 61 to 65 Conduit Street, London, W.1. He was introduced to the property through a Mr. Vermont, to whom for his services he had promised a share in the profits on the re-sale of the property. On the defendant's instructions E Mr. Vermont approached the plaintiffs with a view to their obtaining for the defendant a loan of £45,000 or £50,000 for a short period in connection with the completion of the purchase. Mr. Vermont informed the plaintiffs' manager, Mr. Vagliano, that he was personally interested in the property, having been promised a portion of the profits on its re-sale. He also obtained from Mr. Vagliano a promise of half the fee or commission of one per cent. on the amount F advanced which the plaintiffs would require from the defendant for introducing to him the lender of the money. At no time did he or Mr. Vagliano tell the defendant of this arrangement for sharing the commission and it first came to the defendant's knowledge during the trial. Following the interview the plaintiffs wrote to the defendant that they had arranged a temporary loan on the property for from three to six months, subject to conditions and survey, G their procuration fee to be £1 per cent. of the amount advanced. The defendant sent a letter to Mr. Vermont, who passed it to the plaintiffs, accepting the terms, "it being understood that no fee is payable unless the business is actually completed," and confirming that the defendant would reserve a similar fee for the plaintiffs "on any other business transacted through the same source." On learning that the lenders introduced by the plaintiffs refused H to lend the money for more than three months, the defendant wrote to the plaintiffs suggesting a reduction in their fees since the loan was limited to the shorter period, the full amount to become payable if the loan was converted into a permanent or annual mortgage. At the defendant's request Mr. Vermont interviewed Mr. Vagliano and offered, if the plaintiffs agreed to halve their fee, to accept one third of the reduced fee as his share, receiving two thirds of the balance if the full fee subsequently became payable. Mr. Vagliano agreed, but later he wrote to the defendant about the interview: "Mr. Vermont, however, bearing in mind no doubt that he is also interested in the sale of the property, has made a suggestion to us which we very much appreciate and which will result in the fee payable by you being less if the period is only three months. No doubt, Mr. Vermont will acquaint you with his proposal." Mr. Vermont told the defendant that Mr. Vagliano had agreed to the terms of his letter suggesting a reduced commission, but did not specify the reduced rate. On Mar. 24, 1948, the defendant's father entered into an agreement, the defendant acting as guarantor, for a loan on mortgage of £45,000 for three months from the lenders introduced by the plaintiffs. The period of the loan was later extended by mutual agreement for one month, but the sum was not repaid by the defendant until Nov. 30, 1948, more than eight months after the loan. On the day following the signing of the agreement for the loan, the plaintiffs wrote to the defendant enclosing an account for a fee at one half per cent. on £45,000, *viz.*, £225, and pointing out that "the full agreed rate of one per cent. shall only be charged if the loan is extended to six months or any longer period . . ." The defendant paid the £225, and the plaintiffs paid Mr. Vermont £75 out of it. On a claim by the plaintiffs for payment of the balance of the commission alleged to be due to them by reason of the delay in repayment, SLADE, J., found that there was a valid and binding contract between the plaintiffs and the defendant for the payment of remuneration to the plaintiffs for their services, but that the parties were never *ad idem* as to how the amount of the remuneration should be determined. The law, therefore, implied a contract to pay a reasonable remuneration, which he assessed at £150. He found further that Mr. Vermont was at all material times acting as the defendant's agent, that Mr. Vagliano knew that he was so acting, and that the plaintiffs were not acting as the defendant's agents in putting him in touch with the lenders. He also found that Mr. Vagliano did not agree to pay Mr. Vermont the £75 with the dishonest intention of causing Mr. Vermont to persuade the defendant to accept the commission demanded by the plaintiffs or of persuading him to urge the defendant to act in any way disadvantageously to the defendant's own interest, but he held that, the motive behind the payment being immaterial, the payment constituted a bribe and was recoverable by the defendant from the plaintiffs on the counterclaim.

Neil Lawson for the plaintiffs.
Lloyd-Jones, K.C. and *Vester* for the defendants.

SLADE, J. stated the facts, found for the plaintiffs on their claim for £150, and continued with regard to the counterclaim: A large number of authorities have been cited. Sometimes the words "secret commission" are used, sometimes "surreptitious payment," and sometimes "bribe." For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent. Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes. I emphasise "civil purposes" because the Prevention of Corruption Act, 1906, s. 1 (1), introduces the adverb "corruptly," and, except in the cases provided for in s. 2 of the amending Act of 1916, the onus is put on the prosecution of showing that the payment has been made corruptly. I hold that proof of corruptness or corrupt motive is unnecessary in a civil action, and my authority is the decision of the Court of Appeal in *Hovenden and Sons* v. *Millhoff* (1) where the plaintiffs carried on business as hairdressers' sundrymen and the defendant was a member of a firm of wholesale tobacconists. That firm was dissolved and the defendant carried on the business thereafter alone. For the purpose of purchasing cigars and cigarettes the plaintiffs employed buyers on whose judgment they relied and to whom they paid salaries and bonuses in proportion to their profits, and it was the duty of these buyers to order and to obtain for the plaintiffs the necessary supply of cigars and cigarettes for use in their business on the best trade terms. From 1886 to 1889 the defendant had supplied the plaintiffs with large quantities of cigars and cigarettes for which the plaintiffs had paid upwards of £28,000. In 1889 the plaintiffs discovered that regularly, both at Christmas and Midsummer, during the whole period of their connection with the defendant, he or his firm had made gifts of money in the nature of bribes to the buyers employed by the plaintiffs which were calculated as amounting in all to about 2½ per cent. on the invoice price of the goods sold and delivered. On making this discovery, the plaintiffs commenced an action alleging conspiracy between the defendant and the plaintiffs' buyers to defraud the plaintiffs and they also claimed the money which the plaintiffs' buyers had received from the defendant as money had and received to the plaintiffs' use. The jury negatived the allegation of conspiracy, and GRANTHAM, J., gave judgment for the plaintiffs for one farthing damages. The third answer of the jury was that the payments made to the plaintiffs' buyers by the defendant or his firm had an effect on the minds of the buyers in favour of the defendant. Although the learned judge assessed the damages at one farthing, he formed the conclusion that the action had been substantially one of conspiracy and as that had been disproved he gave judgment for the defendant and the plaintiffs appealed. The appeal proceeded solely on the cause of action for money had and received. I emphasise that because, conspiracy having been negatived by the jury, the arguments and the *ratio decidendi* of the judgments in the Court of Appeal could have proceeded only on the footing that no charge of fraud had been sustained. ROMER, L.J., in his judgment, said (83 L.T. 43):

> "It may, therefore, be well to point out what is a bribe in the eyes of the law. Without attempting an exhaustive definition I may say that the following is one statement of what constitutes a bribe. If a gift be made to a confidential agent with the view of inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent—that is to say, without the knowledge and consent of the principal—then the gift is a bribe in the view of the law."

I emphasise the learned judge's words: "If a gift be made to a confidential agent with the view of inducing the agent" because counsel for the plaintiffs rightly emphasised those words. ROMER, L.J., proceeds (*ibid.*):

> "If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive."

In other words, the learned judge is saying that once the bribe is established, there is an irrebuttable presumption that it was given with an intention to induce the agent to act favourably to the payer and, thereafter, unfavourably to the principal. ROMER, L.J., continues:

> "Secondly, the court will presume in favour of the principal, and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable."

That means that the motive of the donor in making the payment to the agent or donee is conclusively presumed against the person who makes the payment, and, secondly, it is conclusively proved against the person making the payment that the donee is affected and influenced by the payment. The lord justice goes on :

> " Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe."

That is to say, it must be presumed that the price is loaded as against the purchaser at least by the amount of the bribe. Counsel for the plaintiffs says : " Yes, but earlier the learned judge has said that if a gift be made to a confidential agent with a view to inducing him, it is a bribe, and, therefore, in using the later language and referring to bribes the learned judge is in effect saying : ' I am using these later presumptions in cases where a bribe has been established and I have already defined a bribe as being only something which has been established as being paid with a certain motive ' ". That, of course, would tear up the whole of the learned judge's observations because he says lower down that the courts will not receive evidence as to what is the motive of the person making the payment. The motive will be conclusively inferred against him. The Court of Appeal allowed the appeal and for the verdict of one farthing they substituted the amount of the bribe.

In the only other authority to which I desire to refer, *Re A Debtor* (2) (No. 229 of 1927), the appellant employed a moneylender's tout to put him in touch with a moneylender who was prepared to advance money on the security only of a promissory note. The borrower paid the tout a small sum for his services. The tout took the borrower to the moneylender who advanced a sum of £60 on a promissory note for a much larger sum, and the moneylender, without disclosing the fact to the borrower, also handed to the tout a percentage of the amount of cash actually advanced, so that the moneylender's tout had accepted payment both from the borrower and from the lender. The borrower failed to repay the promissory note in accordance with its terms and the moneylender obtained judgment in default of either appearance or defence, served a bankruptcy notice, and after the appropriate period of seven days had elapsed presented a bankruptcy petition on which the registrar made a receiving order. It then came to the knowledge of the borrower that the moneylender's tout had received this payment from the moneylender. He appealed to the Court of Appeal, alleging that the contract was at least voidable, if not void, and that, as it was a bankruptcy matter, the judgment was one which the Court of Appeal was entitled to go behind. The court discharged the receiving order and dismissed the petition. Dealing with the finding of fact of the learned registrar, SCRUTTON, L.J., said ([1927] 2 Ch. 376) :

> " The registrar said that though Latter was no doubt the agent of the debtor he was not satisfied that he was acting in the transaction solely as the debtor's agent. Nor was he satisfied that in the circumstances Latter acted corruptly in accepting the commission of 7½ per cent. from the petitioning creditor [the moneylender]. That conclusion of the registrar is a very dangerous one to the commercial world and to commercial morality. A man who is the agent of A in a transaction between A and B, and who also acts secretly for B in the same transaction, is presumed to act corruptly. Common law authorities require the court to hold that that is a corrupt practice, and, in my opinion, the court ought to presume fraud in such circumstances. It seems to me a dangerous thing to allow a

man to say : 'Although you did not know it, I was also agent for the other party'."

I most respectfully concur in that portion of the judgment of that very learned judge and for the purposes of a civil action, where you have two parties to a contract introduced by an agent of one of them, once it is established that one of the parties to a contract makes a secret payment to the person whom he knows to be the agent of the other, the law will presume against him that he has acted corruptly, that the agent has been influenced by the payment to the detriment of his principal, and that the principal, the defendant in this case, has suffered damage to at least the amount of the bribe.

Judgment for the defendant on the claim with costs and on the counterclaim for £75 as damages or as money had and received with costs.

Solicitors : *Cosmo Cran & Co.* (for the plaintiffs) ; *Kingsley, Napley & Co.* (for the defendant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

MANLEY AND ANOTHER *v.* DABSON.

[King's Bench Division (Lord Goddard, C.J., Oliver and Stable, JJ.), July 26, 1949.]

Street Traffic—Goods vehicle—Records—Duty to keep and carry—Agricultural vehicle—" Used in business of agriculture "—Vehicle conveying farm produce to retail customer—Road and Rail Traffic Act, 1933 (*c.* 53), *s.* 16 (1)—*Goods Vehicles* (*Keeping of Records*) *Regulations,* 1935 (*S.R. & O.,* 1935, *No.* 314), *reg.* 6 (3) (*a*).

The holder of a " C " licence under the Road and Rail Traffic Act, 1933, was charged under s. 16 (1) of that Act with having failed to keep a current record of a journey in respect of an authorised vehicle. The driver was charged under the Goods Vehicles (Keeping of Records) Regulations, 1935 (S.R. & O., 1935, No. 314), reg. 8, with having failed to carry such a record. By reg. 6 (3) (*a*) the driver or holder of a licence in respect of a vehicle " used in the business of agriculture," is, in general, exempt from the duty of keeping or causing to be kept such records. When the vehicle was stopped by the police, it was carrying vegetables, the produce of the licence-holder, for sale by retail.

Held : the vehicle was being " used in the business of agriculture " and the licence-holder and driver were, therefore, excused from keeping or carrying records.

[As to Keeping of Records of Goods Vehicles, see HALSBURY, Hailsham Edn., Vol. 31, p. 815, para. 1284.]

Cases referred to :

(1) *Arthur Fillingham & Sons* v. *Hall*, (1935), unreported ; cited in Stone's Justices Manual, 1948, vol. 2, p. 2077, note (*l*).
(2) *Flatman* v. *Poole*, *Flatman* v. *Oatey*, [1937] 1 All E.R. 495 ; Digest Supp.
(3) *London County Council* v. *Lee*, [1914] 3 K.B. 255 ; 83 L.J.K.B. 1373 ; 111 L.T. 569 ; 78 J.P. 396 ; 42 Digest 864, *160*.

Case Stated by Sussex justices.

At a court of summary jurisdiction sitting at Petworth, Sussex, informations were preferred by the respondent, a superintendent of police, (i) under the Road and Rail Traffic Act, 1933, s. 16 (1), against the appellant, G. E. L. Manley, as the holder of a " C " licence in respect of a utility motor car, and (ii) under the Goods Vehicles (Keeping of Records) Regulations, 1935, reg. 8, against the defendant, Dorothy Manley, as the driver of the vehicle on a road in the parish of Pulborough, charging the appellants with having on Feb. 2, 1949, respectively unlawfully failed to keep and unlawfully failed to carry a current record of a journey of the vehicle. The informations were heard on Feb. 18, 1949, when the appellants contended that by virtue of the Goods Vehicles (Keeping of Records) Regulations, 1935, reg. 6 (3) (*a*), it was not necessary for such a record to be kept since the vehicle was being used in the business of agriculture within a radius of 25 miles from the place where it was usually kept. The prosecutor contended that the vehicle was being used for marketing or retailing goods and not in the business of agriculture. The justices convicted the defendants and fined them £1 each. The defendants appealed and the Divisional Court allowed the appeal, holding that the sale of farm produce was part of the business of agriculture.

Cussen for the appellants.
Harold Brown for the respondent.

LORD GODDARD, C.J. : These are two Cases stated by Sussex justices, sitting at Petworth, before whom the appellants, a husband and wife, were summoned, the charge against the wife being that she, " being the driver of an authorised vehicle, to wit, a utility motor car . . . on a road there, did unlawfully fail to carry a current record," and that against the husband being that he, as the licence-holder, failed to cause such a record to be kept contrary to the Goods Vehicles (Keeping of Records) Regulations, 1935 (S.R. & O., 1935, No. 314), reg. 8, and the Road and Rail Traffic Act, 1933, s. 16 (1) respectively.

Regulation 6 (1) provides :

> " Subject as hereinafter provided in this regulation and in reg. 7 hereof, every driver shall keep and every holder of a licence shall cause to be kept a current record divided into periods of 24 consecutive hours which shall give in respect of each such period during which or during any part of which the driver was employed in driving the information prescribed."

By reg. 6 (3) (*a*) it is provided :

> " In the case of a vehicle used in the business of agriculture it shall not be necessary for the driver or the holder of a licence to keep or cause to be kept the records prescribed by these regulations, except in the case of journeys during the course of which the vehicle is used outside a radius of 25 miles from the place where the vehicle is usually kept."

The second appellant has a farm on which he grows, among other things, vegetables. When his vehicle, driven by his wife, was stopped, green vegetables were found in it which had been grown on the farm and were being taken to the " Swan " Hotel, Pulborough, for sale. The justices were referred to *Fillingham & Sons* v. *Hall* (1), an unreported case quoted in STONE'S JUSTICES MANUAL, which says :

> " Agriculture does not include selling and distributing milk by retail."

We have not had the advantage of seeing a report of that case, but it seems to me that a farmer is using his vehicle in the business of agriculture if he is taking the produce grown on his farm for sale, because that is the only way he can carry on the business of agriculture. The section says, not " used in agriculture," but "used in the business of agriculture," that is to say, in the business of a farmer. There is nothing more akin and appurtenant to the business of a farmer than selling the produce which he grows on the farm.

Counsel for the respondent has contended that if the second appellant had been taking the goods to market she would have been within the exception. I cannot see how it can make any difference if, instead of going to the market, a person goes to a particular customer. He goes to market to find customers. If he has A already found a customer, it seems to me he is still using the vehicle in his business of agriculture.

The case is not altogether without reported authority. In *Flatman* v. *Poole, Flatman* v. *Oatey* (2) Lord Hewart, C.J., said ([1937] 1 All E.R. 496) :

> "The meaning of the exception is perfectly obvious. The purpose of those records is to prevent, on the one hand, or, if that is not possible, B to facilitate, the punishment of persons who employ or use motor vehicles upon the highway for such a continuous stretch of hours as to prevent the drivers from having suitable opportunity of rest, and thereby to imperil the safety of persons on the highway. To suppose that such regulations would be applicable to vehicles used in the business of agriculture is sufficiently fantastic. But here they are expressly exempted." C

In that case, the vehicle was loaded with agricultural implements and furniture in order that they might be moved from one farm to another. If that is the business of agriculture, I cannot see why the taking of agricultural produce for sale is not an *a fortiori* case. It might have been said there that the farmer was nothing more than a removal contractor, removing goods and furniture from one farm to another, which was not carrying on agriculture, but he had been D carrying on business at one farm and he wanted to carry it on at another.

If it had been desired to say that a vehicle was not to be considered as being used in the business of agriculture if the immediate purpose of its use was selling farm produce retail, the regulation could have said so, but it did not do so. The case is singularly like *London County Council* v. *Lee* (3) decided under the Locomotives Act, 1898. The headnote says ([1914] 3 K.B. 255) : E

> "By s. 17, the expression 'agricultural locomotive' includes any locomotive the property of one or more owners or occupiers of agricultural land employed solely 'for the purposes of their farms' and not let out on hire."

The locomotive in that case was drawing to market trolleys with produce in- F tended for sale, and the locomotive was held to be employed for the purpose of a farm. In my opinion, on the true construction of this regulation, a farmer who is using his vehicle to take produce grown on the farm to a customer is within the exception and that is so whether the customer is buying wholesale to sell again or buying retail for his own consumption. For these reasons, I think the appeal should be allowed. G

OLIVER, J.: I agree.

STABLE, J.: I agree.

Appeal allowed with costs.

Solicitors : *Bartlett & Gregory* (for the appellants) ; *Walmsley & Stansbury*, agents for *J. E. Dell & Loader*, Shoreham, Sussex (for the respondent).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

JOHN LEE & SON (GRANTHAM), LTD. AND OTHERS *v.* RAILWAY EXECUTIVE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell and Denning, L.JJ.), July 28, 1949.]

Indemnity—Tenancy agreement—Indemnity by tenant—Loss "which but for
A *the tenancy . . . would not have arisen"—Premises adjacent to railway—Fire caused by locomotive—Damage to goods—Applicability of indemnity clause.*

Goods stored in a railway warehouse let to a tenant were damaged by fire and the tenant brought an action against the Railway Executive alleging that the accident was due to their negligence because a spark or
B other combustible material ejected from their railway engine had caused the fire. The Railway Executive set up a clause in the tenancy agreement providing that : "The tenant shall be responsible for and shall release and indemnify the company and their servants and agents from and against all liability for personal injury (whether fatal or otherwise) loss of or damage to property and any other loss damage costs and expenses
C however caused or incurred (whether by the act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created or anything done pursuant to the provisions hereof would not have arisen."

HELD : the words "which but for the tenancy hereby created . . . would not have arisen" were confined to liabilities which arose by
D reason of the relationship of landlord and tenant ; the fact that the tenant was occupying the warehouse under an agreement from the Railway Executive was immaterial to the allegation in the present case of negligence; and the tenant, therefore, could not be called on to release or indemnify the Railway Executive in the event of negligence being established.

E *Decision of* STREATFEILD, J. (*ante* p. 230), *affirmed.*

[AS TO LIABILITY UNDER CONTRACT OF INDEMNITY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 17-19, para. 14 ; and FOR CASES, see DIGEST, Vol. 26, pp. 233-242, Nos. *1821-1885.*]

INTERLOCUTORY APPEAL by the defendants from a decision of STREATFEILD, J.,
F dated June 23, 1949.

On the trial of a preliminary issue in an action for damages for negligence, or, alternatively, for damages on the ground that the defendants, the Railway Executive, had brought fire on to their property and allowed it to escape on to the plaintiffs' adjoining property and their goods, the plaintiffs alleged that their goods, which were stored in a warehouse adjacent to the railway, had
G been damaged by fire through the negligence of the defendants. The defendants contended that, even if this were proved, they were entitled to be released and indemnified from and against all liability by the first plaintiff, who was the tenant of the warehouse, by virtue of a clause in the tenancy agreement. STREATFEILD, J. held that the clause did not relieve the defendants from liability. The Court of Appeal upheld this decision and dismissed the appeal.

H *Beney, K.C.*, and *Felix Denny* for the plaintiffs.
Gardiner, K.C., and *Douglas Lowe* for the defendants.

SIR RAYMOND EVERSHED, M.R. : This appeal has raised a question of considerable difficulty, but, on the whole, I have come to the conclusion that the appeal should not succeed.

The clause to be construed is in an agreement, dated June 13, 1939, between the predecessors in title of the defendants, the Railway Executive, and the

first plaintiffs. The purpose of the agreement was to grant a tenancy of a warehouse situated in the middle of a number of railway sidings and railway properties near Grantham. Counsel for the defendants has pointed out with justice that the agreement is one in which the railway company undertook the minimum of obligation. He has said that, fairly read, the inference one should draw from the agreement is something to this effect : " We are not anxious to let this warehouse. If we do, you may have it fairly cheaply, but A
we must not be exposed to any kind of risk or liability for which, if we had left it empty, we should not have been liable." I think that, on a general view of the sense of the agreement, counsel is justified in giving it that effect. Clause 10 of the agreement is in these terms :

> " The tenant shall be responsible for and shall release and indemnify the company and their servants and agents from and against all liability B
> for personal injury (whether fatal or otherwise) loss of or damage to property and any other loss damage costs and expenses however caused or incurred (whether by the act or neglect of the company or their servants or agents or not) which but for the tenancy hereby created or anything done pursuant to the provisions hereof would not have arisen."

C
The argument of counsel for the defendants is to the effect that these words must be construed to mean what they say, and that they were intended to throw the widest possible obligation for indemnity and release on the tenants. The real question, however, turns on the meaning to be given to the last two lines : " which but for the tenancy hereby created or anything done pursuant to the provisions hereof would not have arisen." It is plain that it is those D
words which give the real content to the clause as a whole. Without them the clause would have been of such wide import as could not possibly have been intended in a document of this sort. The last two lines define the scope of the obligation.

It is to be noted that there are two categories of liability, namely, liability which would not have arisen " but for the tenancy hereby created " and E
liability which would not have arisen but for " anything done pursuant to the provisions hereof," and it is necessary, if possible, to give proper effect to both branches of the clause. So far as the latter is concerned, " anything done pursuant to the provisions hereof," it is not difficult to see the kind of thing which is contemplated. A number of clauses have been referred to, for example, cl. 4, which carries with it at least the implication that the defendants will F
take goods in and out of the warehouse ; cl. 6, which refers to certain regulations ; cl. 8, which refers to the defendants' right to retain possession of goods for the purpose of securing their own charges ; and, finally—and this is for illustrative purposes the most important clause—cl. 9, whereby the defendants reserve the right to carry pipes, cables and wires, etc., over the premises. To give an example, I think that the words which I am seeking to construe G
in cl. 10 would cover any cause of action the tenants might have by reason of some negligent act which the defendants did in the exercise of their powers under cl. 9 to carry pipes and the like over the premises. These latter words, therefore, appear to me to have a fairly clear and at the same time precise content.

The difficulty is the exact extent of the former words, " the tenancy hereby H
created." I am not satisfied that it is right to treat these words as in some way qualified or limited by the words which follow. I think they mean something different from what is meant by " anything done pursuant to the provisions hereof." Counsel for the defendants says they mean " which but for the existence of the tenancy hereby created would not have arisen." I agree with counsel that the kind of damage which has been suffered in the present case may well have been the sort of thing against which the defendants were

anxious to protect themselves. It appears that a steam engine, while proceeding along the defendants' lines, emitted sparks which set fire to property in the first plaintiff's warehouse and did considerable damage. The allegation in the statement of claim is that the defendants were negligent either in that their engine was unsafe or because for other reasons sparks were emitted from it.

Although it may have been the defendants' intention to protect themselves A from possible claims of that character, the difficulty I have found in considering this clause is that the parties, not being willing to be explicit in their language or to confine themselves to damage of this kind, have evolved a form of words which, if counsel's construction of the material words "but for the tenancy hereby created" is right, seems to me to have most remarkable, if not extravagant, results. "The tenant . . . shall . . . indemnify the company . . . B against all liability for personal injury . . . which but for the tenancy hereby created . . . would not have arisen." What is the meaning of that? Counsel for the plaintiffs has taken the example of a customer of the first plaintiffs, who sets forth from London for the express purpose of visiting the first plaintiffs at their warehouse, and owing to the negligence of the defendants the customer is injured in an accident between Kings Cross and Grantham. Is such a case C covered? Counsel for the defendants may well say: "Everthing is covered assuming such a case can be proved." But if it is covered—and I would agree with the argument that, reading "but for the tenancy hereby created" as equivalent to "but for the existence of the tenancy," it would be covered—then the clause has a scope which I regard as too vague and too extravagant to be supported if a narrower construction presents itself and can be adopted D with equal justice to the language.

There is an alternative construction equally available on the language, namely, that the words "which but for the tenancy hereby created would not have arisen" mean, and are confined to, liabilities which only arise by reason of the relationship of landlord and tenant which this document creates. On that construction, a proper test would be, on any given claim: Is the fact that E the first plaintiffs are the tenants of the defendants under the agreement of June 13, 1939, a necessary or material allegation? If that test be applied in the present case, the answer would be: "No." Examples again have been given of the kind of case that, on this view, would be covered in possible claims against the defendants under implied covenants for quiet enjoyment and so on, but limiting the liability to that which is really related to the relationship F of landlord and tenant which the agreement creates.

Because of the extravagant result which the former view involves, I think that the latter construction is the one which the court ought to adopt. We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They G have put forward a clause which is by no means free from obscurity and have contended that, on the view for which they argued, it has a remarkably, if not an extravagantly, wide scope, and I think that the rule *contra proferentem* should be applied and that the result is that the present claim is not one which obliges the first plaintiffs to give to the defendants a release and an indemnity.

I have dealt with the point of construction to some extent rather differently H from the way in which the learned judge below approached it. I think that, after considering certain causes, he was persuaded that the tenancy must be the *causa causans*. For my part, I have avoided involving myself in that matter. I do not refer to the authorities which have been mentioned, not out of any disrespect to counsel or to the learned judge below, but on the principle, which I think both counsel accepted, that on a matter of construction of this kind other cases provide a very uncertain guide and each document must be construed according to its own terms. If I have arrived by a rather different route, I have reached the same goal which the learned judge reached, and for the reasons which I have stated I feel that the appeal fails and should be dismissed.

SOMERVELL, L.J. : I agree that the appeal fails for the reasons which have been given by the Master of the Rolls.

DENNING, L.J. : I agree. I would only like to give one illustration of the extraordinary consequences to which the interpretation of counsel for the defendants would lead if it were right. So far as I can see, it would mean that if the defendants negligently or recklessly set fire to goods in the warehouse so that, not only the goods in it but also the warehouse itself and adjoining property was destroyed, then not only would the first plaintiffs be unable to recover the damage to their own goods, but they would also be bound to indemnify the defendants against the cost of rebuilding their own warehouse and against their liability to any other persons whose property had been destroyed by their fault. I need hardly say that a construction which leads to those consequences ought not to be adopted unless the words are so plain that there is no doubt about their meaning. This clause is not so plain as that. The words " but for " may denote a cause, or they may be so wide as to include a remote circumstance, and the more reasonable construction here is to limit them to causes properly so called. The last two lines should be read, therefore, as saying : " which has arisen by reason of the tenancy hereby created or anything done pursuant to the provisions hereof." If the wide construction contended for were correct, there would be a serious question whether a contract in such wide terms would be enforced by the courts. There are many provisions in the Railway Acts which restrict the freedom of contract of railway companies. There are provisions which specify their responsibility in respect of the construction of their engines and the maintenance and carrying on of their works and make them liable to compensate people who are damaged. There are provisions which make them liable for injury done in the receiving and delivery of goods, and so forth. Above all, there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused. It would, therefore, be a very serious question whether the defendants are free to exempt themselves in the wide terms which are here contended for. It seems to me preferable that a limited construction should be put on the clause so that it should be valid, and I agree the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Kenneth Brown, Baker, Baker* (for the plaintiffs) ; *E. Coleby* (for the defendants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

Discussed. Graham and Scott (Southgate), Ltd. *v.* Oxlade. [1950] 1 All E.R. 856.

Distinguished. Dennis Reed, Ltd. *v.* Goody. [1950] 1 All E.R. 919.

E. P. NELSON & CO. *v.* ROLFE.

[Court of Appeal (Bucknill, Cohen and Asquith, L.JJ.), July 27, 1949.]

Agency—Estate agent—Commission—Contract to pay commission on introduction of " person able ready and willing to purchase "—Option to purchase property given to third party before introduction—Agent not notified of withdrawal of property from market.

The defendant, a married woman, instructed various estate agents to find a purchaser of property of which her husband was owner and, in the case of one firm of agents (the plaintiffs), she signed an agreement to pay them commission in the event of their introducing to her " a person able ready and willing to purchase the property " for £2,500. One of the other firms of estate agents introduced one E., a prospective purchaser who was willing to buy and to whom the defendant gave an option to purchase the property within 24 hours. The defendant did not withdraw the property from the plaintiffs, and before an agreement to sell to E. was concluded, the plaintiffs introduced a person able, ready and willing to purchase the property, but the owner sold to E. for £2,700.

A HELD : the plaintiffs were entitled to commission on £2,500.

Per COHEN, L.J. : Counsel for the plaintiffs admits that some limitation must be implied, and he says that there are three events in which, notwithstanding the introduction, commission would not be payable. The first is if before introduction the authority is withdrawn ; the second is if before introduction the property has already been sold ; and the third is if before B introduction the owner has entered into a binding contract to sell to somebody else. In the present case the learned judge has introduced a fourth limitation, namely, if at the time of the introduction the property is not for sale because the owner withdraws it by reason of some arrangement, not binding in law, but binding morally or as a matter of business [a view which the court rejected].

C [AS TO AGENTS' RIGHTS TO REMUNERATION, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-263, paras. 432-436, and 1948 SUPP. Tit. Agency; and FOR CASES see 2nd DIGEST Supp.]

Cases referred to :

(1) *Giddys* v. *Horsfall*, [1947] 1 All E.R. 460 ; 2nd Digest Supp.

D (2) *Bennett and Partners* v. *Millett*, [1948] 2 All E.R. 929 ; [1949] 1 K.B. 362; [1949] L.J.R. 1050.

(3) *Reed (Dennis), Ltd.* v. *Nicholls*, [1948] 2 All E.R. 914.

(4) *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] 1 All E.R. 33 ; [1941] A.C. 108; 110 L.J.K.B. 131 ; 164 L.T. 313 ; 2nd Digest Supp.

E APPEAL by the plaintiffs from a judgment of His Honour JUDGE NEAL, sitting at Willesden County Court, dated April 8, 1949, whereby he dismissed the plaintiffs' claim for commission.

The plaintiffs, estate agents, had, in pursuance of a contract, introduced to the defendant a prospective purchaser of property belonging to her husband which her husband had authorised her to sell, but, unknown to the plaintiffs, F the defendant had already granted an option to purchase to another person, to whom the property was eventually sold. The learned county court judge held that a term must be implied in the agreement between the defendant and the plaintiffs that, if the property was not for sale because the defendant had withdrawn it by reason of some arrangement to which she was morally, or as a matter of business, bound, commission would not be payable to the plaintiffs. The G Court of Appeal reversed his decision, holding that no such term could be implied. The facts appear in the judgment of BUCKNILL, L.J.

Geoffrey Howard for the plaintiffs.
G. R. F. Morris for the defendant.

BUCKNILL, L.J. : This is an appeal from a judgment of His Honour H JUDGE NEAL in favour of the defendant in a claim brought by the plaintiffs, Nelson & Co., for the sum of £70 to which they say they are entitled by way of commission. The case is one of some importance and illustrates the saying that hard cases tend to make bad law, but I think that the words of the contract are plain and that the defendant is liable to pay under the terms of it.

The husband of the defendant owned a bungalow, 93 Barnhill Road, Wembley Park, and, being minded to sell it, was in treaty to buy a house elsewhere. The judge has accepted the evidence of the defendant and the evidence of a Mr.

Christelow where their evidence conflicts with the evidence of the witnesses for the plaintiffs, and I take the defendant's evidence accordingly. She said that she had been to various firms for the purpose of selling this bungalow. On these occasions she did not sign any forms. I understand that to mean that she had instructed these agents on the usual terms that they would obtain a commission if they introduced a purchaser. When she got to the plaintiffs' place of business she did sign a form, the material particulars of which are as follows. After giving the address of the property, and the price, £2,500, the form contains this paragraph :

> "I hereby instruct Messrs. E. P. Nelson & Co. to offer for sale the property described above on the understanding that in the event of Messrs. E. P. Nelson & Co. introducing to me a person able ready and willing to purchase the property on the terms indicated above, or on terms subsequently authorised by me, I will pay them immediately upon such introduction commission in accordance with the terms and conditions as specified in the Scale of Professional Charges of the Auctioneers' and Estate Agents' Institute of the United Kingdom, an extract of which scale is given overleaf and which I have carefully read."

The extract simply says :

> "Private Treaty. Negotiating a sale by private contract; or introducing a person able, ready and willing to purchase on terms authorised by the vendor . . ."

and it sets out the percentages.

Another agent to whom the house had been entrusted was Messrs. Cowdrey, & Co., and on the day following the signing of the contract with the plaintiffs a Mr. Emile, sent by Cowdrey & Co., came to the bungalow and said he would like to buy it. He then went back to Cowdrey's, saw Mr. Christelow, and said he wished to purchase the property but had not got the full ten per cent. deposit. He made a preliminary deposit of £5. Mr. Christelow said that he then got into communication with the defendant and on Mr. Emile's behalf asked for an option on the property for 24 hours at a higher figure than that asked by the defendant, and the defendant agreed to give Mr. Emile the option as requested. After Mr. Emile had been to the bungalow, a Mrs. Payne arrived, having been sent by the plaintiffs. She liked the bungalow, but said she wished her husband to see it, but he could not come until the next day and asked the defendant to keep it for them. The defendant said she could not do so, as it might be sold before they had reached a decision. Mrs. Payne then went away, but she returned in the afternoon with her husband. The defendant then said that the house was sold, that she had given an option on it, and that a deposit had been paid. Eventually, the house was sold to Mr. Emile for £2,700.

Counsel for the plaintiffs agreed that to give this contract business efficacy certain implied terms must be inserted. The first was that the contract would not continue in force if, before the plaintiffs introduced the person able and willing to buy, the authority had been withdrawn by the defendant. That is a sensible implied term, because it would effectively prevent any risk of having to pay a double commission. If the defendant had studied the rather stringent terms to which she put her signature, she could have saved all this trouble by simply telephoning to the plaintiffs and saying : "We have got a man who is going to buy the bungalow. Do not send anybody round to see it." Another term which, it is admitted, must be implied was that the contract would not apply if the property had already been sold before the able and willing person had been introduced. The learned judge, instead of limiting the implied term to an actual sale, has gone beyond that and said, in effect, that the contract would not apply if the property had been taken off the market—not legally, but in a business sense. With due respect to the learned judge, I do not understand those words. Either the bungalow had been sold or it had not. It is clear that it had not been sold at the time when Mr. and Mrs. Payne arrived, and, as it had not been sold, the contract was still in existence.

That being so, it seems to me that these terms are perfectly plain. It is not disputed that Mr. Payne was a man able, ready and willing to purchase the property. The property was not, in fact, sold at the time when his wife came to see it, and, therefore the defendant is liable. I need not refer to the various cases which have been drawn to our attention in the course of the argument except to point out that in no less than three cases, *Giddys* v. *Horsfall* (1), *Bennett and Partners* v. *Millett* (2) and *Dennis Reed, Ltd.* v. *Nicholls* (3), a contract in its essentials similar to this has been before the courts and in each case the defendant has been held to be liable to pay the commission although the person introduced has not purchased the property. For these reasons, in my judgment, this appeal should be allowed.

COHEN, L.J. : I am of the same opinion. The merits of this case are all with the defendant, but the argument of counsel for the plaintiffs has convinced me that they are entitled to succeed.

In *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* (4), to which we were referred, it was pointed out by LORD SIMON, L.C. ([1941] 1 All E.R. 40) that there were at least three different classes of cases in which the question of the right to commission could arise. He states the first of them in these terms :

> " There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done, whether his principal accepts the offer and carries through the bargain or not. No implied term is needed to secure this result."

It is not disputed by counsel for the defendant that the present case falls within that class of cases in which commission may become payable, and, as my Lord has pointed out, in such a case it has been held that, in the absence of other circumstances, once the introduction is proved, the commission is recoverable as soon as the introduction has been effected. Counsel for the plaintiffs admits that, even in this class of case, some limitation must be implied, and he says that there are three events in which, notwithstanding the introduction, commission would not be payable. The first is if before introduction the authority is withdrawn ; the second is if before introduction the property has already been sold ; and the third is if before introduction the owner has entered into a binding contract to sell to somebody else. In the present case the learned judge has introduced a fourth limitation, namely, if at the time of the introduction the property is not for sale because the owner withdraws it by reason of some arrangement, not binding in law, but binding morally or as a matter of business. This opinion of the learned judge involves the implication of a term which is not to be found in the contract itself, and, as LORD SIMON, L.C., pointed out in *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* (4) ([1941] 1 All E.R. 40) :

> " In contracts made, however, with commission [agents] there is no justification for introducing an implied term unless it is necessary to do so for the purpose of giving to the contract the business effect which both parties to it intended it should have."

The same view is expressed at rather greater length by LORD WRIGHT (*ibid.*, 53), where he ends his statement of the law with these words :

> " The implication must arise inevitably to give effect to the intention of the parties."

In considering whether or not we can imply here either of two terms which were suggested by counsel for the defendant as necessary in order to support the learned judge's judgment, I think it would be convenient to apply the well-known test of the officious bystander. Before I turn to that, let me state A what I understood to be the terms which counsel suggested. The first was that there should be implied a term that commission would be payable in respect of the first introduction by any agent. On this view, if there had been another agent employed on similar terms to the plaintiffs and he had introduced a purchaser before Mr. Payne arrived, no commission would be payable to the plaintiffs. In the alternative, he said that there must be an implied term that, if B the vendor had justifiably, as he put it, withdrawn the property, the commission would not be payable. I do not think it is possible to say that, if the officious bystander had turned to the parties and said : " Supposing the existence of a state of facts contemplated by either of these two implied terms, would commission have been payable ?", they would both have answered : " Of course not." It seems to me that it is one thing to ask an estate agent to say that he will C not claim commission if the vendor has bound himself to sell to somebody else and quite a different thing to say that he would have agreed not to claim commission if the property had been withdrawn from the market by reason of some arrangement, not binding in law, but which the vendor might choose to think was binding on him in honour or as a business arrangement. The learned judge has said a different question might arise if the vendor had D " improperly or arbitrarily or whimsically withdrawn the property ", but it seems to me that the court would be placed in a difficult position if it had to go into considerations of that kind.

Finally, even if one implied the first of the two terms that counsel for the defendant suggested, I am not sure that it would help him because in the present case it would appear that the other firm, Messrs. Cowdrey & Co., had not induced E the defendant to sign an agreement in this very wide and, as it seems to me at first sight, rather undesirable form, that had been supplied to her by the plaintiffs. The mere introduction of Mr. Emile would, therefore, not have given that firm any right to a commission. It seems to me that, even if we implied the first term, as counsel asked us to do, it would not have entitled him to succeed. For these reasons I agree that the appeal should be allowed.

F

ASQUITH, L.J.: I also agree. I do not think the term ought to be implied as necessary or inevitable. The plaintiffs have performed the literal terms of their contract by introducing a person ready, willing and able to buy, and I do not see the necessity for an implied term that they are to forfeit their right to commission simply because before the introduction the defendant had entered into an arrangement with a third person which made her feel herself morally G bound to sell to that third person. For these reasons, and for the others given by my Lords, I think the appeal should be allowed.

Appeal allowed with costs here and below, to include special fee for counsel.

Solicitors : *W. R. Bennett & Co.* (for the plaintiffs) ; *Mawby, Barrie & Letts* (for the defendant).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

LATILLA AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), July 12, 13, 27, 1949.]

Surtax—Private company—Undistributed income—Apportionment to members—Member a married woman living with her husband—Liability of husband—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 16—*Finance Act,* 1922 (*c.* 17), *s.* 21 (1) (2) (3) (7) (*as amended by the Finance Act,* 1927 (*c.* 10), *s.* 31 (2))—*Finance Act,* 1936 (*c.* 34), *s.* 19 (5).

The Finance Act, 1922, s. 21 (as amended by the Finance Act, 1927, s. 31 (2)), provides : " With a view to preventing the avoidance of the payment of super-tax [now surtax] through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows : (1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year . . . for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year . . . the commissioners may, by notice in writing to the company, direct that . . . the said income of the company shall . . . be deemed to be the income of the members, and the amount thereof shall be apportioned among the members and super-tax shall be assessed and charged under the provisions of this section in respect of the sum so apportioned . . . (2) Any super-tax chargeable under this section . . . shall be assessed upon that member in the name of the company, and . . . shall be payable by the company . . . (7) In this section the expression ' member ' shall include any person having a share or interest in the capital or profits or income of a company . . . " The Finance Act, 1936, s. 19 (5), provides, with regard to tax assessed under s. 21 of the Act of 1922 : " Where . . . the tax . . . is not paid by the company before the expiration of three months from the date of service or before Jan. 2 following the year of assessment (whichever is the later), the tax shall . . . be recoverable from the member on whom the tax was assessed."

A company to which s. 21 applied became liable to surtax for the year 1936-37, and the revenue authorities assessed in the name of the company the husbands of three of its members who were married women living with their husbands. In so doing they relied on the Income Tax Act, 1918, All Schedules Rules, r. 16, which provides that the profits of a married woman living with her husband are to be deemed the profits of the husband and are to be assessed and charged in his name. The husbands appealed :

HELD : (i) section 21 was designed merely as machinery for charging the company with the tax and not as part of the ordinary procedure of assessing and charging an individual, and there was, therefore, no justification for reading the word " member " in that section as sometimes including " the husband of a member who is a married woman living with her husband."

(ii) the effect of s. 19 (5) of the Act of 1936 was to render the debt owed by the company payable by the member, but it did not have the effect of charging the husband of a member with tax, and the assessments should, therefore, be discharged.

[AS TO SURTAX IN RESPECT OF UNDISTRIBUTED PROFITS OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 289, 299, paras. 574-595 ; and FOR CASES, see DIGEST Supp.]

Cases referred to :

(1) *Penang and General Investment Trust, Ltd.* v. *Inland Revenue Comrs.,*

[1943] 1 All E.R. 514 ; [1943] A.C. 486 ; 112 L.J.K.B. 356 ; 169 L.T. 93 ; 25 Tax Cas. 219 ; 2nd Digest Supp.

(2) *Nugent-Head* v. *Jacob* (*Inspector of Taxes*), [1948] 1 All E.R. 414 ; [1948] A.C. 321 ; [1948] L.J.R. 759 ; 2nd Digest Supp.

Appeal by the taxpayers from a judgment of Atkinson, J., dated Mar. 24, 1947. The taxpayers were the husbands of three members of a private company, in respect of the undistributed income of which assessments to surtax had been made under the Finance Act, 1922, s. 21. Having regard to the Finance Act, 1936, s. 19 (5), and the Income Tax Act, 1918, All Schedules Rules, r. 16, the Crown claimed to assess the husbands of the members in the name of the company in respect of proportions of the undistributed income. The Special Commissioners confirmed the assessments, and their decision was affirmed by Atkinson, J. The Court of Appeal now allowed the appeal.

Donovan, K.C., and *Graham-Dixon* for the taxpayers.

The Solicitor-General (*Sir Frank Soskice, K.C.*), *J. H. Stamp* and *R. P. Hills* for the Crown.

Cur. adv. vult.

July 27. The following judgments were read.

TUCKER, L.J. : These three appeals raise the question whether a husband is liable to be assessed and charged to surtax in respect of a sum which has been apportioned to his wife by the Special Commissioners under the Finance Act, 1922, s. 21 (1), as representing her interest in a company controlled by five or fewer people which, in the opinion of the Special Commissioners, has not distributed a reasonable part of its income and with regard to which they have made a direction under the above-mentioned section that its actual income is to be deemed for surtax purposes to be the income of its members. Under these provisions Mr. Latilla was, on Mar. 1, 1943, assessed to surtax in the sum of £285,996 in respect of the year 1936-37, being the sum apportioned to his wife in respect of her interest as a member of a company called F. P. H. Finance Trust, Ltd. Messrs. Latilla-Campbell and Mayo were similarly assessed in the sum of £285,910 each being the sums apportioned to their wives in respect of their interests in the same company. These assessments were upheld on appeal by the Special Commissioners, whose decision has been affirmed by Atkinson, J.

The point is a short one. On the one hand, there is the well-recognised principle of income tax law based on the Income Tax Act, 1918, All Schedules Rules, r. 16, that a husband is liable to be assessed and charged to tax in respect of the income of his wife who is living with him. On the other hand, the Finance Act, 1922, s. 21, as amended by the Finance Act, 1927, s. 31 (2), though, no doubt, designed to prevent loss of super-tax revenue due to the formation of small private companies which did not distribute their profits in dividends, was deliberately framed so as to make the tax recoverable from the company and not from the individual members of the company, though the individual members were given an option whereby they could elect to pay instead of the company. It was not until the passing of the Finance Act, 1936, that the tax in such cases became recoverable from the member, and it is contended that s. 19 (5) of the Act of 1936 cannot be used so as to give a different meaning to the language of s. 21 of the Act of 1922, which was clearly designed to put the liability on the company and consequently to render r. 16 inapplicable, save for the purpose of aggregation of income so as to ascertain the rate of tax chargeable against the company.

It will be convenient at this stage to refer to the relevant rules and sections. The Income Tax Act, 1918, All Schedules Rules, r. 16, so far as material, provides :

> " A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable

> to tax as if she were sole and unmarried : Provided that—(1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee."

Section 21 of the Act of 1922, as far as material, as amended by the Finance Act, 1927, s. 31 (2) provides :

> "With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows : (1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to Apr. 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members and super-tax shall be assessed and charged under the provisions of this section in respect of the sum so apportioned after deducting in the case of each member any amount which has been distributed to him by the company in respect of the said year or period in such manner that the amount distributed falls to be included in the statement of total income to be made by that member for the purposes of super-tax . . . (2) Any super-tax chargeable under this section in respect of the amount of the income of the company apportioned to any member of the company, shall be assessed upon that member in the name of the company, and, subject as hereinafter provided, shall be payable by the company, and all the provisions of the Income Tax Acts and any regulations made thereunder relating to super-tax assessments and the collection and recovery of super-tax shall, with any necessary modification, apply to super-tax assessments and to the collection and recovery of super-tax charged under this section. (3) A notice of charge to super-tax under this section shall in the first instance be served on the member of the company on whom the tax is assessed, and if that member does not within 28 days from the date of the notice elect to pay the tax a notice of charge shall be served on the company and the tax shall thereupon become payable by the company : Provided that nothing in this sub-section shall prejudice the right to recover from the company the super-tax charged in respect of any member who has elected as aforesaid but who fails to pay the tax by Jan. 1 in the year of assessment or within 28 days of the date on which he so elected, whichever is later. (4) Any undistributed income which has been assessed and charged to super-tax under this section shall, when subsequently distributed, be deemed not to form part of the total income from all sources for the purposes of super-tax of any individual entitled thereto . . . (7) In this section the expression 'member' shall include any person having a share or interest in the capital or profits or income of a company . . . (8) The provisions contained in sched. I to this Act shall have effect as to the computation of the actual income from all sources of the company, the apportionment thereof amongst members of the company, and otherwise for the purpose of carrying into effect, and in connection with, this section."

Paragraph 8 of sched. I to the Act, as amended by the Finance Act, 1927, s. 46 and sched. V, pt. III, reads as follows :

> " The apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members, and the income as apportioned to each member so far as assessable and chargeable to super-tax under s. 21 of this Act shall, for the purposes of super-tax, be deemed to represent income from his interest in the company for the year or other period and shall be included in the statement of his total income or in an amended statement of total income which the Special Commissioners are hereby authorised to require and shall be deemed to be the highest part of that income." A

It is not necessary to read the Finance Act, 1927, s. 38, in full, but it has the effect of substituting surtax for super-tax and making surtax a part of income tax. Section 42 (7) of that Act provides :

> " Assessments in respect of surtax shall be subject to appeal to the Special Commissioners except on such matters as under sub-s. (4) of this section are to be regarded as having been finally and conclusively determined, and all the provisions of the Income Tax Acts relating—(*a*) to persons who are to be chargeable with income tax at the standard rate and to assessments to such tax ; (*b*) to appeals against such assessments ; (*c*) to the collection and recovery of such tax ; (*d*) to Cases to be stated for the opinion of the High Court ; shall, so far as they are applicable, apply to the charge, assessment, collection and recovery of surtax, and the Special Commissioners shall, for the purpose of assessment of surtax, have any powers of a surveyor and, for the purpose of the representation of the Crown on any appeal before the Special Commissioners, any person nominated in that behalf by the Commissioners of Inland Revenue shall have the same power at, and upon the determination of, the appeal as a surveyor has at, and upon the determination of, any appeal relating to income tax at the standard rate." B C D

Finally, the Finance Act, 1936, s. 19 (5), provides :

> " Where a notice of charge is served on a company or the liquidator of a company under sub-s. (3) of the said s. 21 and the tax thereupon becoming payable is not paid by the company before the expiration of three months from the date of service or before Jan. 2 following the year of assessment (whichever is the later), the tax shall thereupon, without prejudice to the right to recover it from the company, be recoverable from the member on whom the tax was assessed." E

It is said by the Crown that the concluding words of the passage quoted above from s. 21 (1) of the Act of 1922 are inapplicable to a married woman living with her husband as she is not required to make a return of her total income, and, consequently, double taxation would result where there has been an actual distribution to a married woman member. Furthermore, emphasis is laid on the words " be deemed to be the income of the members," which it is said results in the income being deemed to be the income of the husband where the member is his wife living with him. It is, however, conceded that these words would not by themselves justify an assessment to surtax on the husband having regard to the later words " super-tax shall be assessed and charged under *the provisions of this section*." The Crown have, therefore, to admit that the husband could not be charged until the Act of 1936 was passed. In these circumstances I do not think they can derive much support from the words " shall be deemed to be the income of the members " which simply result in the apportioned sums being deemed to be the income of the member—including married women members living with their husbands—as a step in the process of rendering the tax recoverable from the company. F G H

With regard to the double taxation point, I take the view that para. 8 of sched. I would justify the Special Commissioners requiring a return of total income from a married woman member for the purposes of ascertaining the sum to be charged on the company of which she is a member. If, however, para. 8 does not justify such a requirement, I think the words " falls to be included in the statement of total income to be made " have the same meaning as the earlier words " liable to be included in the statement to be made," and merely refer to the quality of the receipt : see *Penang & General Investment Trust* v. *Comrs. of Inland Revenue* (1), and especially the language of LORD THANKERTON where he says ([1943] 1 All E.R. 517) :

> " In my opinion, the words above quoted refer to the quality of the distribution predicated. It appears to me to be clear that this part of sub-s. (1) had within its purview the failure of a company to distribute a reasonable part of its income as income, which, in an appropriate case, would render it returnable as part of the recipient's total income for purposes of super-tax. My construction of the words quoted may easily be expressed by the substitution of ' would ' for ' to ' and the insertion of the words ' if any ' after ' statements,' as follows—' distributed to its members in such manner as *would* render the amount distributed liable to be included in the statements, *if any*, to be made by the members of the company of their total income for the purposes of super-tax.' Accordingly, the appellants' ground of challenge of the direction fails."

The language of s. 21 (1) appears to me in its ordinary and natural meaning to be applicable to any member of the company, including a married woman living with her husband, whereas the Crown are compelled to read into the sub-section, after the words " that member " at the end of the passage quoted above, the words " or by her husband in the case of a member who is a married woman living with her husband." Similarly, in sub-s. (2), the Crown must insert after " that member " the words, " or her husband in the case of a member who is a married woman living with her husband." Again in sub-s. (3) they must insert, after " member of the company," the words " or the husband of the member," and after " that member," the words " or her husband as the case may be." Sub-section (3) seems to me decisive of this case, as it is, I think, clear that the election is given to the member of the company, and if she be a married woman she, and she alone, is entitled to elect. I cannot accept the submission of the Solicitor-General that the definition of " member " in sub-s. (7) as including " any person having a share or interest in the capital or profits or income of a company " is wide enough to include the husband of a member by reason of his liability to tax in respect of his wife's income. This submission assumes that the very question in dispute has been answered in favour of the Crown, but, even so, the husband could not possibly, in my view, be included in this definition. I feel unable to read into these sections the words necessary to support the Crown's construction, having regard to the fact that the whole section is designed merely as machinery for charging the company and not as part of the ordinary procedure of assessing and charging an individual. When s. 19 (5) of the Act of 1936 was passed it merely resulted in enabling the Crown to recover from the member that which had previously been recoverable only from the company, and I can see no reason for reading into that sub-section the words " but this shall not apply in the case of a member who is a married woman living with her husband, in which case the tax shall be recoverable from her husband." The sub-section appears to me to render the tax recoverable from the member whether she be a married woman or not, and I cannot see what answer she would have to such a claim if made on her personally. The provisions of s. 21 are of a penal character, and to interpret them as imposing on a husband a liability to pay surtax by reason of non-distribution of profits of a company of which he is not a member, and of the profits of which he has no right to any share and from which his wife may in fact have received nothing, would require very clear words.

In contrast to the language of s. 21 of the Act of 1922, the legislature in the Finance Act, 1938, s. 38 (1) (*a*), makes express reference to the wife or husband of a settlor, while in the Finance Act, 1939, s. 15 (6), it is provided that references in that section to a person shall in the case of an individual be deemed to include the wife or husband of the individual. The section in question is one giving extended powers to the Special Commissioners in the case of investment companies to make apportionments under s. 21 of the Act of 1922 in the case of persons who are not members of the company, and is, therefore, very much in point. Neither the Special Commissioners nor ATKINSON, J., have explained precisely how they would read s. 21 of the Finance Act, 1922, so as to give effect to their decision, nor have they expressed any view with regard to the election given under sub-s. (3) of the section. Furthermore, they make no reference to the fact that the section was designed solely as machinery for recovering tax from the company. For these reasons I would allow this appeal.

SINGLETON, L.J. : If a private company does not distribute a reasonable part of its income it is obvious that members of the company may avoid some part of that which they would have to pay by way of surtax if more was distributed. I use the expression "private company" to describe a company within the Finance Act, 1922, s. 21 (6), as amended. The F. P. H. Finance Trust, Ltd., was such a company. The Finance Act, 1922, s. 21, was passed in order to meet this position. The Special Commissioners are thereby enabled to direct that the income of such a company shall be deemed to be the income of the members if it appears to them that there has not been distributed a reasonable part of the income of the company from all sources. Thereafter that income is to be apportioned among the members. Under sub-s. (2) any super-tax (now surtax) chargeable under the section in respect of the amount of the income apportioned to any member of the company is to be assessed on that member in the name of the comany and

> "shall be payable by the company, and all the provisions of the Income Tax Acts and any regulations made thereunder relating to super-tax assessments and the collection and recovery of super-tax shall, with any necessary modification, apply to super-tax assessments and to the collection and recovery of super-tax charged under this section."

Under sub-s. (3) a notice of charge to super-tax under the section is, in the first instance, to be served on the member of the company on whom the tax is to be assessed, and, if the member does not within 28 days of the notice elect to pay the tax, a notice of charge is to be served on the company and the tax thereupon becomes payable by the company. Thus, though the member might for reasons of his or her own elect to pay the tax, the liability to pay the tax was by the section placed upon the company and upon no one else. Paragraph 8 of sched. I to the Act provides the method of apportionment and that the income as apportioned to each member shall, for the purposes of super-tax, be deemed to represent income from his interest in the company for the year or other period, and shall be included in the statement of his total income, or in an amended statement of total income which the Special Commissioners are authorised to require, and shall be deemed to be the highest part of that income.

In order to arrive at the rate of tax payable regard must be had to the Income Tax Act, 1918, All Schedules Rules, r. 16. The incomes of husband and wife have to be lumped together and apportioned income of either of them is to be deemed the highest part of that income. On that basis the amount of tax on the apportioned income is calculated. Under the Finance Act, 1922, s. 21 (1), the apportionment is among the members of the company ; under s. 21 (2) super-tax chargeable in respect of the amount apportioned to any member is to be assessed on that member *in the name of the company*. What, then, was the position of a married woman who was a member of a company in regard to which action was taken by the Special Commissioners under s. 21 ? An apportionment could only be made among the members, and, consequently, a proportion of the income of the company must be apportioned to her. Under r. 16 a married woman entitled to any property or profits for her separate use is assessable and chargeable to tax, but if she is living with her husband at the material time the profits are to be deemed the profits of the husband and are to be assessed and charged in his name and not in her name. Section 21 applies when it appears to the Special Commissioners that the company has not distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax a reasonable part of its actual income. A married woman living with her husband did not, and does not, render any such statement. That is done by her husband, and her income is deemed to be his income for that purpose. It is not said that this affects the liability to super-tax under s. 21 (1), but the result would appear to be that "member" in that sub-section is sometimes to be read literally and at other times as meaning "husband of the member, if the member is a married woman living with her husband." This adds greatly to the difficulties of construing the section and of forming a view as to the position created by subsequent amendments.

By the Finance Act, 1927, s. 31 (2), there were added to s. 21 (1) of the Act of 1922 the words

> "and super-tax shall be assessed and charged under the provisions of this section in respect of the sum so apportioned after deducting in the case of each member any amount which has been distributed to him by the company in respect of the said year or period in such manner that the amount distributed falls to be included in the statement of total income to be made by that member for the purposes of super-tax."

The object of this amendment was to avoid double taxation. Again the position of a married woman who is a member of the company is overlooked. Where the member is a married woman her share of the income so distributed is distributed to her and not to her husband, but the husband makes the return for tax purposes. Thus, once more the word "member" is used in both senses. These refinements did not matter in the least until a further change was made by the Finance Act, 1936. So far a member of a company could not be called on to pay any super-tax assessed under the Finance Act, 1922 (as amended in 1927). Under s. 21 (2) of the Act of 1922 the amount of the income apportioned to any member is to be assessed on the member in the name of the company, and is payable by the company, and the provisions of the Income Tax Acts or regulations thereunder relating to super-tax and the collection and recovery of super-tax apply, with any necessary modification, to super-tax assessments and to the collection and recovery of super-tax charged under that section—that is, of course, to the collection and recovery of super-tax from the company. I have already referred to s. 21 (3) which makes it abundantly clear that the liability to pay was on the company. By the Finance Act, 1936, s. 19 (5), the matter is carried a stage further. If the tax is not paid by the company within a certain time

> ". . . the tax shall thereupon, without prejudice to the right to recover it from the company, be recoverable from the member on whom the tax was assessed."

The husband, the appellant, was not a member of the company. Mrs. Latilla was a member, and the Special Commissioners apportioned to her the sum of £286,996 5*s.* part of the income of the company for the period under consideration. An assessment to surtax was made under the Finance Act, 1922, s. 21, on the appellant, the husband of the member on whom the apportionment had been made. The company sustained a heavy loss in the year following the year of assessment and is in liquidation. Apparently, there is no prospect of its paying the tax. The husband objects to the assessment, contending that, even if the pre-requisites to assessment to surtax under the Finance Act, 1922, s. 21, be held to be satisfied, such assessment can only be made on a member of the company to whom an amount of the company's income has been apportioned; that there is no provision that where a wife is the member, the husband shall be deemed to be a member in her place; that, on consideration of all the relevant statutory provisions, income apportioned to a wife is not to be deemed the husband's income within the meaning of r. 16; and that, consequently, the assessment made on the husband was bad in law and should be discharged.

The Inland Revenue Commissioners rely on r. 16, which, they claim, is a controlling rule which operates throughout the Income Tax Acts. You cannot, they say, assess a married woman living with her husband, and this apportioned income, which is to be deemed to be her income, must be treated as his income and he is assessable and chargeable in respect of it. Rule 16, as LORD UTHWATT pointed out in *Nugent-Head* v. *Jacob* (2) ([1948] 1 All E.R. 418), is a collecting section and not a charging section. It is, I think, essential to bear in mind that one is not considering income which has been received, nor tax which has become due in respect of income received, by a taxpayer. The Finance Act, 1922, s. 21, initiated a scheme of taxing a private company which did not distribute what was considered to be a reasonably sufficient proportion of its income. One arrived at the amount of the tax by reference to the total income of the member (and for that purpose the incomes of husband and wife had to be aggregated) and the apportioned income was to be deemed to be the highest part of the income, thus attracting the highest rate of tax, but the liability to pay the tax was placed on the company, and is still on the company. The change made by the Finance Act, 1936, s. 19 (5), was to provide that, if the company did not discharge its debt or liability, the tax is to be recoverable from the member. The tax was, and is, payable by the company. It is a tax on the company. It is only if it is not paid by the company within the time specified that it becomes recoverable from the member. I cannot see why in these circumstances "member" in the Finance Act, 1936, s. 19 (5), should be read as meaning "husband of the member if the member is a married woman." As I have said, "member" in the Finance Act, 1922, s. 21 (1), means sometimes one and sometimes the other. The Solicitor-General, in dealing with s. 21 (2) and (3), said that it might mean either the husband or the wife.

There is some reason for making a member of a private company responsible if the company does not pay. He or she has, or had, an interest in the company and, maybe, some direction or control over its affairs. A wholly different position arises when it is sought to charge the husband of a married woman who is a member. So far as I know, he could have no right whatever to recover against the company any tax paid by him. It would require clear words to place liability on the husband, and I cannot find them anywhere. I see no reason why the word "member" in the Finance Act, 1936, s. 19 (5), should be read as meaning anyone other than a member. There is nothing in s. 19 itself to encourage one to take a wider view. If it had been the intention of the legislature to make the husband responsible, it would have been easy to add to s. 19 (5) "provided that if the member is a married woman living with her husband the tax shall be recoverable from the husband." This is not a case of the husband being called to defray tax accruing due on income received by his wife. The tax was a tax on the company, but, as it was surtax, it could not be assessed on the company. The effect of the change made by the Finance Act, 1936, is to make a debt owed by one person (the company) payable by another (the member) if the first does not discharge the debt. In my opinion, it goes no further than that, even though the debt is, or is described as, tax, it is still a tax on the company, and on no one else. I am in favour of allowing the appeal.

JENKINS, L.J.: I agree. *Appeal allowed with costs.*

Solicitors: *Churchill, Clapham & Co.* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

HARRISON v. HOPKINS.

[COURT OF APPEAL (Bucknill, Cohen and Asquith, L.JJ.), July 21, 22, 28, 1949.]

Rent Restriction—Tenant—"Persons deriving title under original tenant"—Administratrix of original tenant's estate—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), *s.* 12 (1) (*f*).

In 1928 the landlord let to the defendant's father a cottage to which the Rent Restrictions Acts applied. As from 1942 the defendant lived with her father in the cottage until his death in June, 1948, and thereafter she continued to live in it with her husband. The defendant's father died intestate, leaving five children living besides the defendant, but none of these other children had lived in the cottage. In July, 1948, the defendant obtained a grant of letters of administration to her father's estate, and on Aug. 24, 1948, the landlord served on her a notice to quit, expiring on Sept. 6, 1948, and later claimed possession from her both in her personal capacity and in her capacity as administratrix of her father's estate.

HELD: that the defendant, as administratrix of her father's estate, was a "person . . . deriving title under the original . . . tenant," and was, therefore, a "tenant" within the meaning of s. 12 (1) (*f*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and when the notice to quit expired she became a statutory tenant and so entitled to the protection of the Acts.

Dicta of SCRUTTON, L.J., in *Skinner* v. *Geary* ([1931] 2 K.B. 562) and of MORTON, L.J., in *Lawrance* v. *Hartwell* ([1946] 2 All E.R. 259), *applied.*

Sharpe v. *Nicholls* ([1945] 2 All E.R. 55); *Parker* v. *Rosenberg* ([1947] 1 All E.R. 87); *McIntyre* v. *Hardcastle* ([1948] 1 All E.R. 696); and *Smith* v. *Mather* ([1948] 1 All E.R. 704), *distinguished.*

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401; and FOR CASES, see DIGEST, Vol. 31, pp. 562, 563, Nos. *7097-7107*, and Supplements.]

Cases referred to:

(1) *Smith* v. *Mather*, [1948] 1 All E.R. 704; [1948] 2 K.B. 212; [1948] L.J.R. 1209; 2nd Digest Supp.

(2) *Lawrance* v. *Hartwell*, [1946] 2 All E.R. 257; [1946] K.B. 553; 115 L.J.K.B. 481; 175 L.T. 150; 2nd Digest Supp.

(3) *Sharpe* v. *Nicholls*, [1945] 2 All E.R. 55; [1945] K.B. 382; 114 L.J.K.B. 409; 172 L.T. 363; 2nd Digest Supp.

(4) *McIntyre* v. *Hardcastle*, [1948] 1 All E.R. 696; [1948] 2 K.B. 82; [1948] L.J.R. 1249; 2nd Digest Supp.

(5) *Parker* v. *Rosenberg*, [1947] 1 All E.R. 87; [1947] K.B. 371; [1947] L.J.R. 495; 176 L.T. 170; 2nd Digest Supp.

(6) *Thynne* v. *Salmon*, [1948] 1 All E.R. 49; [1948] 1 K.B. 482; [1948] L.J.R. 506; 2nd Digest Supp.

(7) *Skinner* v. *Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; Digest Supp.

(8) *Collis* v. *Flower*, [1921] 1 K.B. 409; 90 L.J.K.B. 282; 124 L.T. 510; 31 Digest 563, *7105*.

(9) *Mackley* v. *Nutting*, [1949] 1 All E.R. 413; [1949] 2 K.B. 55; [1949] L.J.R. 803.

APPEAL by the tenant from a decision of His Honour JUDGE ST. JOHN FIELD, K.C., sitting at the Leicester County Court, dated Mar. 9, 1949.

The landlord claimed possession of a dwelling-house to which the Rent Restrictions Acts applied, and the county court judge held that the defendant was not a tenant within the meaning of s. 12 (1) (*f*) of the Act of 1920 and made an order for possession. The Court of Appeal now allowed the defendant's appeal. The facts appear in the judgment of BUCKNILL, L.J.

Mrs. Y. Frazer for the tenant.
Stabb for the landlord.

Cur. adv. vult.

July 28. The following judgments were read.

BUCKNILL, L.J. : This is an appeal from an order of His Honour Judge St. John Field, K.C., granting to the landlord the possession of a cottage. In 1928 the landlord let the cottage to one Joseph Bland at a rent of 4s. per week. As from 1942 Bland's daughter, Christine, the defendant, started to live with him. Christine subsequently married Bernard Hopkins, but she and her husband continued to live with Bland in the cottage. On June 14, 1948, Bland died intestate, leaving five children living besides the defendant. On July 7, 1948, the defendant obtained letters of administration. On Aug. 24 the landlord served notice to quit by Sept. 6 on the defendant, who was living in the cottage, and subsequently issued the summons in this action, claiming possession against the defendant both in her own capacity and in her capacity as administratrix of the estate of Joseph Bland. At the hearing the landlord's arguments were : (i) Bland was always a contractual tenant and never a statutory tenant, and, therefore, the defendant could not claim protection under s. 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. (ii) The defendant was merely administratrix and representative of all persons entitled to Bland's estate, and, therefore, she was not a tenant within the meaning given to that word by s. 12 (1) (*f*) of the Act of 1920, which is to the following effect.

> " The expressions . . . ' tenant ' . . . include any person from time to time deriving title under the original . . . tenant."

The defendant's argument, on the other hand, was that she became the contractual tenant when she took out letters of administration, and, therefore, became a statutory tenant when the notice to quit expired. The county court judge decided for the landlord on the ground that the case came within the principle in *Smith* v. *Mather* (1), and that, therefore, the deceased's children did not become statutory tenants.

With respect to the judge, I do not think that *Smith* v. *Mather* (1) is decisive of this case. The facts in that case differed fundamentally from those in the present case, because in *Mather's* case (1) no letters of administration were taken out. The decision of the Court of Appeal proceeded on the basis that by s. 9 of the Administration of Estates Act, 1925, the tenancy vested in the President of the Probate, Divorce and Admiralty Division, that it was inconsistent with such vesting in the President that there should also be a statutory tenancy in the children of the deceased tenant, and that the notice to quit served on the President was a valid notice to bring the contractual tenancy to an end. The crucial point in this case is whether the defendant, when she received a grant of administration of the deceased tenant's estate, became a tenant within the meaning of s. 12 (1) (*f*) of the Act of 1920.

Some remarks by Morton, L.J., in *Lawrance* v. *Hartwell* (2) support this view. In that case the plaintiff let a dwelling-house to X. Subsequently, the defendant also went to live in the house and X made a will appointing the defendant sole executrix and sole beneficiary. X died and probate of her will was granted to the defendant. The plaintiff gave the necessary notice to quit to the defendant and then began an action for possession. The defendant claimed the protection of the Rent Acts, and the question for decision was whether she was a " tenant " entitled to protection. The county court judge gave judgment for the defendant. On appeal the plaintiff argued that the defendant took possession purely in a representative capacity, and as such was incapable of residing on the deceased's property as a home. Morton, L.J., in the course of his judgment, pointed out ([1946] 2 All E.R. 259) that the whole legal and beneficial interest in the tenancy was vested in the defendant, and then went on to say :

> "...I propose to assume for the moment that the defendant had no beneficial interest at all in the testatrix's estate. In those circumstances would the defendant be protected by the Acts? On the assumption that I have made, the defendant would still be a person deriving title under the original tenant and in fact the defendant would still be in possession although there would be this difference in the situation, that sooner or later a beneficiary might come along and say 'that house was demised to me and I A desire to reside in it. Please assent to my taking over, and leave the house.' But, in the meantime, the position is that the defendant is in the house. In my view, an executrix . . . who is living in the house at the time the notice to quit expires, and who has not up to that time taken any step to divest herself of the interest in the property, does become a statutory tenant."

B These remarks, although *obiter*, seem in principle to fit the present case. Indeed, inasmuch as the defendant is a part beneficiary as well as administratrix, her position is stronger than in the illustration given by MORTON, L.J., where the defendant has no beneficial interest in the tenancy. On the other hand, the landlord relied on *Sharpe* v. *Nicholls* (3). In that case the plaintiff's husband owned a cottage which he had let to the defendant. On the death of her husband C the plaintiff desired the cottage for her own occupation, and she, therefore, started proceedings claiming possession of the premises which were required for her own occupation, claiming with her nephew as personal representatives of the deceased landlord. At the hearing the case was argued solely on the question of hardship, and the judge ordered the defendant to give the plaintiff possession. On appeal the defendant argued that the plaintiffs claimed only as personal D representatives of the landlord, and that there was no evidence that the widow was beneficially entitled to the premises. As the point was not taken before the judge and the order was bad in other respects, a majority of the court ordered the case to be re-tried. MORTON, L.J., however, considered that judgment should be given for the defendant on the ground that the plaintiffs had not proved the necessary facts to bring them within para. (*h*) of sched. I to the Rent and E Mortgage Interest Restrictions (Amendment) Act, 1933, which provides, in effect, that the court shall have power to make an order for the recovery of possession if the dwelling-house is reasonably required by the landlord for occupation as a residence for himself or his children or parents. MORTON, L.J., said that the whole case was that the plaintiffs were the owners as personal representatives, there was no evidence that the widow had any beneficial interest F in the house, and, in his opinion, the expression "landlord" in para. (*h*) of sched. I did not apply to one of several legal personal representatives. So, also, in *McIntyre* v. *Hardcastle* (4) the plaintiffs were sisters and had joint legal and beneficial ownership of a house within the Rent Acts. They brought an action for possession against the tenant on the ground that the house was required for occupation as a residence by one of them. The judge dismissed the action G on the ground that para. (*h*) of sched. I to the Act of 1933 did not apply where only one of the landlords claimed the house for his own occupation, and this decision was upheld on appeal. In the present case counsel for the landlord argued that the administratrix only shared the beneficial interest in the premises with the five other children of the deceased tenant and could not be said to have such a beneficial interest in the property as would entitle her to claim to be a H person deriving title under the original tenant. He pointed out the hardship on the landlord if a personal representative could claim the house as a residence for himself although he had no beneficial interest in the property, provided he was residing there when the notice to quit was given.

The only effective solution that I can see to this difficult problem is on the basis that the decision must depend on its particular facts and on the actual words of the appropriate section of the Act, and that it is not practicable to make the decision accord with its possible results in every hypothetical case with quite different facts. In this case there was no evidence that any of the other five children made any claim to the cottage or had ever lived there. As Tucker, L.J., said ([1948] 1 All E.R. 699) in *McIntyre* v. *Hardcastle* (4)

> " All kinds of difficulties have been suggested as likely to follow whichever interpretation is accepted by us. I do not think that the legislature contemplated this situation at all when this paragraph was framed, and, therefore, I feel driven to interpret it merely in the light of the actual language used."

Applying this test, it seems to me that in the present case the defendant as administratrix derived title under the original tenant, and, being in occupation of the house at the material time, she is entitled to the protection of the Acts. I, therefore, think this appeal should be allowed.

COHEN, L.J. : I am of the same opinion. The question turns on the meaning of the word " tenant " in s. 12 (1) (*f*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that a " tenant " includes

> " any person from time to time deriving title under the original . . . tenant."

There is nothing in the context to require the attribution of a secondary meaning to these words. In their natural signification persons claiming title by devolution are as much within the definition as persons claiming title by assignment. If, therefore, the sub-section is construed according to the natural sense of the words used, the defendant is a tenant within the sub-section. It is not disputed that she was in occupation at the material date, namely, the date of expiration of the notice to quit, and, says her counsel, she is therefore plainly a statutory tenant. This was the argument she addressed to the learned county court judge and she supported it by a reference to *Lawrance* v. *Hartwell* (2). In that case this court upheld the claim of the tenant on the ground that, as the entire interest in the tenancy had vested in the defendant as executrix and beneficiary before the expiration of the notice to quit, she was a person deriving title under the original tenant within the meaning of s. 12 (1) (*f*), and, since she was personally residing in the dwelling-house, she was entitled to remain as statutory tenant, but Morton, L.J., who gave the leading judgment with which the other members of the court agreed, went on to consider what the position would have been had the defendant had no beneficial interest in the estate of the testatrix. He held that even on this basis the defendant would have been entitled to remain in possession saying ([1946] 2 All E.R. 259) :

> " On the assumption that I have made, the defendant would still be a person deriving title under the original tenant and in fact the defendant would still be in possession although there would be this difference in the situation, that sooner or later a beneficiary might come along and say ' That house was demised to me and I desire to reside in it. Please assent to my taking over, and leave the house.' But, in the meantime, the position is that the defendant is in the house. In my view, an executrix who is living in the house at the time of the testatrix's death, who is living in the house at the time the notice to quit expires, and who has not up to that time taken any step to divest herself of the interest in the property, does become a statutory tenant."

This view, if correct, plainly covers the present case, but the learned county court judge rejected this argument, saying that the case was concluded in favour of the landlord by the decision of this court in *Smith* v. *Mather* (1). That case, however, turned on para. (*g*) of s. 12 (1), and the point we have to decide did not arise. Counsel for the landlord did not seek to support the county court judge's *ratio decidendi*, but he presented a much more formidable argument in support of the landlord. He relied particularly on two decisions of this court, the first, *Sharpe* v. *Nicholls* (3) and the second, *Parker* v. *Rosenberg* (5), in both of which this court had to consider the rights of a landlord to possession. The question in each case arose, not under s. 12 (1) (*f*), but under s. 3 of the Act of 1933 and para. (*h*) of sched. I thereto. In *Sharpe* v. *Nicholls* (3) proceedings were commenced by the widow and nephew of the deceased landlord as personal A representatives to recover possession of premises within the Acts for the occupation of the widow. There was no evidence to prove that the widow had any beneficial interest in the estate of the deceased landlord. The actual decision in the case did not turn on whether personal representatives were landlords within the meaning of para. (*h*), but MORTON, L.J., expressed an opinion on the point ([1945] 2 All E.R. 60) saying :

> B "The plaintiffs' whole case, as I have shown from their pleadings, is based upon the allegation that they were the owners as personal representatives. I cannot find any admission at the trial in any shape or form that the widow had any beneficial interest in the house. I do not know in the least who was entitled to the house. For all I know, Sharpe may have made a will leaving it to a nephew or to any other person. In those circumstances, C one must consider ; can it be said that 'the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for himself' when the plaintiffs are legal personal representatives suing in that capacity and one of them wants to live in the house ? In my opinion, such a case is not within the terms of para. (*h*) at all. Strange results would follow if that were not so. For instance, you might have four legal personal representa- D tives, none of whom was related to the testator at all, and one of them might require the house as a residence for himself, having no beneficial interest whatsoever in the property. I am clearly of opinion that such a case could not possibly be within the terms of para. (*h*). It is also to be observed that the words 'himself or any son or daughter of his . . . or his father or mother' seem to refer to a person who is the landlord not in the E sense that he is one of several personal representatives but in the sense that he is the sole owner of the property subject to the tenancy. It seems to me, therefore, that the plaintiffs entirely failed to prove that they came within para. (*h*) ; and if they failed to prove that they came within para (*h*), it seems to me the words of s. 3 of the Act absolutely precluded the county court judge and would preclude this court, from making any order for F the recovery of possession."

These observations were *obiter*, but in *Parker* v. *Rosenberg* (5) they were approved and applied where legal personal representatives were seeking to recover possession of premises for the occupation of a sister of the testatrix who was the tenant for life under her will. TUCKER, L.J., said ([1947] K.B. 376) :

> G "It is clear that neither the definition section of the Act of 1920 nor para. (*h*) of sched. I to the Act of 1933 confer on anyone any right to an order for possession which he does not otherwise possess. Paragraph (*h*) is designed to relax in certain cases the previously imposed statutory restrictions on the right of recovery. In the present case Miss Marsh, apart from the Rent Restrictions Acts, would not have been entitled to sue in H ejectment. She was not a party to the lease and was not entitled to the reversion. There is nothing in para. (*h*) of sched. I to the Act of 1933 enabling her to sue or be added as a plaintiff. As the proper plaintiffs, the trustees, cannot bring themselves within para. (*h*) and Miss Marsh cannot herself sue, it follows that no order for possession could properly be made in the present case."

Those decisions lend some colour to the argument of counsel for the landlord, but I would observe that the question in each case before the court was not as to the meaning of the expression " landlord " in the abstract, but as to the right of the landlord to possession under para (*h*), and the landlord had, therefore, to prove not only that he was a landlord but also that he required the premises for his own occupation and that greater hardship would be involved in refusing him possession than in depriving the tenant of possession, a burden which plainly an executor or administrator without a beneficial interest in the property would be unable to discharge. These considerations are not expressly mentioned in the judgment in the cases cited, but they afford a means of reconciling them with the earlier opinion expressed by Morton, L.J., in *Lawrance* v. *Hartwell* (2), an opinion with which I find myself in complete agreement. Counsel for the landlord also referred us to a decision of this court in *McIntyre* v. *Hardcastle* (4), where two joint legal and beneficial owners sought to recover possession under para. (*h*) of sched. I to the Act of 1933 in order that one of them might occupy the premises. Their claim was rejected, it being pointed out that when the paragraph was re-written with the aid of the Interpretation Act, 1889, so as to apply to the case of two executors, the plaintiffs were unable to fulfil the conditions of para. (*h*). That case does not, I think, assist the decision of the case before us. For these reasons I would allow the appeal.

ASQUITH, L.J. : This is an appeal by a defendant from a decision of the county court judge granting possession of certain premises to the plaintiff. The facts of this case appear from the judgment and are not in dispute. The question is whether, on the expiry of the notice to quit served on the defendant, the defendant became a statutory tenant. If she did, it is now common ground that she has done nothing to forfeit the " status of irremovability " inherent in statutory tenancy. She was a statutory tenant from the moment the notice to quit expired, if, and only if, she was then a " tenant " of a dwelling-house to which the Acts apply. The dwelling-house was certainly, as regards rateable value, a dwelling-house to which the Acts applied, for, although only its rent appears in the evidence, every dwelling-house is presumed to be such in respect of the rateable value until the contrary is shown : s. 7 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938.

Was the defendant a " tenant " of this dwelling-house ? This question remits us to the definition of " tenant " for the purpose of the Acts. Section 12 (1) (*f*) defines " tenant " as including anyone " deriving title under the original tenant." At the first blush it would appear obvious that the defendant complies with that description. On Mr. Bland's death intestate his tenancy vested under s. 9 of the Administration of Estates Act, 1925, in the President of the Probate Division until administration was granted, and, when administration was granted, it vested in the administratrix, namely, the defendant. She, therefore, derived title, through the President as intermediary, under " the original tenant," Mr. Bland. To be a tenant within the definition she has also to be in occupation at the time the notice to quit expires, but she more than fulfils this condition. She had resided in the dwelling-house for several years before her father died, and is residing there today. It is, however, argued that an administrator, though resident, is not a tenant (i) if he has no beneficial interest in the tenancy, or (ii) if, though he has a beneficial interest, it is not exclusive—if, that is, there are other beneficiaries sharing that interest with him.

I proceed to consider the first of these propositions. If its contrary is established, the second proposition does not arise and the case is concluded in favour of the defendant. It is said that, where the original tenant is dead, his personal representatives are a mere conduit pipe for " transmitting the title to the beneficiaries " and that it cannot have been intended that they should gain substantive rights exercisable in their own personal interest, such as the status of irremovability conferred by a protected tenancy. Such a status is notoriously non-transferable and is inappropriate to a bare personal representative whose *raison d'etre* is to transfer property or rights to others. Further, it is contended that, on the alternative view, a personal representative who is a trustee would necessarily, in circumstances such as those of the present case, make a profit out of his trust. Again, the object of the Act is, it is said, to keep a roof over the head of a person made of flesh and blood and beneficially entitled, not of a person whose occupation is inherently transitory and who is a mere mechanism for handing that occupation over. Then, again, it is argued that the only provision in the Acts designed to protect possession after death is s. 12 (1) (*g*), which, admittedly, does not apply to protect the defendant's possession in this case since it only applies where the deceased was a statutory, not a common law, tenant : *Thynne* v. *Salmon* (6) ; *Smith* v. *Mather* (1). These and similar arguments were advanced by counsel for the landlord, with a force and address to which this bald summary does less than justice.

In considering them, we should take as our starting point the proposition that, in construing a statute, the words used are primarily to be read in their ordinary grammatical meaning, or, if the words used amount to a term of art, in their established technical meaning. The words " deriving title under the original tenant " seem inevitably to include the defendant, whether regarded as plain English or as a formula used in a technical sense by conveyancers. But the matter doesn't rest there, for the meaning of words, as ascertained by the foregoing tests, may have to be modified by reference to the context, to the mischief struck at by the statute, and to decided cases construing it. As regards case law, there is no authority precisely in point, though several cases are indirectly relevant through *dicta* or implication. More than one of these are decisions on the meaning not of " tenant " but of " landlord," a term which is also defined in s. 12 (1) of the 1920 Act. These decisions construe " landlord " mainly in respect of its meaning for the purposes of para. (*h*) of sched. I to the 1933 Act. Thus, in *Sharpe* v. *Nicholls* (3) it was held by the Court of Appeal that, where two personal representatives sought to avail themselves of para. (*h*) on the ground that one of them required the premises for residence for himself, they were not a " landlord " within (*h*), and, therefore, failed. On the pleadings it was clear that the plaintiffs sued in their representative capacity. It does not appear whether both or either had any beneficial interest, since it does not even appear whether there was a will or not or whether the personal representatives sued as executrices or administrators. *Parker* v. *Rosenberg* (5) decided the same again as regards the meaning of " landlord " in para. (*h*) of the schedule in relation to a claim by trustees appointed under a will who had no beneficial interest. They were the proper plaintiffs, but they could not succeed. A beneficiary who was added as co-plaintiff was held to be improperly so added.

Lawrance v. *Hartwell* (2) is a decision on the meaning not of " landlord " but of " tenant," and, therefore, nearer to this case. The deceased tenant left a will, and the defendant, who was in residence at the time of the decease and thereafter, was sole executrix and sole beneficiary under the will. She was held to be a " tenant " within s. 12 (1) (*f*) *qua* person " deriving title under the original tenant." The question whether the position would have been the same if she had had no beneficial interest, though at the highest collateral to the point actually decided, was extensively canvassed and occupies half—or, perhaps, more than half—of the leading judgment of MORTON, L.J., with which the other two members of the court merely concurred. His answer to this question is a plain : " Yes." This appears sufficiently from such passages as the following ([1946] 2 All E.R. 259) :

> " . . . I propose to assume for the moment that the defendant had no beneficial interest at all in the testatrix's estate. In those circumstances would the defendant be protected by the Acts ? On the assumption that I

have made, the defendant would still be a person deriving title under the original tenant [notwithstanding] that sooner or later a beneficiary might come along and say 'That house was demised to me, and I desire to reside in it. Please assent to my taking over, and leave the house'."

MORTON, L.J., pointed out that in *Skinner* v. *Geary* (7), SCRUTTON, L.J., commenting on *Collis* v. *Flower* (8), makes it clear that he held the same view. A
In conclusion MORTON, L.J., makes an observation which, even if the passages I have cited from his judgment and those he has cited from SCRUTTON, L.J., are purely *obiter*, is in itself irrefragable. He said (*ibid.*, 261):

> "The position is that there is no authority for the proposition that an executor who has proved the will, who has not assented to a bequest to someone else, and who is in actual possession of the house at the termination of B
> the common law tenancy, is not entitled to the protection of the Acts."

In my view, if this is true of executors, it is equally true of administrators. This expression of opinion may be *obiter*, but it proceeded from a judge with great experience in construing these Acts, and I cannot see any adequate reason why it should not be adopted. It accords not only with the views of C
SCRUTTON, L.J., but with the literal and the technical meaning of the words used. I am, for myself, not impressed by the argument founded on the construction given in certain cases to the word "landlord." I do not think the meaning of the word "tenant" can be deduced simply *mutatis mutandis* from that of the word "landlord." The definitions of the two terms in s. 12 (1) of the 1920 Act are not such that the definition of the one is an infallible guide to D
that of the other by conversion, reciprocity, or any other logical automatic device, as a perusal of s. 12 (1) (*g*) will show. Apart from this, the cases I have in mind and have cited deal with the meaning of "landlord," not solely in regard to its definition in s. 12 (1), but specifically in regard to its meaning in the particular context of para. (*h*) of sched. I to the 1933 Act. The language employed in para. (*h*) is, it seems to me, entirely inappropriate when a land- E
lord who is a personal representative is involved. Where a personal representative is involved, then, as was pointed out during the argument by COHEN, L.J., the question of the comparative hardship to the tenant of granting, and to the landlord of refusing, an order for possession seems wholly artificial, and I think these cases, founded on the meaning of "landlord" and of its meaning in a particular connection, shed no light on the meaning of the term F
"tenant" in this case.

Smith v. *Mather* (1), on the authority of which the county court judge decided against the defendant, seems to me of no direct relevance to this case, because it was concerned with the question whether a relation of the deceased was entitled to stay on by virtue of s. 12 (1) (*g*), and in this case no one contends that the defendant is entitled to stay on by virtue of that provision, which G
only applies where the deceased tenant was a statutory and not, as in the present case, a contractual tenant. *Thynne* v. *Salmon* (6), is, for the same reason, irrelevant. So, also, is, as the learned county court judge rightly observes, *Mackley* v. *Nutting* (9), a case which the learned judge says was "brought to his notice." It was not cited before him by any counsel in the case. The judge states that though bound by, he does not understand, this H
decision. Since we agree with him that the decision is irrelevant, perhaps this circumstance is not very important. The argument that, on the construction which I favour, the personal representatives, *quoad* trustees, would be bound to make a profit out of their trust does not strike me as at all decisive. If they did, the *cestui que trust* could, no doubt, cause them to account for the cash value of any such profit. For the purposes of s. 12 (1) (*f*) I do not think the landlords could look beyond the "curtain" of trustees. I adhere to the *dicta*

of MORTON, L.J., in *Lawrance* v. *Hartwell* (2), a decision to which I was a party, and of SCRUTTON, L.J., in *Skinner* v. *Geary* (7). I am of opinion that the administratrix was a protected tenant, that the order for possession was wrong, and that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Bennett, Ferris & Bennett*, agents for *Bray & Bray*, Leicester (for the appellant); *Shelton, Cobb & Co.*, agents for *Woodrow & Aysom*, Leicester (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re WRIGHT (a Bankrupt). *Ex parte* LANDAU (a Creditor) *v.* THE TRUSTEE.

[CHANCERY DIVISION (Danckwerts, J.), August 3, 1949.]

Bankruptcy—Lease—Covenant not to assign without consent—Binding on tenant and "successors in title"—Trustee a "successor in title" to tenant.

By a covenant in a lease of a dwelling-house and shop the tenant, which expression was to include "his successors in title," undertook "not to assign underlet or part with the possession of the demised premises or any part thereof without the written consent of the landlord such consent not to be unreasonably withheld in the case of a respectable and responsible person." The tenant became bankrupt on Jan. 20, 1949. The trustee in bankruptcy wishing to assign the lease to the bankrupt's wife, the landlord sought a declaration that he (the trustee) was bound by the covenant.

HELD: the trustee was a successor in title to the bankrupt although the lease vested in him by operation of law, and as such was bound by the terms of the covenant.

Dicta of NEVILLE, J., in *Re Birkbeck Permanent Benefit Building Society* ([1913] 2 Ch. 38) and LORD STERNDALE, M.R., in *Re Farrow's Bank, Ltd.* ([1921] 2 Ch. 174), *applied.*

Doe d. Goodbehere v. *Bevan* (1815) (3 M. & S. 353) and *Goring* v. *Warner* (1724), (2 Eq. Cas. Abr. 100) *explained and distinguished.*

[AS TO ASSIGNMENT OF LEASE BY TRUSTEE IN BANKRUPTCY, see HALSBURY, Hailsham Edn., Vol. 2, p. 240, para. 271; and FOR CASES, see DIGEST, Vol. 31, pp. 391, Nos. *5365-5379.*]

Cases referred to:

(1) *Doe d. Goodbehere* v. *Bevan*, (1815), 3 M. & S. 353; 2 Rose, 456; 5 Digest 953, *7811.*

(2) *Dyke* v. *Taylor*, (1861), 3 De G.F. & J. 467; 30 L.J.Ch. 281; 3 L.T. 717; 25 J.P. 515; 5 Digest 953, *7812.*

(3) *Goring* v. *Warner*, (1724), 2 Eq. Cas. Abr. 100; 31 Digest 391, *5375.*

(4) *Re Birkbeck Permanent Benefit Building Society*, [1913] 2 Ch. 34; 82 L.J.Ch. 386; 108 L.T. 664; 10 Digest 888, *6046.*

(5) *Re Farrow's Bank, Ltd.* [1921] 2 Ch. 164; 90 L.J.Ch. 465; 125 L.T. 699; 10 Digest 876, *5946.*

MOTION for a declaration that the respondent was bound by the covenants in a lease vested in him as trustee of a bankrupt to whom premises had been demised by the applicant and, in particular, by a covenant not to assign or underlet or part with the possession of the premises without the applicant's written consent, such consent not to be unreasonably withheld in the case of a respectable and responsible person. The applicant also sought an injunction restraining the respondent from assigning, underletting or parting with the possession of the premises in breach of covenant ; for a declaration that the applicant was entitled reasonably to withhold his consent to the assignment of the premises to the bankrupt's wife ; and for an order that the respondent comply forthwith with a resolution of the committee of inspection directing him to take immediate steps to recover possession of the premises from the bankrupt's wife now in possession. Danckwerts, J., held that the expression " successor in title " in the covenant included a trustee in bankruptcy and the trustee was, accordingly, bound by the terms of the covenant.

Aronson, K.C., and *Muir Hunter* for the applicant (the landlord).
Caplan for the respondent (trustee in bankruptcy).

DANCKWERTS, J. : This is an application by motion by Mr. Joshua Landau, landlord under a lease dated Apr. 19, 1947 :

> " . . . (i) for a declaration that the respondent, the trustee in the bankruptcy of one Cyril Wright, is bound by the covenants in the said lease contained, and, in particular, by a covenant not to assign or underlet or part with the possession of the demised premises without the written consent of the applicant, such consent not to be unreasonably withheld in the case of a respectable person ; (ii) an injunction to restrain the respondent from assigning, underletting, or parting with possession of the said premises in breach of the aforesaid covenant ; (iii) a declaration that the applicant is entitled reasonably to withhold his consent to the assignment of the said premises to Mrs. Wright, being the wife of the bankrupt."

The lease was of a dwelling-house and shop, No. 6, Walkers Court, Berwick St., London, and was for the term of 21 years from Mar. 25, 1947. The rent reserved was for the first three years £550 per annum, for the next three years £600 per annum, and for the remainder of the term £650 per annum, payable by equal half-yearly payments in advance on Mar. 25 and Sept. 29 in every year. The parties are described in the lease as :

> " Joshua Landau . . . (hereinafter called ' the landlord ' which expression shall where the context so admits include the person for the time being entitled to the reversion immediately expectant on the determination of the term created) of the one part and Cyril Wright . . . (hereinafter called ' the tenant ' which expression shall where the context so admits include his successors in title) of the other part."

Clause 2 (8) of the lease is a covenant by the tenant

> " Not to assign underlet or part with the possession of the demised premises or any part thereof without the written consent of the landlord such consent not to be unreasonably withheld in the case of a respectable and responsible person."

In cl. 4 (1) there is a condition of re-entry in these terms :

> " If the rent hereby reserved or any part thereof shall at any time be unpaid for twenty-one days after becoming payable (whether formally demanded or not) or if the covenants on the tenant's part herein contained shall not be performed or observed or if the tenant shall become bankrupt or make any assignment . . . it shall be lawful for the landlord at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon this demise shall absolutely determine but without prejudice to the right of action of the landlord in respect of any antecedent breach of the tenant's covenants herein contained."

The tenant, Mr. Cyril Wright, was adjudicated bankrupt on Jan. 20, 1949. There is now no question of the condition of re-entry on bankruptcy because it is admitted on behalf of the applicant that the covenant and the right incident to it of re-entry has been waived. Apparently, the respondent, the trustee in bankruptcy, has had certain negotiations with the applicant with regard to the assignment to two different assignees and has paid rent for the six months in advance which was due on Mar. 25, 1949. The respondent now wishes to assign the residue of the term to Mrs. Wright, the debtor's wife, and it is claimed on his behalf that the covenant against assignment is not binding on him and he is entitled to assign without any consent on the part of the landlord. One of the best known authorities on the subject is *Doe d. Goodbehere* v. *Bevan* (1). It has long been accepted that on the authority of that case a trustee in bankruptcy is at liberty to assign a bankrupt's leasehold property notwithstanding a covenant that the tenant or his assigns shall not assign or part with the property in question. Counsel for the applicant, however, claims that the reasons for that decision no longer apply because s. 4 (1) of the Bankruptcy Act, 1914, contains statutory provisions, which have appeared in the Bankruptcy Act, 1869, and onwards, enabling a trustee in bankruptcy to get rid of an onerous lease by disclaimer. He says that provisions are made for the results which follow on such a disclaimer, and, therefore, a trustee in bankruptcy is no longer in such a position that he may find himself involuntarily landed with an onerous lease and unable to dispose of it except by assignment to some other person. He also claims that the reasons for the decision no longer apply because of the passing of the Landlord and Tenant Act, 1927, which, by s. 19 (1), introduces into every covenant against assignment a provision to the effect that the consent to the assignment should not be unreasonably withheld. A third point taken by counsel for the applicant was, that, by reason of rent having been paid by the respondent under the lease and the applicant having accepted him as tenant and waived the condition of re-entry on bankruptcy, he had ceased to be a mere person in possession by operation of law and become a person in possession by privity of contract so that he was subject to the terms of the lease in all respects. For that he relied on *Dyke* v. *Taylor* (2). I need not decide whether that case was rightly or wrongly decided, because the present circumstances hardly approach the circumstances of that case, and also it is not necessary for me to apply it in view of the decision at which I have arrived. Somewhat extraordinary results might follow if that decision were applied to the full. For instance, a trustee in bankruptcy, having parted with property in perfectly ordinary circumstances, and even with the landlord's consent, might be held to be liable for ever under the covenants of the lease notwithstanding that he had parted with the property.

The matter really comes down to this. First, are cases such as *Doe d. Goodbehere* v. *Bevan* (1) to be treated as still good law ? Secondly, do those cases apply to the terms of the lease in the present case ? Counsel for the applicant asked me to decide that *Doe d. Goodbehere* v. *Bevan* (1) was no longer appropriate in regard to the present state of the law of bankruptcy. Counsel for the respondent, on the other hand, asked me to say that that case is fully operative at the present time and prevents any covenant against assignment limiting the trustee's ability to assign the lease. The reasons for that, he said, were that the bankruptcy law imposes on the trustee in bankruptcy a duty to realise the property of the bankrupt for the benefit of his creditors and that statutory duty overrides all contractual provisions which might limit and prevent the proper realisation of the property. I hope I have not put his argument too high, but that seems to me to be the result which must follow if he is correct.

Doe d. Goodbehere v. *Bevan* (1) and other cases cited are, in my opinion, explainable, apart from such a wide proposition as that which I have mentioned, by reference to the precise terms of the covenants in the particular cases concerned under which it can be said that persons who are not mentioned in the covenants are not bound by the provisions and so are not prohibited from assigning. For instance, in *Goring* v. *Warner* (3) the covenant was :

> " . . . that the lessee, his executors or administrators, should not assign the term without the lessor's consent under his hand in writing, with a power of re-entry in such case to the lessor . . . "

The commissioners under the authority of the statute referring to the strict distribution of property for the benefit of creditors, and assignees from such commissioners, are neither of them within the express terms of such a covenant, and counsel for the respondent is justified in saying that LORD MACCLESFIELD, L.C., as reported (2 Eq. Cas. Abr. 100),

> " held clearly, that the assignment by the commissioners (being done by authority of a statute, which will supersede any private agreement between even the parties) and the assignment over by the assignees was no breach of the condition ; *ergo* decreed plaintiff to hold and enjoy, and an injunction to stay proceedings at law."

If that is applied literally and to the full, it does not matter what the terms of the covenant against assignment are. The persons charged with the duty of distributing the bankrupt's property are not bound by them. In *Doe d. Goodbehere* v. *Bevan* (1) the covenant was that the tenant, his executors, administrators, or assigns, should not assign the indenture, or his or their interest therein, or assign, or underlet the messuage and premises, or any part thereof, to any person or persons whatsoever without the consent in writing of the lessor. Although there is language used by all the judges in that decision which might be construed in a wide sense, it seems to me that the real basis of the decision is that involuntary assigns such as a trustee in bankruptcy, or the commissioners for the purpose of distributing bankrupt's property, as it was in that case, are not assigns within the meaning of such a covenant, and are, therefore, not prohibited from parting with or assigning the leasehold property in question. That is the real basis of that decision, which has stood for a long time and which, if it is to be held no longer part of the law, must be so held, in my opinion, by the Court of Appeal.

The view which I take of the effect of that decision seems to be supported by two modern cases. In *Re Birkbeck Permanent Benefit Building Society* (4) there was an exception of persons taking by operation of law in a prohibition of assignment of a policy of insurance. The property having been vested by an order of the court in the liquidator of a company—it was held that the liquidator took by operation of law, and, therefore, was not subject to the provisions of the restriction in question. In the course of his judgment NEVILLE, J., said ([1913] 2 Ch. 38) :

> " There is another point of view which I think equally affects the condition of the insured, and it is this. *Doe d. Goodbehere* v. *Bevan* (1) clearly shows that *prima facie* a contractual restriction of assignment does not apply to the assignment by a person on whom the property has devolved by operation of law, and who is under an obligation to assign. Of course, you may have so contracted as to include such a case, but the mere condition against assignment does not *prima facie* include it."

That passage seems to me to be quite inconsistent with the wider view that there is some policy of the law of bankruptcy which prevents a trustee in bankruptcy being bound by any condition or covenant against assignment.

In *Re Farrow's Bank, Ltd.* (5) it was held that in the ordinary case of a liquidator of a company in liquidation, the liquidator could not assign the leasehold property of the company contrary to a covenant against assignment, for the simple reason that the property did not vest in the liquidator without an order of the court, and it would be an assignment by the tenant, that is to say, the company, but for my present purpose the material passage is in the judgment of LORD STERNDALE, M.R., in which he distinguished the case of a liquidator from that of a trustee in bankruptcy. He said ([1921] 2 Ch. 174):

> "Now, as has been pointed out, the position of the trustee in bankruptcy is quite different from that of a liquidator. He does not act on behalf of the bankrupt; he does not dispose of the bankrupt's property as such; all A the property is vested in him. The real question which arose in the bankruptcy cases to which we have been referred may be stated in this way. There was a covenant that the lessee should not assign without the consent of the lessor, and that bound him and his assigns. The trustee in bankruptcy had assigned without the consent of the lessor. Was that an act of the lessee or his assigns? It was not of course necessary to hold that the B assignment was not his act; that was obvious on the face of it; and what was held was that the trustee in bankruptcy was not the assign of the bankrupt within the meaning of the covenant, because the covenant related only to voluntary assigns and not to assigns in law. That is really the basis of all those decisions, whatever may have been the language used."

C Applying that to the present case, it seems to me that all that cases like *Doe d. Goodbehere* v. *Bevan* (1) have decided is that the trustee in bankruptcy is not an assign within the covenants in those cases that the lessee or his assigns should not dispose of the property. In the present case the words are different. The covenant, reading it with the clause descriptive of the parties at the beginning of the lease, is a covenant by the tenant and his successors D in title not to assign, and so forth, without the landlord's consent. I am unable to see why the trustee in bankruptcy, even though he obtains the property by operation of law, is not a successor in title of the debtor, that is to say, the tenant. Therefore, in my view, the respondent is bound by the terms of the covenant and I am prepared to make a declaration accordingly.

Declaration accordingly.

E Solicitors: *Landau & Co.* (for the applicant); *Stone & Stone* (for the respondent).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

F

SORRELL *v.* PAGET.

[COURT OF APPEAL (Bucknill, Cohen and Asquith, L.JJ.), July 26, 1949.]

G *Animal—Cattle straying—Damage feasant—Distraint—Lien of distrainor—Inappropriate claim by distrainor—Claim for "£2 for salvage"—Duty of owner to estimate and tender proper compensation.*

The plaintiff's heifer strayed on to a railway line abutting on the farms of both the plaintiff and the defendant, and the defendant, in the interest H of public safety and that of the plaintiff, drove it into a stubble field. In the night it escaped from that field and strayed into one of the defendant's fields, in which he kept a herd of T.T. cattle. The defendant thereupon impounded the heifer in one of his own barns. When the plaintiff's servants called to collect the heifer, the defendant demanded "two pounds for 'salvage' and one shilling per day keep" as a condition of releasing the animal. The plaintiff did not pay the amount demanded, nor did he tender any sum. The defendant continued to detain the heifer which died some days later, though fed and watered by him. The court inferred from the judgment of the county court judge that the defendant had suffered damage as the result of the straying of the plaintiff's heifer. The plaintiff claimed damages for wrongful conversion of the heifer.

HELD : (i) that the defendant had a right of distress damage feasant, and was entitled to a lien on the heifer in respect of the damage sustained until compensation for such damage and a proper sum in respect of the keep of the heifer was paid or tendered.

(ii) that, however unreasonable or inappropriate may have been the amount or nature of the defendant's demand, it was the duty of the plaintiff to estimate the proper amount of compensation and to tender that amount to the defendant, and, therefore, the plaintiff's claim failed.

Gulliver v. *Cosens*, (1845) (1 C.B. 788), applied.

[AS TO DISTRESS DAMAGE FEASANT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 548-556, paras. 940-956 ; and FOR CASES, see DIGEST, Vol. 18, pp. 436-439, Nos. *1730-1861*.]

Cases referred to:

(1) *Falcke* v. *Scottish Imperial Insurance Co.*, (1886), 34 Ch.D. 234 ; 56 L.J.Ch. 707 ; 56 L.T. 220 ; 29 Digest 383, *3069*.

(2) *Albemarle Supply Co., Ltd.* v. *Hind & Co.*, [1928] 1 K.B. 307 ; 97 L.J.K.B. 25 ; 138 L.T. 102 ; Digest Supp.

(3) *British Empire Shipping Co.* v. *Somes*, (1858), E.B. & E. 353 ; 27 L.J.Q.B. 397 ; 31 L.T.O.S. 196 ; *affmd.*, (1859), E.B. & E. 367 ; *sub nom.*, *Somes* v. *British Empire Shipping Co.*, (1860), 8 H.L. Cas. 338 ; 18 Digest 446, *1823*.

(4) *Henly* v. *Welch*, (1706), 11 Mod. Rep. 89 ; Holt, K.B. 563 ; 2 Salk. 685 ; 13 Digest 23, *168*.

(5) *Bradyll* v. *Ball*, (1785), 1 Bro. C.C. 427 ; 32 Digest 230, *155*.

(6) *Gulliver* v. *Cosens*, (1845), 1 C.B. 788 ; 14 L.J.C.P. 215 ; 5 L.T.O.S. 199 ; 18 Digest 448, *1842*.

(7) *Lindon* v. *Hooper*, (1776), 1 Cowp. 414 ; 18 Digest 448, *1846*.

(8) *Glynn* v. *Thomas*, (1856), 11 Exch. 870 ; 25 L.J.Ex. 125 ; 26 L.T.O.S. 281 ; 20 J.P. 227 ; 18 Digest 324, *585*.

APPEAL by the plaintiff from an order of His Honour JUDGE CLEMENTS, sitting at Maidstone County Court, dated Feb. 25, 1949, dismissing the plaintiff's claim for £35 damages for wrongful conversion of a heifer. The Court of Appeal dismissed the appeal. The facts appear in the judgment of BUCKNILL, L.J.

H. G. Garland for the plaintiff.
Boydell for the defendant.

BUCKNILL, L.J. : This is an appeal from an order of His Honour JUDGE CLEMENTS dismissing the plaintiff's claim for £35, the value of a heifer. The plaintiff alleged that on Oct. 23, 1948, the defendant seized and took possession of the heifer, that on or about Oct. 26, the plaintiff by his servants orally demanded the return of the heifer by the defendant, but that the defendant refused to deliver it up and thereby converted it to his own use and deprived the plaintiff of it. The third allegation was that the defendant so negligently treated the heifer that it went mad and died on or about Oct. 30. The defendant, by his defence, alleged that on Oct. 23 the heifer was wrongfully in the defendant's close, doing damage there to the defendant, and that he seized and took the heifer as a distress for the damage and impounded it in a barn. On Oct. 27 the plaintiff by his servants demanded the return of the heifer, but, neither at the time of making the demand nor at any time prior to the heifer's death, did the plaintiff tender any compensation to the defendant for the damage caused by the heifer, nor make, nor offer to make, to the defendant payment for the reasonable cost of the food and water supplied by the defendant to the heifer. Then there is a denial of negligence.

The short history of this unfortunate heifer is that in October the plaintiff, who is a farmer and a stock dealer, bought her at market and took it to his farm. On Oct. 22 in the early morning the heifer strayed on to the railway line which abuts on both the plaintiff's and the defendant's farms. The defendant drove the heifer off the line at a level crossing, and she was taken possession of again by the plaintiff's servants, and the defendant at the time complained about the heifer. Notwithstanding that episode, in the evening of the same day the heifer again got on to the railway line, this time causing much inconvenience and stopping a train. It was getting dark, and the defendant, rightly I think, in the interests of the heifer and of the common safety of people using the line drove her off the line and into a field of his, described as a stubble field.

The first point which arises is this : Did the defendant, in doing that, commit any wrong with regard to the plaintiff's heifer ? Did he wrongfully take possession of her ? My answer to that is that he did not. What he did was done in the interests of the plaintiff and his property as well as of the safety of the public. He put her in this field, which the county court judge has described as a place of "comparative safety," and, when last seen that night by the light of a torch, the heifer was sleeping peacefully in the field. Unfortunately, either during the night or in the early morning of Oct. 23, the heifer got out of the stubble field, crossed a public highway, and strayed into another field of the defendant's, and on the morning of the 23rd the defendant saw her grazing in the field where also were cattle of his own T.T. herd. That was very discomforting for the defendant, because he was careful to keep his herd free from all possible infection. So this time, instead of putting the heifer back into the stubble field or on the road, he put her in his barn. He gave her hay and water, but he did not communicate with the plaintiff and tell him that his heifer was in the barn. On the morning of the 27th the plaintiff, having found out where the heifer was and having tried to communicate with the defendant on the telephone without success, sent two men with a lorry to collect her. There is a slight divergence in the evidence as to what happened at the interview between the defendant and these two men, but the county court judge says that he prefers the evidence of the defendant on that point. The judge's note of the evidence is as follows :

> "On the 27th, the plaintiff's men came to ask for the heifer. I met Burnham [one of the plaintiff's men]. He said he had come for the beast. I said : 'I want £2 for salvage, 1*s.* per day keep.' Never calculated. Burnham said he had no money, and referred me to the lorry driver. I repeated to the lorry driver what I had said to Burnham. He said : 'You will have to send in a bill.' I expostulated about the matter and said I could not trust their master. I said I wanted to be paid before I let her go. He said he would pay for the keep. I said I wanted to be paid the whole amount. He did not produce any money. No money offered . . . 10*s.* 0*d.* and 3*s.* 0*d.* was not mentioned. I sent him back to get the money, £2 and keep—whatever keep amounted to—not then calculated."

On that interview it seems to me that the second point arises in this case, namely, whether the defendant wrongfully refused to give the heifer up. The county court judge in his judgment says:

> "No actual money was offered to the defendant for the keep or damage. The defendant told the men to go and get the whole of the money, keep and compensation. It was open to the men to do one of two things—hand the defendant [a shilling] a day for keep, or go away and return

and tender the keep money. It had been argued that they should be excused because they were told to go and get the money. There was never in this case any kind of offer to pay any sum at all, and, therefore, no legal tender."

During the argument a discussion took place as to the use of the word "salvage." Strictly speaking, salvage is not a recognised head of claim in the common law as it is at sea. I need only refer to the judgment of Bowen, L.J., in *Falcke* v. *Scottish Imperial Insurance Co.* (1) to show what the position is. He said (34 Ch.D. 248) : A

> "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will." B

Unfortunately, although it is admitted that the defendant asked for salvage, there is no evidence in the note to show that he was asked what he included in that word. There is no evidence that he made any claim for damage apart from salvage, and I think he clearly would be entitled to damage, if he could prove it—damage, for instance, done by the heifer in getting into this field and grazing, and possible damage to the herd. But, assuming that the defendant put forward a claim for salvage which was not recognised by the law, I think that the cases establish that it was the duty of the plaintiff to make a tender in respect of damage done by the animal. He never made a tender, and until the tender was made I think the defendant was justified in keeping the heifer in the barn. C D

The third point is whether the defendant was negligent in keeping the heifer in the barn for a week before she died. It is for the plaintiff to prove that the defendant was negligent, and that the death of the beast was the result of that negligence. That is a question of fact, and the judge has come to the conclusion, as he says in his judgment, that "the plaintiff has not proved that the animal died as a result of the defendant's fault." For these reasons, in my judgment, this appeal should be dismissed. E

COHEN, L.J. : I agree. On the question whether the right of distress damage feasant had accrued to the defendant, I have nothing to add to what has been said by my Lord. That being so, the question is whether the refusal to deliver up the heifer on Oct. 27, gave the plaintiff a cause of action. The plaintiff was entitled to delivery of the heifer on making tender of the proper amount of compensation for damage. The judge has found that no tender was made. Counsel for the appellant first submitted that no damage was proved. It is true that there is no express record of any evidence as to damage or any reference to damage in the judgment, but I think it is a clear inference from the judgment that the judge was satisfied that there was sufficient damage to make a tender necessary. On any other basis it was unnecessary for him to go into the question of tender, but, as an alternative to his first submission, counsel for the appellant submitted that his client was relieved of the obligation to tender by the excessive demands on the part of the defendant, which he said were not only excessive in amount, but excessive in quality—that is to say, that he demanded compensation and keep when he was only entitled to damages. F G H

In support of that argument he relied on the observations of Scrutton, L.J., in *Albemarle Supply Co.* v. *Hind & Co.*, (2). The observations in question are sufficiently recorded in the headnote. The Lord Justice said:

> "A person claiming a lien must either claim it for a definite amount

> or give the owner particulars from which he himself can calculate the amount for which a lien is due. The owner must then, in the absence of express agreement, tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (*a*) if he has no knowledge, or means of knowledge, of the right amount; or (*b*) if the person claiming the lien A for a wrong cause or amount makes it clear that he will not release the goods unless his full claim is satisfied, and that claim is wrongful. The fact that the claim is made for more than the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or makes it clear that he insists on the full amount of the right claimed."

B That was a case, not of a right of distress damage feasant, but of the lien of a repairer who had done repairs to a car, a lien arising out of a contract and not a right arising out of the tort of the party against whom the lien was sought to be asserted, but counsel said that there was reason to think that the two rights were on a par, and he referred us to *British Empire Shipping Co.* v. C *Somes* (3) where the question that arose was as to the right of a ship repairer to claim £21 a day for the use of the dock during detention. LORD CAMPBELL, C.J., in giving the judgment of the court, said (E.B. & E. 366):

> "Although the lord of a manor be entitled to amends for the keep of a horse which he has seized as an estray (*Henly* v. *Welch* (4), the distrainor of goods which have been replevied cannot claim any lien upon them: D *Bradyll* v. *Ball* (5). So, where a horse was distrained to compel an appearance in a hundred court, it was held that, after appearance, the plaintiff could not justify detaining the horse for his keep. If cattle are distrained damage feasant, and impounded in a pound overt, the owner of the cattle must feed them; if in a pound covert or close, 'the cattle are to be sustained with meat and drink at the peril of him that distraineth, and he shall not E have any satisfaction therefore'."

That case would only, I think, go to this, that there would be no obligation to tender for keep. Indeed, counsel has called our attention to the fact that the right for claim for keep did not arise until 1854 (Cruelty to Animals Act, 1854), and then it was only a statutory right giving right to a summary F remedy and not a right to distrain for the amount due, but, despite the similarity, it seems to be clearly established by authority that there is a radical difference in one respect, and that is in respect of the question of the onus of fixing the amount which must be tendered in order to give the distrainee the right to return of the property on which the distraint has been levied. That distinction seems to be clearly established by the decision in *Gulliver* G v. *Cosens* (6). The actual decision in that case was as to the right of a distrainee, who had satisfied an excessive demand in order to recover his goods, to recover the amount thus paid in excess as money had and received to his use, but, in giving the judgment of the court, TINDAL, C.J., expressed an opinion on the wider point which is relevant here. He said (1 C.B. 796):

> "It appears to me that, when the present plaintiff found he was too H late to make a tender, so as to entitle himself to replevy the sheep and to succeed in an action of replevin, his proper course was, to make a tender of sufficient amends to cover the damage sustained; and, in the event of the defendant refusing to accept the sum tendered, and deliver up the sheep, he should have brought detinue; for, they were held by the defendant merely as a pledge. In that case, the hazard of the sufficiency of the tender would fall, as it ought to do, on the owner of the cattle. It has been urged that here a tender was unnecessary, inasmuch as the

> sum demanded for compensation was exorbitant : that argument, however, as it seems to me, is answered by saying that the risk of determining the real amount of damage, is not by law imposed upon the defendant. This I should be disposed to hold upon principle, and independently of the authority of *Lindon* v. *Hooper* (7), which I am unable to get over, and which I am not aware has been overruled ; and, though cases have occurred in which it has been decided that an excessive demand dispenses A with a tender, yet those were cases where the law made it incumbent *on the defendant* correctly to ascertain the amount of his demand."

That case was approved and applied in the Court of Exchequer Chamber in *Glynn* v. *Thomas* (8) where COLERIDGE, J., in giving the judgment of the court, said (11 Exch. 877): B

> "In *Gulliver* v. *Cosens* (6) the court assumed the sum demanded for the damage to have been excessive, but laid it down that the plaintiff, being the original wrong-doer, was still bound to tender the sum which he alleged to be sufficient ; and in the present case the plaintiff, for the same reason was equally bound to make the tender." C

Those two cases seem to me to lay down a rule which we are bound to follow, and I do not think that it makes any difference in principle that the demand in the present case was excessive, or may have been excessive, not only in quantity but in quality. Had the plaintiff paid the amount demanded and sought to recover it as money had and received, the fact that there was an excessive demand in quality might have afforded a ground, notwithstanding D the decision in *Gulliver* v. *Cosens* (6), on which he would have been entitled to recover the amount paid as money had and received. It does not seem to me that an excessive demand, even in quality, relieves the plaintiff of the duty, which the county court judge has found he did not perform, of making a proper tender. It has been suggested that *Gulliver* v. *Cosens* (6) might not be followed, in so far as it held that the action for money had and received E would not lie. That suggestion is to be found in GLANVILLE WILLIAMS ON LIABILITY FOR ANIMALS, p. 116, but there is nothing to suggest that in so far as the case laid down that the onus of making a proper tender was on the plaintiff, it was not still the law. Indeed, it seems to be the view of the author, expressed on p. 114, that the law in this respect is as laid down in *Gulliver* v. *Cosens* (6). For these reasons, I agree that the appeal should be F dismissed.

ASQUITH, L.J. : I also agree and will only add a sentence or two on the question whether tender was excused. *Gulliver* v. *Cosens* (6) decides directly no more than that, where the rightful distrainor demands, as a condition of releasing the animal, more money than he is entitled to as compensation G for the damage done, and the owner of the animal pays this exorbitant sum, the latter cannot recover back the excess as money had and received, at any rate, where a pound is a common pound, but it affirms very clearly the principle that, however extortionate the demand of the distrainor for compensation in point of *quantum* this does not excuse the owner from the duty which lies on him, as a tortfeasor, of forming an estimate of the amount of damage H and making a tender of that amount. If he omits to do this, the continued detention of the animal by the distrainor is lawful, provided it was originally so. Is the position the same when the distrainor's demand is not for an extortionate quantum of compensation for damage done, but for payment in respect of something wholly distinct from compensation for damage, for instance, a reward for his services in rescuing the animal from a position of danger ? If it is, then the defendant should succeed ; if not, he fails. Here the defendant claimed what he called "salvage", something, strictly speaking, not in law recoverable for services rendered on land at all. Salvage by land is a legal chimera. Does this alter the position and excuse tender ? No direct authority on the point has been brought to our notice, and perhaps none exists. For myself, I think the principle underlying *Gulliver* v. *Cosens* (6), which was affirmed by the Exchequer Chamber in *Glynn* v. *Thomas* (8) both as to what it actually decided and as to the reasoning upon which it proceeded, is that the owner of the animal must estimate the damage and tender the estimated amount, whatever the nature of the distrainor's money demand, whether in relation to the quantity or the quality of that demand. It is just as unreasonable to require the owner to make such a tender where the actual damage amounts to 1*s.* 0*d.* and the distrainor demands in respect of such damage £100 as to require him to make a tender where the damage is £100 and he demands £100, but claims it under the inappropriate title of "salvage." Yet, if the distinction insisted upon by counsel for the appellant was upheld, and the owner made no tender, in the first case the distrainor would be within his rights in continuing the detention, and, in the second, he would not. He would have forfeited his right. Counsel was unable to cite any authority which decided, directly or indirectly, that the owner of the animal distrained is ever excused from making a tender by any kind of demand made by the distrainor.

The rule laid down in *Gulliver* v. *Cosens* (6) is harsh, and, it may be, unreasonable. But it certainly impresses the type of lien involved in distress damage feasant with a totally different character from an ordinary contractual lien such as was in issue in *Albemarle Supply Co., Ltd.* v. *Hind & Co.* (2), which was relied on by the appellant. But it seems to me to have been part of our law for centuries that no demand made by the distrainor can excuse the owner of the animal from tendering a sum estimated by himself as equivalent to the damage the animal has done. This was not done in the present case. For these reasons I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *J. Albert Davis & Co.* (for the plaintiff) ; *Radcliffes & Co.*, agents for *E. A. Morling & Sons,* Maidstone (for the defendant).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

NATIONAL COAL BOARD *v.* HORNBY AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), July 20, 21, 22, 29, 1949.]

Mines—Coal mine—Farm—Option to purchase granted to colliery concern—Acquisition of assets of colliery concern by National Coal Board—Purported exercise of option by National Coal Board—Coal Industry Nationalisation Act, 1946 (*c.* 59), *ss.* 5 (1) (2), 7, *sched. I, pts. I, II, paras.* 9, 14, *sched. II.*

On Apr. 4, 1938, F. entered into an agreement with the L. Co. (which was at all material times a colliery concern within the meaning of the Coal Industry Nationalisation Act, 1946, s. 63) by which it was provided that, in consideration of a yearly sum of £10 payable to F. by the L. Co., the L. Co. was to have the option to purchase at any time within ten years from the date thereof certain land and buildings known as N.L. Farm (which was a "farm" within para. 25 of sched. I to the said Act). Clause 3 of the agreement provided that the option was to be exercised by the L. Co.'s giving notice in writing to F., and thereupon F. was to be deemed to have agreed to the purchase of N.L. Farm for £13,000, to be completed within six weeks of the receipt of the notice. The agreement made no reference to the executors, administrators or assigns of F. or to the assigns of the L. Co. On May 4, 1945, F. conveyed N.L. Farm by way of gift to his son and daughter, H. and M., who acquired the property with full knowledge of the agreement of Apr. 4, 1938. By the Coal Industry Nationalisation Act, 1946, ss. 5-9, provision was made for the transference of the assets of colliery concerns to the National Coal Board. Certain classes of assets, described in sched. I, pt. I, were, by s. 5 (1) of the Act, vested automatically in the board on Jan. 1, 1947 ; other assets, indicated in sched. I, pt. II, and including interests in farms, were, by s. 5 (2), to vest at the option of the National Coal Board or the owners of the assets on the service of a notice by one on the other ; and further assets vested under s. 5 (3) on certain other conditions. No notice was served by the board under s. 5 (2), but by notice in writing to F. dated Feb. 18, 1948, the board purported to exercise the option under the deed of Apr. 4, 1938, and they now claimed specific performance of the agreement for sale which they submitted was so constituted. Evidence was given on behalf of the L. Co. that the company assumed and admitted that its rights and interests under the deed of Apr. 4, 1938, had passed to the board.

Held : on the evidence, the L. Co. entered into the agreement of 1938 for the purposes of coal industry activities, and its interest was held " for the purpose of having land available for use for coal industry or transferred allied activities " within the meaning of para. 9 of pt. I of sched. I to the Act, and, therefore, the interest could have passed under s. 5 (1) ; the agreement was a contract within s. 7 of the Act and sched. II to it, and, therefore, " had effect in favour of and against the board " so as to place the board in the shoes of the L. Co. for the purpose of enforcing the agreement ; and, although the N.L. farm was property within pt. II of sched. I passing only on notice, as the L. Co. had agreed that the property had passed it was unnecessary to determine under which provision it had so passed, and specific performance should be decreed.

[For the Coal Industry Nationalisation Act, 1946, ss. 5 and 7, and scheds. I and II, see HALSBURY'S STATUTES, Vol. 39, pp. 260-262, 264, 265, 301-307.]

Cases referred to :

(1) *London & South Western Ry. Co.* v. *Gomm*, (1882) 20 Ch.D. 562 ; 51 L.J.Ch. 530 ; 46 L.T. 449 ; 37 Digest 79, *195*.

(2) *Woodall* v. *Clifton*, [1905] 2 Ch. 257 ; 74 L.J.Ch. 555 ; 92 L.T. 292 ; 37 Digest 81, *211*.

Action by the National Coal Board for specific performance of an agreement for the sale of a farm which the board alleged was constituted on the giving of a notice to purchase in the purported exercise by the board of an option granted to a colliery concern under an agreement dated Apr. 4, 1938. Vaisey, J., granted the relief sought. The facts are set out in the judgment and are summarised in the headnote.

L. M. Jopling for the plaintiffs, the National Coal Board.
Baden Fuller for the defendants (F., H. and M.).

Cur. adv. vult.

July 29. **VAISEY, J.,** read the following judgment. The origin of this action is an agreement in writing dated Apr. 4, 1938, and made between the first defendant, Francis Hornby (therein and hereinafter called " the grantor "), of the one part, and the Lilleshall Co., Ltd. (therein and hereinafter called "the company"), of the other part. I will at this point observe that the company is and was at all material times a "colliery concern" within the meaning of that expression as used in the Coal Industry Nationalisation Act, 1946, (see s. 63 (1)) which Act I will call "the Coal Act" or "the Act", that is, it is a company whose business includes the working of coal as more particularly defined in s. 63 (1) of the Act. I understand also that it had other activities in addition to those which constitute it a colliery concern. This fact may have some relevance to the matter in issue.

By cl. 1 of the said agreement it was declared and provided that in consideration of a yearly sum of £10 payable as therein mentioned by them to him the grantor thereby gave to the company an option to purchase at any time within ten years from the date thereof at the price of £13,000 the property described in the schedule thereto. That property consisted of certain lands and buildings at Lilleshall, in Shropshire, known as New Lodge Farm, comprising an area of about 329 acres. It is, in fact, a farm within the definition contained in para. 25 of sched. I to the Act. Clause 2 of the agreement prescribed the method of payment of the said sum of £10, and cl. 3 contains provisions to the following effect. The option was to be exercised by the company giving notice in writing to the grantor, and on that being done the grantor was to be deemed to have agreed to the purchase of the property at the price aforesaid. The purchase money was to be paid and the purchase completed within six weeks of the receipt of the notice by the grantor. An abstract of the grantor's title to the property was to be delivered within seven days of the receipt of the notice. Vacant possession of the property was to be given to the company on completion, but the company was on completion to let to the second defendant, Frank Hornby (son of the grantor), and the grantor was to procure the said Frank Hornby to take, the said property (other than any part thereof which might then be required by the company for its immediate purposes) from year to year at the yearly rent of £500 (or at a reduced rent proportionate to the acreage let if any part should be so required by the company as aforesaid), and otherwise on the terms and conditions of a tenancy agreement to be prepared by the company's solicitors and to contain in addition to the usual terms and conditions a provision authorising the company to resume possession on giving one month's notice in writing of any part of the said property for any purpose in connection with the company's business or for the purpose of building or estate development or for any other purpose not being the use of the property for agriculture. Certain provisions as to compensation for improvements are set out in the said clause, and the Law Society's conditions of sale (1934 ed.) are made applicable subject to the express terms of the agreement. There are further provisions in the said agreement to which it is unnecessary for me to refer. I have next to mention a deed of gift dated May 4, 1945, and made between the grantor, of the one part, and the second defendant and his sister, the third defendant, Muriel Hornby, of the other part, whereby the said property was conveyed to the second and third defendants in fee simple. It is not disputed that the second and third defendants acquired the property with full notice of the said agreement, which, somewhat surprisingly, makes no reference at all either to the executors, administrators or assigns of the grantor or to the assigns of the company.

The plaintiffs, the National Coal Board, were established by s. 1 and 2 of the Coal Act, and it is hardly necessary for me to state the general nature of their functions, rights and duties. They are matter of common knowledge. By a notice in writing dated Feb. 18, 1948, and served on the first defendant on or shortly after that day, the plaintiffs exercised or purported to exercise the option granted by the said agreement and require the first defendant to convey the said property to the plaintiffs in accordance with the provisions of the agreement. They claim specific performance of the agreement for sale constituted by the said agreement and the before-mentioned notice. They also originally claimed damages, but abandoned that claim at the trial. Their only other claim is for the costs of the action.

The right of the plaintiffs to the relief which they seek would appear to rest entirely on the provisions of the Coal Act and on the proper method of applying those provisions to the said agreement of Apr. 4, 1938. The company is and was, as I have said, a colliery concern, and the substantial question for my decision may be shortly stated as being the question whether the plaintiffs, having served the notice of Feb. 18, 1948, are entitled to enforce the rights and are liable to be subjected to the obligations which the company could have enforced and would have been liable to be subject to under the said agreement of Apr. 4, 1938, in accordance with its terms if the Coal Act had not been passed. The notice was admittedly served and received within the proper time and no point has been, or probably could have been, taken that the notice should have been served on the second and third defendants instead of or in addition to the first defendant. The defendants resist the plaintiffs' claim, not on the ground, but for the reason (as I must suppose), that they think that the property is now worth more than £13,000, or, possibly, they are actuated by some sentimental or similar considerations. Their case is wholly unmeritorous in the sense that they would admittedly have been bound by the agreement if the Coal Act has not been passed and would have had no defence if an action similar to the present had been brought against them by the company. Their case depends on their establishing that the provisions of the Act have incidentally and fortuitously invalidated the agreement by discharging them from their obligations thereunder. The plaintiffs, on the other hand, say that they have, under and by virtue of the Act, become and now are the successors in title of the company and stand in the place of the company for all the relevant purposes of the agreement. The case for the defendants has been argued with much force and ingenuity by their counsel who has led me through the tortuous mazes of the Coal Act with the object of proving that the plaintiffs are not the company's successors in title for the relevant purposes of such succession. He argues that their title is defective or non-existent, or that, at any rate, it has not been proved.

The plaintiffs, by s. 1 (1) of the Coal Act, are on and after a date defined in the Act as the primary vesting date (which was Jan. 1, 1947*) charged with, among other duties, that of working and getting the coal in Great Britain to the exclusion of every other person and company. To enable them to discharge that duty, the assets of the so-called colliery concerns are transferred to them under the extremely elaborate provisions of a fasciculus of sections (ss. 5 to 9 inclusive) of the Act. The scheme may be briefly stated. Certain assets or classes of assets, described in pt. I of sched. I to the Act, are to vest in the plaintiffs automatically on the primary vesting date : see s. 5 (1). Other assets or classes of assets, described in pt. II of the same schedule, are so to vest at the option of either the owners thereof or the plaintiffs exercisable by the service of a notice on the other of them : see s. 5 (2) ; and further assets or classes of assets (described in pts. III and IV of sched. I) are so to vest under conditions which I need not specify : see s. 5 (3) and (4).

The main contention of the defendants is that the company's interest in the said agreement of Apr. 4, 1938, is an asset which falls within pt. II of sched. I and has never vested in the plaintiffs for the reason that neither the company nor the plaintiffs have ever served the other with the requisite option notice. The defendants point to para. 14 in the said pt. II, which refers to "interests of colliery concerns in farms." They say that New Lodge Farm is unquestionably a farm, and they say that the agreement of Apr. 4, 1938, conferred an interest in a farm on the company. In support of this proposition they cite the well-known authorities of *London & South Western Ry. Co.* v. *Gomm* (1) and *Woodall* v. *Clifton* (2), and they say that the requisite notice under s. 5 (2) of the Coal Act has never been served. This last fact the plaintiffs admit, and I will say at once that the omission is, in my judgment, extremely regrettable and not at all easy to explain or justify. The reference to farms in para. 14 of pt. II of sched. I to the Act cannot have escaped the notice of the officials and legal advisers of the plaintiffs. The service of the appropriate notice would, it is true, have been a purely formal act, but it would have placed the matter beyond the reach of controversy and would have made it almost certain that this action would never have been brought. It would have established the plaintiffs' rights and freed them from the technical objection on which the defendants have placed reliance. The service of the notice *ex abundanti cautela* was so obvious and so simple a precaution that I confess surprise that the plaintiffs did not take it. I might go so far as to say that I think they were careless, but they may have grounds of legitimate excuse of which I am not informed. The plaintiffs' case may be stated as follows. They say that the company's rights and interests under the agreement of Apr. 4, 1938, have passed to them either as comprised in pt. I of sched. I, or, alternatively, by the operation of s. 7 of the Act. That section provides that the contracts mentioned in sched. II to the Act shall have effect in favour of or against the plaintiffs as and to the extent therein mentioned. The plaintiffs say that the agreement of Apr. 4, 1938, is such a contract.

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* see Coal Industry Nationalisation (Primary Vesting Date) Order, 1946, (S.R. & O., 1946, No. 1986.)

Now, I have come to the conclusion that the Act in its application to that agreement contains provisions which are to some extent both contradictory and cumulative. If s. 5 (2) and pt. II of sched. I had stood alone, the company's interest under the said agreement would plainly, in my judgment, have come within their ambit, but I would say the same if s. 5 (1) and pt. I of sched. I had stood alone, and if s. 7 and sched. II had stood alone. The contention that the agreement must fall to be dealt with either under s. 5 (2), or under s. 5 (1), or under s. 7, and that those alternatives are mutually exclusive in the sense that it cannot be held to fall within more than one of them may be, and I think is, true in one sense, and, if a case arose as between the plaintiffs and a colliery concern which made it of importance to decide the question into which compartment (so to speak) of the concern's cupboard-full of assets a particular item of property such as the agreement of Apr. 4, 1938, had to be placed, then in such circumstances the question would have to be faced and decided. But if the colliery concern and the plaintiffs choose to treat such an asset as coming under any one or two of the three possible heads, and as excluded from the others or other of such heads, I do not see why the choice could not be effectively made. Have the plaintiffs and the company in the present case made such a joint election and chosen to put the agreement into s. 5 (1) or into s. 7, or one of them, and to exclude it from s. 5 (2) ?

Counsel for the plaintiffs alleged, but has not proved, that there is a document in the form of a schedule of assets which plainly establishes that they have done so. It is a matter for great regret and some comment that such evidence was not produced at an early stage of the proceedings, but, in the absence of evidence, I cannot accept that contention in that form. Witnesses were, however, called before me whose testimony, and, indeed, whose very presence in the witness-box, suffices to satisfy me that the company has assumed and admits, and could not now be heard to deny, that its rights and interests under the agreement have passed from it to the plaintiffs. The witnesses in question include a Mr. Fielden, who has been a director of the company since 1933 ;

a Mr. Willis Brown, who was manager of the company from March, 1936, until 1940, when he became joint managing director, becoming sole managing director in 1945 ; and a Mr. Machin, who held responsible positions in the company in and after 1938. If the company had wished at any time to assert that its interests under the agreement of Apr. 4, 1938, were only to pass to the plaintiffs in the event of the service of an option notice under s. 5 (2) of the Act, I think it is now far too late for them to do so. I am satisfied by the A evidence that the company entered into the agreement in the course of or for the purposes of coal industry activities as defined in the Act, and that its interest thereunder was acquired and held for the purpose of having land available for use for coal industry or transferred allied activities as so defined.

So holding, I come to the conclusion that the matter is, or can be and has been, brought within para. 9 of pt. I of sched. I to the Act. Other relevant B paragraphs in that Part are paras. 1 and 2 : see also para. 22 in pt. V ; and it further follows (as it seems to me) that the agreement of Apr. 4, 1938, is a contract coming within s. 7 of the Act and para. I of sched. II to the Act, and I think that it has effect in favour of and against the plaintiffs to the extent requisite for placing them in the shoes of the company for the purposes for which they seek to be so placed. The agreement is a composite document. C It creates interests in coal-bearing land ; it creates interests in a farm ; and it is a contract. It is, therefore, a document which is not easy to place, or which is, perhaps, too easy to place. It seems to be doubly or trebly qualified —that is, qualified for entry into more than one compartment of the cupboard to which I have metaphorically referred. The complexities of the Act are very great, and offer a congenial and fruitful field for dialectical discussion, but the D basic fact remains (as I believe and hold) that the agreement was entered into by the company for the ultimate purpose of getting coal. The property lies in the middle of seams which were being and were intended to be worked by the company. It was, and is, a part of their undertaking as colliery proprietors. It would be a remarkable result if the omission to serve an option notice under s. 5 (2) of the Act had left this interest suspended in the air when all the other colliery E assets of the company had passed to the plaintiffs. If necessary, I suppose, the company could, for the purpose of quieting the plaintiffs' title, execute a confirmatory assurance of some kind in their favour, though I should have thought it quite unnecessary for them to do so. I decree specific performance of the agreement for the sale of the premises to the plaintiffs.

Decree of specific performance granted. Each party to bear his own costs down F *to and including the order. Defendants to pay the costs thereafter.*

Solicitors : *R. S. S. Allen*, Solicitor, National Coal Board; *Gibson & Weldon*, agents for *Lloyd & Robinson*, Stafford (for all defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

KAHLER *v.* MIDLAND BANK, LTD.

[ouse of Lords (Lord Simonds, Lord Normand, Lord MacDermott, Lord Reid and Lord Radcliffe), June 21, 22, October 20, 1949.]

nkers—Deposit of securities—Canadian securities held by Czech bank in safe custody for customer—Deposit by Czech bank with London bank—Right of customer of Czech bank to demand delivery from London bank without consent of Czech bank—Release, or transfer into another name, of foreign securities in safe custody prohibited by Czechoslovak exchange control regulations.

In 1938 the appellant, who was at that time a Czechoslovak national resident in Prague, became a customer of the Z. bank in Prague, and on Dec. 28, 1938, the Z. bank wrote to him informing him that, by order of his former bankers, they were crediting him with certain securities (including 800 share certificates, equivalent to bearer securities, in a Canadian company) in the deposit account which they had opened for him. The share certificates, which had been bought by the appellant some years earlier on the London Stock Exchange through bankers in Zurich, were noted in the letter of Dec. 28, 1938, as being " domiciled " in London.

On Jan. 16, 1939, the Z. bank wrote to the respondents, the Midland Bank Ltd., in London, asking them to " receive for our account . . . and place . . . into our depot with your . . . selves, crediting us for same under advice to us," certain shares, including 1,164 shares in the Canadian company, 800 of which were those held by the Z. bank in safe custody for the appellant. The Z. bank did not, however, refer to the appellant in this letter, nor did they state that they were holding the shares on behalf of a third party. On the printed form, amended in typescript, sent by the respondents to the Z. bank on Feb. 6, 1939, acknowledging the latter's instructions, the respondents referred to the Z. bank as their " customer " in the transaction and there was no reference to the appellant. After the occupation of Czechoslovakia by the German forces in March, 1939, the appellant wished to leave the country, and, to obtain a permit to leave, he was compelled by the Germans to hand over to them all his assets in Czechoslovakia, including his rights in regard to the Canadian shares. To effect this, his account was transferred from the Z. bank to the B. bank, which was under German control (a transaction which was later ratified and accepted by the appellant), and on Apr. 17, 1939, the Z. bank wrote to the respondents asking them to withdraw from the Z. bank's securities account with the respondents 800 of the Canadian shares and to place them " into the depot of " the B. bank with the respondents. The letter of Apr. 17, 1939, went on to state : " This transfer is made by order and for account of the owner of these shares, Mr. V.K. [the appellant] who transfers his securities account from our bank to [the B. bank]. The ownership of the shares remains unchanged." On receipt of this letter, the respondents, on May 11, 1939, sent to the B. bank, advising them of the " receipt for your account " of the shares described, a form similar to the one sent to the Z. bank on Feb. 6, but the form of May 11 contained the name of the appellant as the " owner." The respondents did not communicate with the appellant at all. In May, 1946, the appellant's rights *vis-a-vis* the B. bank were restored by the Czechoslovak authorities, but under the Czechoslovak law (similar exchange control regulations having been in operation in that country at all material times) any transfer of foreign securities from or to a Czech resident without the permission of the Czechoslovak National Bank was unlawful (the word " transfer " being defined in the relevant Act as including release, or transfer into another name, of securities in safe custody). The appellant had ceased to be a Czech resident, as he had left Czechoslovakia about Apr. 1, 1939, but the B. bank was a Czech resident for the purposes of the regulation and the Czechoslovak National Bank had refused their consent to the delivery of the shares to the appellant. In an action by the appellant asking for an order on the respondents to hand over the shares to him, the appellant based his claim (*a*) *ex contractu*, and (*b*), alternatively, in detinue, on the ground that he was absolutely entitled to the shares. The respondents contended (*a*) that there was no contract between them and the appellant, because the B. bank, and not the appellant, was their customer, and (*b*) that the appellant's claim in detinue could not succeed, as he was not entitled to immediate possession of the shares, the National Bank having refused consent to the transfer to him of the shares.

Held : (i) the appellant had failed to establish any contractual relationship between himself and the respondents.

(ii) (Lord MacDermott and Lord Reid *dissenting*) as the Czech exchange control regulations were in force at all material times and under those regulations it was illegal for a Czech bank to part with foreign securities in its custody without the consent of the Czechoslovak National Bank, even if the securities were at the date of the contract situate in some other country, it must be presumed that the law of Czechoslovakia was intended to govern the delivery of the shares on termination of the bailment between the appellant and the B. bank, and, therefore, as the consent of the National Bank had been withheld, the B. bank would be entitled to deny possession of the shares to the appellant ; and, as the English courts would not compel performance of a contract if by its proper law the performance was illegal, his claim in detinue failed, he having no right to immediate possession, and the respondents could not be compelled to deliver the shares to him.

Decision of the Court of Appeal ([1948] 1 All E.R. 811), *affirmed.*

[As to Safe Custody of Securities, see HALSBURY, Hailsham Edn., Vol. 1, pp. 850-852, paras. 1380-1382 ; and for Cases, see DIGEST, Vol. 3, pp. 256, 257, Nos. *760-766*.

As to Position of Sub-Agent, see HALSBURY, Hailsham Edn., Vol. 1, pp. 227, 228, paras. 392-394 ; and for Cases, see DIGEST, Vol. 1, pp. 391-393, Nos. *943-962*.]

Cases referred to :

(1) *Gordon* v. *Harper*, (1796), 7 Term Rep. 9 ; 2 Esp. 465 ; 43 Digest 496, *354*.

(2) *Bradley* v. *Copley*, (1845), 1 C.B. 685 ; 14 L.J.C.P. 222 ; 5 L.T.O.S. 198 ; 43 Digest 497, *361*.

(3) *Ralli Brothers* v. *Compania Naviera Sota Y Aznar*, [1920] 2 K.B. 287 ; 89 L.J.K.B. 999 ; 123 L.T. 375 ; 11 Digest 397, *699*.

(4) *De Beeche* v. *South American Stores, Ltd., and Chilian Stores, Ltd.*, [1935] A.C. 148 ; 104 L.J.K.B. 101 ; 152 L.T. 309 ; Digest Supp.

(5) *Biddle* v. *Bond*, (1865), 6 B. & S. 225 ; 5 New Rep. 485 ; 34 L.J.Q.B. 137 ; 12 L.T. 178 ; 29 J.P. 565 ; 3 Digest 101, *287*.

(6) *Zivnostenska Banka National Corporation* v. *Frankman*, *post* p. 671.

(7) *R.* v. *International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] 2 All E.R. 164 ; [1937] A.C. 500 ; 106 L.J.K.B. 236 ; 15 L.T. 352 ; Digest Supp.

(8) *Perry* v. *Equitable Life Assurance Society of U.S.A.*, (1929), 45 T.L.R 468 ; Digest Supp.

Appeal by the plaintiff from a decision of the Court of Appeal (Scott, Asquith and Evershed, L.JJ.), dated April 19, 1948, and reported [1948] 1 All E.R. 811, reversing a decision of Macnaghten, J., dated June 4, 1947.

The appellant claimed to be absolutely entitled to certain share certificate which the respondents held for safe custody in the dossier of the Bohemia Discount Bank and Society of Credit, a Czechoslovak banking company, an asked for an order on the respondents to hand over the securities to him. e respondents resisted the order on the ground that their contract was not th the appellant but with the Czech bank, and, therefore, it was inconsistent th the terms of their contract and with banking practice to hand over the curities to the appellant except with the consent of the Czech bank. MAC-GHTEN, J., gave judgment for the appellant, but the respondents' appeal om his decision was allowed by the Court of Appeal. The House of Lords ORD MACDERMOTT and LORD REID *dissenting*) now upheld the decision of e Court of Appeal. The facts appear in the opinions of LORD NORMAND d LORD REID.

Salmon, K.C., and *D. C. L. Potter* for the appellant.

Sir Valentine Holmes, K.C., *H. L. Parker* and *J. G. Foster* for the respondents.

The House took time for consideration.

Oct. 20. The following opinions were read.

LORD SIMONDS: My Lords, the facts of this case are fully stated in e opinion which my noble and learned friend, LORD NORMAND, will deliver d I need not rehearse them. Nor, but for the fact that, as I understand, me of your Lordships do not concur in the view that this appeal should be smissed, should I have thought it necessary to add any words of my own. appears to me, my Lords, that the solution of this case depends on the view ich is taken of the relation in which the appellant stood, or must be deemed have stood, to the Bohemian Bank after that bank had succeeded the Zivno-enska Bank as the customer of, and bailor to, the Midland Bank in respect the securities which are the subject of this appeal. I advisedly say "stood must be deemed to have stood," for, whatever alternative contention might ve been open to the appellant, he has by his pleading, original, amended d re-amended, committed himself—and I do not doubt for very good reason mmitted himself—to the view that the securities were properly transferred om the depot of the Zivnostenska Bank to that of the Bohemian Bank with the idland Bank. This view of the transaction materially narrows the area of bate.

In the first place, I am clearly of opinion that the Court of Appeal was right holding that between the appellant and the Midland Bank there was no ntractual *nexus*. On this point there is no disagreement among your Lord-ips. But it is on the alternative plea that a difference arises. The appellant, ntract failing him, claims in detinue. The securities, he says, are his. Neither e Midland Bank nor the Bohemian Bank claims any beneficial interest in, or n over, them. The answer made by the bank is that that is not enough to pport a claim in detinue—the appellant must show also that he is entitled immediate possession, and that he cannot do, for the Midland Bank holds e securities in safe custody for the Bohemian Bank and that bank is entitled refuse delivery to the appellant. It is the validity of this answer which is in sue and it is, I think, a matter of regret that the appellant did not think fit bring before the court the Bohemian Bank whose answer it is. The question, wever, is the same whether the answer is made by the one bank or the other.

It becomes necessary then to examine the answer made by the Midland Bank. involves two propositions which are to some extent interdependent. The st is that under Czechoslovak law the Bohemian Bank cannot lawfully deliver e securities to the appellant; the second, that, therefore, their bailee, the idland Bank, ought not to be compelled by the courts of this country so to liver them up. The first of these propositions is clearly established by the idence of Dr. Hartmann, which does not appear to me to be open to challenge. is necessary only to say that the relevant law relating to foreign exchange, der which the delivery without a consent that was in fact withheld would be illegal, is not, in my opinion, a law of such a penal or confiscatory nature that it should be disregarded by the courts of this country. The second proposition presents greater difficulties. It involves the consideration of two matters —first, what were the terms of the contract of bailment between the appellant and the Bohemian Bank, and, second, what was the law governing its performance so far as that consisted of delivery of the securities on termination of the bailment.

First, as to the terms of the contract. Here, my Lords, we are, I think, in a region of artificiality. For though, as I have already said, the appellant is committed to the view that the securities were properly transferred to the depot of the Bohemian Bank with the Midland Bank, yet it remains to determine what as between him and the Bohemian Bank were the contractual terms. Herein lies the difficulty, but it appears to me that, admitting the proper transfer of the securities to the depot of the Bohemian Bank and alleging no other terms as between himself and that bank than had formerly obtained between himself and the Zivnostenska Bank, the appellant is driven to the admission that he is in the same position, no better and no worse, as he would be in if no transfer had taken place. What, then, would the position be if, on behalf, not of the Bohemian Bank but of the Zivnostenska Bank, the Midland Bank had pleaded that the appellant was not entitled to immediate possession because their bailors were entitled to refuse delivery ? This would depend, I think, on one thing only, *viz.*, what is the proper law of the contract between the parties. If the proper law is the law of Czechoslovakia, I have no doubt that the defence is a valid one, for the courts of this country will not compel the performance of a contract if by its proper law performance is illegal. And it follows that it must be admitted as a good defence in an action of detinue that the bailor, whose bailee is sued, is entitled to deny possession to the plaintiff because it is illegal to give him possession.

What, then, is the proper law of the contract that was made with the Zivnostenska Bank and that I have assumed to have been renewed with the Bohemian Bank ? In my opinion, it was the law of Czechoslovakia. The contract was made in that country between an individual and a corporation both resident there. At the date of the contract and at the material times thereafter the law of Czechoslovakia included a law regulating transactions in foreign exchange substantially the same as that which prevailed at the date of the issue of the writ. At all material times it was illegal for the bank, Zivnostenska or Bohemian, to part with foreign securities in its custody without the consent of the National Bank or other proper authority, whether those securities were at the date of the contracts in fact situate in Czechoslovakia or in some other country. In these circumstances I cannot accede to the contention of the appellant that the proper law of the contract so far as it concerns the delivery of the securities is governed by the law of England or of any other country in which they may chance to be situate. I do not doubt that the appellant may have hoped to obtain some advantage by having his securities kept in London, but, whatever his hopes or fears, it is impossible to suppose either that the bank intended any other law than that of Czechoslovakia to govern the contract or that the appellant could impute any such intention to them. Why should they be presumed to subject themselves to a foreign law, whose application might make them liable to penalties under their own law ? And why should he be presumed to have made a contract in the faith that its performance would be governed by a foreign law when he must have known that the bank would by no means agree to submit to it ? On the other hand, it is easy to presume that a contract, clearly governed by the *lex loci contractus* in its interpretation and in all aspects of the rights and obligations it creates except that of delivery up, should in that aspect also be governed by the same law. I doubt whether your Lordships can get any assistance from the very numerous authorities on this branch of the law and I refrain from reviewing them. Ultimately the test is that stated in DICEY'S CONFLICT OF LAWS, 6th ed., p. 579, r. 136 :

> ". . . the . . . 'proper law of a contract' means the law . . . by which the parties intended, or may fairly be presumed to have intended, the contract to be governed . . ."

A I think that the fair presumption to be derived from the whole of the circumstances of the contract, unusual and artificial as they are, is that the parties intended the law of Czechoslovakia to govern it in all its aspects.

Coming to this conclusion, I must hold that the Bohemian Bank would be entitled to deny possession of the securities to the appellant so long as under B Czechoslovakian law it was lawfully forbidden to do so. If so, its bailee, the Midland Bank, should not be compelled in the absence of the Bohemian Bank to deliver them up. For these reasons, which will be amplified by some of your Lordships, I am of opinion that this appeal should be dismissed with costs.

LORD NORMAND : My Lords, this appeal involves questions of difficulty affecting the owner's right to delivery of securities, deposited in a London bank C by a bank in a foreign country the law of which under certain conditions restricts the disposal or transfer of possession of the securities. The action was begun in July, 1939, but proceedings were suspended during the war. In June, 1947, MACNAGHTEN, J., gave judgment in favour of the appellant and ordered the respondents to deliver to him the share certificates, which are the subject of his claim. This judgment was reversed by the Court of Appeal in April, 1948. D The action was pleaded both on contract and in detinue. The judgment of MACNAGHTEN, J., was a judgment in detinue, and I may say at once that I agree both with the Court of Appeal and with my noble and learned friend on the woolsack and my noble and learned friends who are yet to address the House and whose opinions I have had the advantage of reading in print that the appellant has failed to establish that there was privity of contract between E himself and the respondents.

The appellant was a native of Czechoslovakia who formerly resided in Prague. In March, 1927, or later, he bought on the London Stock Exchange through his bankers in Zurich shares of the Brazilian Traction Light and Power Co., Ltd. [a Canadian company]. The share certificates, which are for practical purposes bearer securities, remained in London. The Zurich bankers transferred F the shares from the credit of the appellant's account with them to the credit of Messrs. Petschek and Co., bankers in Prague. From time to time the appellant caused certain of his shares to be sold, and in January, 1937, the number owned by him was 800, which were then, as they still are, deposited with the respondents in London. On Dec. 28, 1938, the Zivnostenska Bank, Prague, which was taking over the business of Messsr. Petschek and Co., wrote a letter to the G appellant informing him that they were by order of Messrs. Petschek crediting him with certain listed securities in the deposit account which they had recently opened for him. The list of securities included the 800 Brazilian Traction Co. shares with which this appeal is concerned and they were noted in the list as "domiciled" in London. On Jan. 16, 1939, the Zivnostenska Bank wrote also to the respondents in London informing them that they would receive for H Zivnostenska's account from Messrs. Samuel Montagu and Co., London, by order of Messrs. Petschek, 1,164 Brazilian Traction shares (which, it is agreed, included the 800 owned by the appellant) and requesting the respondents to place them in the Zivnostenska's deposit with the respondents. In reply to this letter the respondents, on Feb. 6, 1939, sent to Zivnostenska a printed form stating that the Zivnostenska Bank was the "customer" and that specified shares including the 1,164 Brazilian Traction shares had been received from Samuel Montagu and Co., by order of Messrs. Petschek and Co. There was a blank space in which the name of the owner of the shares would have been inserted if known. These documents, it is common ground, evidence two contracts, first, a contract between the appellant and the Zivnostenska Bank, which now becomes his banker and his bailee for the securities, and, second, a contract between the Zivnostenska Bank and the respondents by which the respondents become the Zivnostenska Bank's bailees. In March, 1939, the Germans overran Czechoslovakia, and the appellant, who is of Jewish race, became a victim of their persecutions. I may pass over the details of the proceedings by which the appellant was forced to deposit with the Bohemian Discount and Credit Bank all securities which he possessed, including the shares in suit, and to authorise that bank to dispose of them in his name. The appellant signed a written " agreement " confirming this arrangement, but as it was signed under duress it is not binding on him. In return for his signature the appellant, on Apr. 2, 1939, was allowed to leave Czechoslovakia. He first resided in France and afterwards in the United States of America, of which he is now a naturalised citizen.

The next document is important. It is a letter from the Zivnostenska Bank to the respondents dated Apr. 17, 1939, and I quote its terms in full.

> " Dear Sirs, By the present we beg to request you to withdraw from our securities account with your goodselves 800 *shares Brazilian Traction Light and Power Co., Ord. Cap. Stock No Par,* using for this purpose the shares which were credited to our above account on Feb. 6, 1939/ref. B64318/—and to place same into the depot of the Bohemian Discount Bank and Society of Credit, Praha, with your goodselves. This transfer is made by order and for account of the owner of these shares, Mr. Viktor Kahler, Praha 11, Vaclav. nam. 55, who transfers his securities account from our bank to the Bohemian Discount Bank and Society of Credit, Praha. The ownership of the above shares remains unchanged. While crediting you for these shares on the securities account, we remain, Dear Sirs, Yours very truly, Zivnostenska Banka."

As a result of the receipt of that letter the respondents, on May 11, 1939, sent to the Bohemian Bank a printed form similar to that sent to the Zivnostenska Bank on Feb. 6. Some differences may be noted. The appellant is named as owner and his address in Prague is entered, and the document " advises the receipt for your account " of the 800 Brazilian Traction shares. No communication was sent by the respondents to the appellant at the time. There is no doubt that Zivnostenska's letter of Apr. 17 was part of the machinery by which the German government in Czechoslovakia and its agents carried into effect the agreement which they had forced the appellant to sign. Further steps were taken as the result of which the Bohemian Bank came to hold the securities, not for the appellant, but for the German authorities. The appellant now entered into correspondence with the respondents, seeking without success to obtain from them an undertaking not to part with the securities except with his consent. The respondents' attitude then was that they had received the securities from the Zivnostenska Bank without intimation that they were to be held to the appellant's order. On July 26 the appellant wrote to the Zivnostenka Bank purporting to determine its authority to hold his securities and a copy of this letter was sent by him to the respondents.

To complete the statement of the relevant facts as they stood at the raising of this action I must now deal with the Czechoslovakian exchange regulations which the respondents allege, and the Court of Appeal has found, to be an impediment to the delivery of the securities in suit. Among the proved documents is a translation of the material paragraphs of the Czechoslovakian Foreign Exchange Act, No. 92 of 1946, and it is proved that regulations having the same effect have been in force in Czechoslovakia since 1934. The regulations made it unlawful and a punishable offence to transfer, without the permission of the Czechoslovakian National Bank, foreign securities

> "... from a currency inlander to a currency foreigner into his ownership, as a pledge or for any other reason and by whatever way (book transfer, placing into safe custody, transfer of securities in safe custody into another name, release, etc.) ..."

A or,

> "... from a currency foreigner to a currency inlander into his ownership, as a pledge or for any other reason ..."

or:

> "... from a currency inlander to a currency inlander, as a pledge or for
> B any other reason."

Dr. Hartmann, a Czechoslovakian lawyer of experience, gave evidence about the meaning and effect of these regulations. His evidence is that "currency inlanders" are persons who have their normal residence in Czechoslovakia and have lived there for at least one year, and that all other persons are currency C foreigners. The appellant was, therefore, a currency inlander till Apr. 2, 1939, and he was thereafter a currency foreigner. Dr. Hartmann deponed also that, at the time when the securities were placed in the depot of the Zivnostenska Bank of the Midland Bank, the Zivnostenska Bank could not have delivered them to the appellant without the consent of the National Bank, because the Zivnostenska Bank and the appellant were at that time both currency inlanders, D and that after the appellant left Czechoslovakia and became a currency foreigner they could still not be delivered to him by a bank in Czechoslovakia without the consent of the National Bank. Under cross-examination he said that the word "transfer" in the regulations was not a matter of title but included a transfer of possession. There was no counter evidence, and Dr. Hartmann's evidence must be accepted as conclusive evidence of the law applicable in E Czechoslovakia to the transfer of possession of foreign securities.

In answer to the appellant's claim for a declaration that he was the owner of and beneficially entitled to the share certificates and for an order for their delivery, the respondents pleaded *inter alia* that since May 11, 1939, they had held the share certificates to the order and for the account of the Bohemian Bank and that it was their duty not to part with them without the assent of F their customer unless on proof of the appellant's title to immediate possession. They also pleaded that they were prohibited by the provisions of the Czechoslovakia (Restrictions on Banking Accounts, Etc.) Act, 1939, from parting with them without Treasury consent, or, alternatively, that the certificates were enemy property and that under the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), they were prohibited from dealing with G them without the consent of the Board of Trade. Any difficulties created by these enactments have, however, been removed because the consents of the Treasury and the Board of Trade were obtained on Mar. 27, 1947. After the war ended and before the trial of the action the appellant's solicitors were in communication with the Bohemian Bank in Czechoslovakia. The result was, in brief, that the Bohemian Bank admitted that it did not maintain any claim H to the securities, but informed the appellant's solicitors that the National Bank's position was that any transactions with the securities needed its consent. The solicitors tried to obtain the consent of the National Bank to the delivery of the securities, but it was refused.

My Lords, the appellant's contention, as stated in his Case, is that:

> "... he had an immediate right to the possession of the shares and that the Bohemian Bank's consent to the delivery up of the shares was unnecessary and that their failure to consent should be ignored."

It was on this contention that the decision in the Court of Appeal hinged. Evershed, L.J., said ([1948] 1 All E.R. 818) :

> "In my judgment, to succeed . . . the plaintiff must prove not merely that he is . . . entitled beneficially to the shares, but also that he is entitled to possession of the certificates."

With that way of stating the issue there can, I think, be no quarrel. The true owner's right to delivery of goods deposited by a third party with a bailee depends on his right to immediate possession : see *Gordon* v. *Harper* (1) and *Bradley* v. *Copley* (2) ; and if there is any defect in his right to immediate possession he must fail. Usually the defect arises from an adverse right of possession in a third party, but a defect arising from another cause would, I think, be equally fatal. In the present case, therefore, it is not sufficient that the appellant has established his title to the ownership of the shares. The bailee is entitled to demand proof that he is entitled to immediate possession. In the circumstances of this case that depends on the question whether there was a contract between the appellant and the bailor, the Bohemian Bank, and, if so, on the meaning and effect of that contract.

It is unfortunate that the appellant did not convene as defendants, in addition to the respondents, the Zivnostenska and the Bohemian Banks. If he had done so and if they, or, at any rate, the Bohemian Bank, had appeared, the issues would have been contested between the proper contradictors. The appellant did not choose to take that course. So it has come about that the respondents have been allowed to state contentions and maintain arguments which properly lay not in their mouth but in the mouth of the Bohemian Bank. Of this irregularity the appellant cannot complain and he must accept the situation which he has created by his own procedure and pleadings. It was, perhaps, the respondents' submission that there was no contract between them and the appellant and that their customer was the Bohemian Bank, and it alone, that induced the appellant to amend his pleadings in the Court of Appeal. By that amendment he has finally set at rest any doubt whether there was a contract between him and the Bohemian Bank, for he there alleges that the Zivnostenska Bank had been his bankers and that, purporting to act as his bankers and in pursuance of an authority to be implied from the relationship of banker and customer, the Zivnostenska Bank, by the letter of Apr. 17, 1939, instructed the respondents on his behalf to withdraw his certificates from the Zivnostenska Bank's securities account and to place them into the depot of the Bohemian Bank with the respondents for safe custody by order and for account of the appellant. And to clinch the matter he further alleges that, if the Zivnostenska Bank had no authority to write the letter of Apr. 17, 1939, he subsequently ratified its act in writing it. This amendment precluded the appellant from contending that the letter of Apr. 17, 1939, falls to be disregarded as being part of the machinery by which the German authorities effected the confiscation of the appellant's property, and it becomes unnecessary to consider that contention and the consequences which might flow from it if it were sustained.

Whether under the contract so alleged the appellant had against the Bohemian Bank an immediate right of possession, or whether his right of possession was governed by the Czech currency restriction laws must, I think, depend on whether English law or Czechoslovakian law is the proper law of the contract, for, if the proper law of a contract is the law of a foreign country, the courts of this country are by our law bound to apply that foreign law in determining the effect of the obligations undertaken by the parties. In ascertaining what is the proper law of a contract our courts have to solve a question of the parties' intention, and it is here that some difficulty arises. The Bohemian Bank and the appellant have to be taken as contracting parties because the appellant has by his pleadings accepted that position, but he was not a willing party at the time when the letter of Apr. 17, 1939, was written, and it may be doubted whether the Bohemian

Bank was a willing party. To ask what law the parties intended to govern the contract is to ask a question that admits only of an artificial answer. The one clear effect of the letter of Apr. 17, 1939, is to substitute the Bohemian Bank for the Zivnostenska Bank as the appellant's bailee. No change in the incidents or the conditions of the bailment except that can be inferred from the letter, and the appellant has suggested none in the amendment of his claim. The appellant, it is true, was no longer resident in Czechoslovakia on Apr. 17, 1939, but it appears to me unreal to inquire whether his change of residence should be taken as affecting the proper law of the bailment. The reality was that he had been allowed to change his residence only on condition of surrendering all right to the shares and neither that surrender nor the consequent change of residence were voluntary acts, for both were the result of German abuse of power and intimidation. They can lead to no inference of intention. I, therefore, come to the conclusion that the proper law of the bailment between the appellant and the Bohemian Bank must be taken to be the same law as the law which governed the bailment between the appellant and the Zivnostenska Bank. But that was a contract between parties who were resident in Czechoslovakia and subject to its laws. The proper law of that contract was clearly the law of Czechoslovakia. The answer of the Zivnostenska Bank to a demand by the appellant before Apr. 17, 1939, would have been that it could not deliver the certificates to him without the consent of the National Bank. The Bohemian Bank is now in the same position as that in which the Zivnostenska Bank then was, and it can make the same answer because the law of the contract must be taken to be the law of Czechoslovakia.

Cases like *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (3) and *De Beeche* v. *South American Stores, Ltd., and Chilian Stores, Ltd.* (4) are not, I think, in point. The principle on which they were decided is that the courts of this country will not compel the fulfilment of an obligation when performance includes the doing in a foreign country of something which the laws of that country make it illegal to do, but a judgment *in rem* compelling the delivery of securities held in London would not involve the doing of anything in a foreign country. I think that the dismissal of the appeal does not involve the enforcement of Czechoslovakia revenue law or penal laws. I have not found it necessary to consider the Bretton Woods Agreements Order in Council, 1946. For these reasons I would dismiss the appeal.

My Lords, I should greatly regret that this House should come to a decision which might be represented as giving even the shadow of a figment of recognition to the German oppression of helpless people in territories lawlessly overrun by them. Let me, therefore, say without ambiguity that I give no recognition to the acts of the German authorities, and that I recognise the existence of a contract between the appellant and the Bohemian Bank only because the appellant himself has dissociated it from the confiscatory measures of which he was the victim and has himself voluntarily recognised and ratified it.

LORD MACDERMOTT : My Lords, I agree that the appellant has failed to establish any contractual relationship between himself and the respondents and I need not add to what has already been said about that branch of his case. This leaves for consideration the claim in detinue, a claim which, it may be well to observe at the outset, seeks from an English court an order for delivery up by an English company of chattels in their physical possession in England.

The writ claiming delivery of the certificates, the chattels in question, was issued on July 28, 1939. The salient features of the situation as it was at that date may be shortly stated. The appellant was the owner of the certificates. They were not subject to any encumbrance or lien and may be regarded as equivalent to bearer securities. The respondents, who may be taken as then aware of these facts, held the certificates in London for and on account of one of their foreign customers, a Czechoslovakian bank, and it in turn was or must be regarded as being then a bailee for the appellant for the safe custody of the certificates. (This bank was either the Zivnostenska Bank or the Bohemian Bank. To decide which is not altogether easy having regard to the complexities of the case and the somewhat artificial position produced by the course of the proceedings, but on consideration I think there is more to be said for holding that the Bohemian Bank was the respondents' customer at the time to which this narrative relates and I shall proceed on that basis. I need not pause to give my reasons for this choice. Little turns on it, in my opinion, since, on the view I take of the facts, the Bohemian Bank's contract of bailment with the appellant must be regarded as similar in all material respects to that which had subsisted earlier between him and the Zivnostenska Bank.) The appellant had made what may be treated as a demand for the certificates, as the sole owner thereof, and this had been refused by the respondents on the ground that they could not comply save on the order of a British court or on the instructions of their customer, the Bohemian Bank. Such instructions were not forthcoming for reasons stated as being that, by the Czechoslovakian foreign exchange laws then in force, they could not lawfully be given without the consent of the National Bank of Czechoslovakia which was withheld. I shall assume for the purposes of this opinion, and without any critical examination of the relevant Czechoslovakian legislation, that these reasons were well founded in fact—*i.e.*, that the National Bank refused consent and that the law of Czechoslovakia forbade the respondents' customer, the Bohemian Bank, to do any act to release or transfer the certificates to the appellant without such consent. It will be necessary later to supplement this summary at certain points, particularly with respect to the appellant's contract with the Bohemian Bank, but it will be convenient now to pass to a brief consideration of the nature of the claim and the issues it involves.

It is trite law that a claimant in detinue must prove that he is entitled to possession and, further, that the respondents have failed to comply with a request for delivery. What is open by way of defence to a defendant is not so well settled in cases like the present where the relationship between the parties is not that of bailor and bailee. Can such a defendant, though claiming no adverse right or interest in himself, plead that some third party has such a right or interest and that, by reason thereof, the plaintiff is not entitled to immediate possession ? There seems to be no clear authority on the point, but, on principle, I do not see why a defence of this nature should be denied, at any rate where the relationship between the third party and the defendant is that of bailor and bailee. It is true that, as between a claiming bailor and his bailee, the latter is generally precluded from raising a *jus tertii*, but that rule rests on an estoppel arising from that relationship and cannot well be evoked where the bailee is sued by a stranger. The settled exception to the rule which permits a bailee to resist his bailor's claim by showing that he has lost the chattel bailed to the true owner or, as it is sometimes put, that he has suffered eviction by title paramount, is more relevant. The broad and simple ground for this exception may, I think, be found in the passage in the judgment of the Court of Queen's Bench delivered by BLACKBURN, J., in *Biddle* v. *Bond* (5) which reads (6 B. & S. 231) :

> " . . . the bailee has no better title than the bailor, and, consequently, if a person entitled as against the bailor to the property claims it, the bailee has no defence against him."

Speaking generally, two results may be said to flow from this. First, a bailee must be at liberty to resist a claim made by one who is not his bailor by showing that his bailor has the better right to immediate possession. And, secondly, a bailee, in order to resist successfully the claim of an owner who is not his bailor, must usually do more than show that he is but a bailee and has not been authorised by his bailor to make delivery in satisfaction of the claim. I do not think this last proposition was seriously challenged at your Lordships' Bar, but it is not without relevance as the respondents' first line of defence, as appears from their letters and the pleadings, was that they could do nothing to meet the appellant's demand without the instructions of their customer, the Bohemian Bank. In the circumstances that was an understandable attitude, but, in itself, I do not think it constituted an answer in law to the claim, at any rate after a A reasonable time for investigation had elapsed.

Proceeding, then, on the basis that it was open to the respondents to show that the Bohemian Bank was entitled as against the appellant to possession, the next question is whether this has been done. As already indicated, the respondents alleged no proprietary interest in the Bohemian Bank or any claim to retention on foot of some charge or lien. They did prove, however, if the assumption I B have made above as to the effect of the relevant Czechoslovakian law is justified, that the Bohemian Bank could not do anything to authorise them to hand the certificates over without breaking that law and, indeed, committing a criminal offence thereunder. Now, if that were all and the respondents could say no more, I think it is clear that they would have no answer to the present claim. The law of another State will not of itself justify the detention or conversion of property C in England which is wrongful according to the law of England. If a foreigner in this jurisdiction finds my watch, the courts of this country will not allow him to keep it merely because the law of his own country forbids him, wherever he may be, to make restitution of articles of that sort. The respondents, however, based their case on the conjoint effect of the Czechoslovakian law and the appellant's contract of bailment with the Bohemian Bank. It may be said at D once that, if this contract bound that bank to re-deliver the certificates in Czechoslovakia and not elsewhere, the appellant could not succeed. Apart altogether from difficulties of a more technical nature, he would then have to face the rule, stated by VISCOUNT SANKEY, L.C., ([1935] A.C. 156) in *De Beeche* v. *South American Stores, Ltd. and Chilian Stores, Ltd.* (4), that :

> E " . . . the law of this country will not compel the fulfilment of an obligation whose performance involves the doing in a foreign country of something which the supervenient law of that country has rendered it illegal to do ".

But this does not, in my opinion, help the respondents in the present case. Whatever else may be said of it, I am satisfied that the contract he made, or must be taken to have made, with the Bohemian Bank entitled the appellant F to call for delivery of his certificates in London. That was where the relevant shares had been bought and where the certificates were at all material times. The contract itself referred to the certificates as located in London, though containing no express stipulation as to the place where delivery from safe custody was to be made. On the evidence I can see nothing to preclude the appellant from requiring the Bohemian Bank to hand over his certificates in London if, G in the circumstances, he was entitled to get them at all.

This brings me to the substance of the respondents' defence and the heart of the case as I see it. What the respondents say, if I have gathered their submissions aright, comes in effect to this. The appellant's contract of bailment should be regarded by the courts of this country as governed throughout by Czechoslovakian law, and, so regarded, the effect is that it cannot be determined H save with the consent of the National Bank, and, as that has not been given, the appellant has no present right to possession in London or elsewhere and cannot, therefore, sustain, a claim in detinue. It may be added here that the relevant Czechoslovakian law has been substantially the same at all times material to this appeal. My Lords, the appellant's contract must, I think, be rested on the letter of Dec. 28, 1938, which was addressed to him in Prague by the Zivnostenska Bank. This letter says little more than that the securities listed in it are credited to the appellant's deposit account with that bank for safe custody. The list includes some securities which, it may be inferred, were held in Czechoslovakia, but others, including the certificates in question are shown as " domiciled " elsewhere, some in London, some in New York, one in Amsterdam and another in Tel Aviv. The appellant was then a resident Czechoslovakian and the bank was a Czechoslovakian bank. In these circumstances I am unable to resist the conclusion that, at any rate so far as the interpretation of the contract and the substance of the obligations arising thereunder during the course of the bailment are concerned, the parties may be regarded as intending that the governing law should be that of Czechoslovakia. But must they be taken to have agreed that that law was also to govern the entire performance of the contract abroad, so that if the appellant, as he was entitled to do, sought delivery of his securities where they actually were, say in London or in New York, his bailee would be within its rights in retaining possession until the National Bank gave its consent ? If consensus went that length I think it would be an end of the matter, for in such case (and assuming no question of public policy to be involved) the law of England would regard Czechoslovakian law as the proper law of every material aspect and hold, accordingly, that the appellant was not entitled to immediate possession as against the respondents' bailor. But, my Lords, when the letter of Dec. 28, 1938, and its attendant circumstances are considered, the appellant cannot, in my view, be said to have agreed that the Czechoslovakian foreign exchange laws were to regulate performance outside Czechoslovakia with respect to those of his securities which were listed as domiciled abroad. By the end of 1938 the mounting tide of Nazi aggression was obviously threatening to engulf his country, and no one resident therein who was a man of property and belonged to the Jewish faith could entertain anything but the liveliest fears for himself and his fortune. The wise were those who had at least a part of their substance dispersed abroad and beyond immediate reach, the foolish those who had all in one basket at home. That such was the situation confronting the appellant and his co-religionists at that time cannot, I think, be disputed as a matter of historical fact. Nor, in my opinion, can it be ignored in any inquiry as to the contractual intention to be imputed to the appellant concerning the safe custody of his securities in December, 1938. He must be assumed to have known the general nature of the restrictions imposed by Czechoslovakian law, and I think it would not be going too far to say that he must also have appreciated that those restrictions might well be turned to account by the Nazis for their own purposes when they arrived. Why should he intend that his right to deal with his securities abroad should be regulated by those restrictions ? I can see no ground for attributing any such intention to him. On the contrary, it is, I think, but reasonable to assume that his confidence and hope in regard to these securities must have rested on the laws of the countries where they were placed and where as yet there was freedom and peace.

What, then, of the Zivnostenska Bank ? Can it be taken to have acquiesced in the choice of law which the appellant had such cogent grounds for making part of the contract ? Its position was, of course, quite different and it is impossible to impute to it any intention which would have meant a breach of the laws of its own country, but I do not think it can be said that by agreeing to facilitate the appellant to this extent the bank would necessarily have involved itself in such a breach. The certificates were at all material times in London and in other hands—first those of Samuel Montagu and Co. and then those of the respondents—and an order made against the actual holders by the courts of this jurisdiction on the basis that the law governing performance in England was English would not, so far as I can see, have required of the bank any act or course of conduct forbidden by the law of Czechoslovakia. For this reason, if one were at liberty to infer that the parties had actually come to agreement on the point, I would find it easier to regard them as agreeing to accept English

rather than Czechoslovakian law as the law of performance in London. I doubt, however, if the facts justify an inference of agreement. It is true that the letter of Dec. 28, 1938, speaks of the certificates as " domiciled " in London, but there is nothing in the evidence to show that this was a term of art apt to attract the law of the place of deposit. I do not think it can be read as more than a statement of location and I can find nothing else in the material available to warrant
A a firm conclusion that there was agreement in fact on this particular aspect of the matter. These considerations may not, therefore, suffice to import any stipulation as to the applicability of laws other than those of Czechoslovakia, but they do suffice, in my opinion, to negative quite definitely the implication of any common intention that the laws of that country should dominate the whole field of performance.

B My Lords, if this is the right view to take, I do not think it can be displaced or overriden by saying that the contract is a Czechoslovakian contract and that the Czechoslovakian foreign exchange laws—in so far as material—must be read into it. Counsel for the respondents refrained from advancing this contention and I think he was right. There is nothing in the evidence of Dr. Paul Hartmann, the expert witness on Czechoslovakian law, to support it and it
C really begs the question to be decided. If then, as I would hold, the proper law of the contract is to a substantial extent that of Czechoslovakia, must it be said on that account, and notwithstanding the circumstances, that that law is also the proper law of the mode of performance in London ? Though there is no authority binding your Lordships to the view that there can be but one proper law in respect of any given contract, it is doubtless true to say that the courts
D of this country will not split the contract in this sense readily or without good reason. In my opinion, however, there is good ground for so doing in the somewhat unusual and, as I think, compelling circumstances of the case.

This, however, is really part and parcel of the larger question that now emerges, namely, what is the appropriate presumption of law to apply ? The choice is between the *lex loci contractus* and the *lex loci solutionis*. I would hold in favour
E of the latter. I think it meets the just requirements of the situation more adequately and fairly than the former. I also think it accords more closely with what may reasonably be imputed having regard to all the circumstances, including the nature of the contract—a bailment for safe custody with, as a normal characteristic, an obligation to re-deliver at the request of the bailor ; the position of each of the contracting parties ; the lack of any *consensus*, express
F or to be implied, in favour of Czechoslovakian law as the law of the aspect under discussion ; and, not least, the fact that the claim relates to the right to *possession* of tangible property in this jurisdiction. It is, moreover, to be observed, as a factor to be taken into consideration though not necessarily conclusive in itself, that, if the relief sought by the appellant were granted on this basis, it would not involve the Bohemian Bank, any more than it would have involved
G the Zivnostenska Bank, in taking any step in breach of Czechoslovakian law. The judgment desired would not necessitate collaboration or even a change of attitude on the part of the appellant's present bailee. For these reasons I think that the proper law in relation to performance in London ought to be the law of England and not that of Czechoslovakia.

If that view is correct, the absence of consent on the part of the National
H Bank affords the respondents no valid ground for withholding the certificates unless it can be said that the Czechoslovakian foreign exchange laws are, apart from any question of choice or conflict of law, to be acted on by the courts of this country. As matters stand I think any contention of this kind must be rejected. In their defence the respondents pleaded the Bretton Woods Agreements and the Order in Council of 1946 relating thereto (S.R. & O., 1946, No. 36). In the course of the argument, however, they admitted their inability to rest this branch of their case on any specific provision of these agreements and were

content to rely on them merely to the extent of indicating in a general way that the States which were parties thereto would respect each other's exchange control legislation. That might have some bearing if the question was whether the recognition of the relevant Czechoslovakian laws would be contrary to public policy in this country—a matter I have not found it necessary to discuss—but it cannot well have any other bearing, for these instruments do not go the length of incorporating those laws in the law of England. I am, accordingly, of opinion A that no adverse right or interest in the Bohemian Bank or its bailees, the respondents, sufficient to defeat the appellant's claim, has been established. I would, therefore, allow the appeal and restore the decision of MACNAGHTEN, J.

LORD REID: My Lords, in 1938 the appellant resided in Prague. He owned a number of securities which were held for him by a firm called Petschek. That firm was amalgamated with the Zivnostenska Bank and on Dec. 28, 1938, B a letter was written from the Prague office of that bank to the appellant which stated:

> "... we are crediting you with the undermentioned securities in the deposit account which we recently opened for you, namely ..."

Then follow a number of securities which were apparently held in Prague and C a number of others held in New York and elsewhere. The one with which this case is concerned is thus referred to:

> "Safe deposit, 800 Brazilian Traction shares with current coupons, dom. London."

The letter ends: D

> "... we desire to say that you will have the aforesaid securities deposited with us for safe custody."

These shares were, in fact, deposited with the respondents in London. On Jan. 16, 1939, a letter was written from the Prague office of the Zivnostenska Bank to the respondents informing them that they would receive 1,164 Brazilian E Traction shares (which admittedly include the above mentioned 800) and asking the respondents to:

> "... take over these shares and place them in our depot with your goodselves crediting us for same under advice to us."

The respondents were not informed and did not know to whom these shares F belonged. I have no doubt that at that stage the position was that there was a contract between the Zivnostenska Bank and the appellant, and that there was no contract between the respondents and the appellant. I have not much doubt that the appellant's contract with the Zivnostenska Bank was a Czechoslovakian contract of which the proper law was the law of that country. For the purposes of this case I shall assume that that was so.

G The appellant failed to escape when Czechoslovakia was overrun by the Germans and before being allowed to leave the country he was compelled to execute, on or before Apr. 1, 1939, a so-called agreement with the Bohemian Discount and Credit Bank which had become the tool of the Gestapo. By this document the Bohemian Bank, in effect, obtained complete control of the whole assets of the appellant. I have no doubt that this agreement was void as having H been obtained under duress and I did not understand the respondents' counsel to argue otherwise. On Apr. 17, 1939, the Zivnostenska Bank wrote to the respondents the following letter:

> "By the present we beg to request you to withdraw from our securities account with your goodselves 800 *Shares Brazilian Traction Light & Power Co., Ord. Cap. Stock No Par*, using for this purpose the shares which were credited to our above account on Feb. 6, 1939, /ref. B 64318/ —and to

> place same into the depot of the Bohemian Discount Bank and Society of Credit, Praha, with your goodselves. This transfer is made by order and for account of the owner of these shares, Mr. Viktor Kahler, Praha, 11, Vaclav nam. 55, who transfers his securities account from our bank to the Bohemian Discount Bank and Society of Credit, Praha. The ownership of the above shares remains unchanged. While crediting you for these
> A shares on the securities account, we remain . . ."

The respondents acknowledged this letter by a printed form dated May 11, 1939. On the same day the respondents made an entry in their securities book under the heading "Bohemian Discount Bank and Society of Credit, Prague" showing that the appellant was the owner of the shares in question. On Apr. 1, 1939, the appellant left Czechoslovakia and he never returned to that country. It
B seems clear that he did not instruct the Zivnostenska Bank to write the letter of Apr. 17 to the respondents. No doubt, it was written because that bank accepted the appellant's agreement with the Bohemian Bank as a valid agreement. If the appellant had so chosen, I think that he could have disclaimed this letter as having been written without his authority and could have refused to recognise the Bohemian Bank as having any rights with regard to his shares.
C What the result would have been it is needless to inquire because the appellant has chosen to ratify and adopt the Zivnostenska Bank's letter of Apr. 17, 1939. This was made quite explicit in his amended statement of claim of Mar. 18, 1948. It necessarily follows from this that the appellant must be held to have assented to his shares being held in the depot of the Bohemian Bank with the respondents. As the Bohemian Bank also assented to the shares being held
D there for their account, there must, I think, be held to have arisen between the appellant and the Bohemian Bank the relationship of bailor and bailee, and that is not disputed by the respondents. I agree with your Lordships that on no view of the facts can it be held that such a relationship arose between the appellant and the respondents. I think that the respondents hold the shares under a contract of bailment with the Bohemian Bank, and they cannot have a
E better right to refuse to deliver the shares to the appellant than the Bohemian Bank could have. The Bohemian Bank is not a party to this case, but the case cannot, in my view, be decided without considering what their rights are. In the circumstances I think that it is possible to consider that matter in their absence.

I find it exceedingly difficult to determine the nature and terms of the contract
F of bailment between the appellant and the Bohemian Bank. That contract does not arise from any express agreement, because I think that the void agreement between them made before the appellant was allowed to leave Czechoslovakia must be left out of account. The terms of the contract cannot be clearly inferred from any of the actions of the parties, but the way in which the appellant has chosen to present his case makes it impossible for him to deny that such a
G contract exists. I think that, once it is determined that there is a contract of bailment between the appellant and the Bohemian Bank, the decision of this case must turn on the precise nature of that contract, but to determine the precise nature of a contract of this character is a speculative enterprise and I feel no confidence in the result at which I have arrived.

The refusal of the respondents to deliver the appellant's share certificates to
H him can only be justified if the Bohemian Bank would be entitled to refuse to deliver. Admittedly, the Bohemian Bank has no right to the shares and no claim against the appellant which would warrant a claim to retain them. A refusal of the Bohemian Bank to deliver the shares or to authorise the respondents to deliver them could only be based on the law regarding foreign exchange control in force in Czechoslovakia. There is in evidence a translation of certain regulations which are part of the law of that country. In my judgment, those regulations do not come within the category of confiscatory or fiscal legislation

of a foreign country which English courts cannot recognise. It is, therefore, necessary to determine their meaning and also to determine whether and to what extent they must be given effect in this case. On the first question I think that it is established that the Bohemian Bank would have committed an offence under the law of Czechoslovakia if, without having the necessary permission from the Czechoslovakian authorities, they had delivered these certificates to the appellant, either in London or in Czechoslovakia, at the date when this A action was raised, and would commit such an offence if they so delivered those certificates now. Such delivery would, in my view, be a " transfer " from a " currency inlander " to a " currency foreigner " within the meaning of those regulations and as such prohibited unless the consent of the National Bank of Czechoslovakia had first been obtained. The question in this case really is whether that would afford a good defence to the Bohemian Bank if they were B sued in England for delivery of the appellant's property which they hold for him in England.

The decision of this case, as I see it, turns on the question whether the appellant's contract with the Bohemian Bank must be held to be governed and interpreted by the law of Czechoslovakia or by the law of England. If the proper law of the contract is the law of Czechoslovakia, then it must be assumed C that that law is the same as the law of England except in so far as the contrary appears from evidence. Under the law of England performance of a contract will not be enforced if or in so far as such performance is illegal under the law of England. It must be assumed that a similar principle applies in Czechoslovakia and that, if an action were raised there for delivery in London of the securities in question, even if it were held that London is the *locus solutionis* under the D contract, that action would not succeed because delivery would involve an offence against the law of Czechoslovakia. It appears to me that, if it is established that the proper law of a contract is the law of a foreign country and that the courts of that country would hold that performance of that contract cannot be enforced, an English court must also so hold unless the ground on which the foreign court would so hold is a ground which an English court ought not to E recognise. I have already stated that, in my opinion, an exchange control regulation of the kind here in question is not within the kind of foreign law which an English court cannot recognise. It, therefore, follows that, if the proper law of this contract is the law of Czechoslovakia, the Bohemian Bank could not be required to deliver the securities. The bailment by the Bohemian Bank to the respondents was known to the appellant when he assented to the Bohemian F Bank holding his property as his bailee, and it must, I think, follow that, if the appellant could not succeed against the Bohemian Bank, he cannot succeed against the respondents and the appeal must fail.

I turn to consider what the position would be if the appellant's contract were held to be an English contract. The law of England will not require an act to be done in performance of an English contract if such act would be unlawful G under English law or if it would be unlawful by the law of the country in which the act has to be done, but I know of no authority for the proposition that an English court will not enforce performance in England by a foreigner of an act which is lawful in England merely because the law of the foreigner's country prohibits him from doing that act in England. A foreigner can only get protection in such a case if there is a term in the contract which gives it to him. So, if H delivery of the securities is an act which the Bohemian Bank are under the contract to do in England and if the contract is governed by the law of England, the appeal must succeed.

It is now necessary to determine what was the contract between the appellant and the Bohemian Bank. There appear to me to be three possible views about this contract : first, that it must be regarded as being similar in all respects to the appellant's contract with the Zivnostenska Bank which preceded it ;

secondly, that the course which the appellant has taken in this action compels Your Lordships to decide the case on the footing that the void agreement between the appellant and the Bohemian Bank must be regarded for the purposes of this case as valid in whole or in part ; and, thirdly, that neither the terms of the appellant's contract with the Zivnostenska Bank nor the terms of the void agreement can be imported into this contract, with the result that the terms A of this contract, in so far as not determined against the appellant by his admissions, must be inferred from the whole facts and circumstances of the case. I recognise the attraction of the first view, but I cannot accept it for this reason. The Zivnostenska contract may have contained special conditions such, for example, as those which will shortly have to be considered by Your Lordships in another contract to which the Zivnostenska Bank is now a party [*Zivnostenska* B *Banka National Corporation* v. *Frankman* (6)]. At least it might have contained such conditions and I think that the argument can fairly be tested by supposing that it did. I can see no ground for assuming that the Bohemian Bank agreed to take over the Zivnostenska Bank's contract whatever its conditions might be. In fact, the Bohemian Bank came in under an agreement which, if they could have operated it, gave them very much wider rights. Is the appellant, then, C precluded from asserting that the terms of his agreement with the Bohemian Bank differ from the terms of his previous agreement with the Zivnostenska Bank ? That leads me to the second view to which I have referred. I think that it is necessary to examine the pleadings to see just what the appellant must be held to have admitted. In the original stages no reference was made to the Bohemian Bank. The first reference to it was in the defence dated Dec. 6, 1939, D where the respondents referred to the letter of the Zivnostenska Bank of Apr. 17, 1939, which I have already quoted and pleaded :

> " Since the said May 11, 1939, the defendants have held and still hold the said share certificates to the order and for and on account of the said Bohemian Bank."

Then in an affidavit of Jan. 15, 1940, the truth of which is admitted, the appellant E told how he had been forced to sign the agreement with the Bohemian Bank. The facts there narrated appear to me to show clearly that that agreement was void and respondents' counsel did not argue either that it is valid or that the appellant is bound in this case to admit that it is wholly valid. That agreement is not again referred to. In their amended and re-amended defence the respondents continue to rely on their contract with the Bohemian Bank and F state alternatively :

> " . . . that the plaintiff by transferring the said shares into a depot with the defendants of the Bohemian Bank submitted himself according to Czechoslovak law to all the provisions from time to time in force of the financial and monetary regulations of Czechoslovakia in respect of the G said shares."

Finally, the appellant in his amended statement of claim stated alternatively that the Zivnostenska Bank had his authority to send the letter of Apr. 17, 1939, or that he subsequently ratified and adopted it. I have already stated that I think that this prevents the appellant from denying that there is a contract between him and the Bohemian Bank. Does it go farther and prevent him from H denying either (first) that that contract is similar in all respects to his earlier contract with the Zivnostenska Bank, or (secondly) that that contract is the void agreement and none other ? These two alternatives are quite different and I can only say that I can see no sufficient reason for holding the appellant to either alternative. It is quite true that the Bohemian Bank is admitted to have succeeded the Zivnostenska Bank as the appellant's bailee, but that does not necessarily imply any particular similarity between the two contracts, and I cannot see that the appellant must be held to have admitted, not only that there is a contract between him and the Bohemian Bank, but also that it is in all essential respects similar to his earlier contract with the Zivnostenska Bank. Still less can I see how he must be held to have admitted that the void agreement must for the purposes of this case be treated as a subsisting contract, and, as I have said, this was not argued. It was argued, somewhat faintly I thought, that the appellant had, in effect, adopted that part of the void agreement which authorised the Bohemian Bank to hold the shares. Subsequent partial adoption of a void contract I find to be a difficult conception which I cannot A accept as applicable.

I, therefore, think that the problem can only be solved by considering the whole facts of the case. I think that it is fairly clear that the appellant did not think that he had made or had admitted making any contract with the Bohemian Bank. The only reason why he adopted the Zivnostenska Bank's letter of Apr. 17, 1939, was because he thought that that course would help him to say B that he had a contract with the respondents. The Bohemian Bank were trying, so long as they were under German domination, to enforce the void agreement which had been obtained from the appellant before he was allowed to leave Czechoslovakia, but the fact that the parties misunderstood the legal effect of what they were doing cannot prevent the necessary legal consequences from attaching to their acts, and it is a necessary inference from their acts that a C contract of bailment exists between them. That contract must, I think, be independent of the void agreement. I think that the only matters which appear with any clarity are that the Bohemian Bank with the appellant's consent hold in London for the appellant property belonging to him. Moreover, before the letter of Apr. 17, 1939, the appellant had left Czechoslovakia with no intention of returning. He was probably in France at the relevant time. If that were all, D there would be a contract of bailment between a bailor in France and a bailee in Czechoslovakia with regard to property held throughout in London, and I think that the inference would be that London was the place where the bailor was entitled to demand re-delivery of his property. Such a contract would, I think, be governed by the law of England.

Is there anything more in the circumstances which makes it necessary to E infer that the contract is of a different nature or contains other terms ? It may be said that the Bohemian Bank would never have agreed to a contract which did not give them the necessary protection. That may be, though it might, perhaps, equally be said that the appellant, having just escaped from Czechoslovakia, would never have agreed to a contract which subjected his property to this control. I do not think that any help is to be got from considerations F of this character. If this is to be held relevant, the argument must, I think, be that, because it is clear that, if their attention had been directed to the point, the Bohemian Bank would never have consented to become bailees except on condition that in the performance of their contract they should not be required to do something which was unlawful and punishable under the law of Czechoslovakia, therefore it must be held to be an implied term of their contract that G performance cannot be demanded in such a manner as to render them liable to such punishment. But there are no special circumstances in this case. The case for implying such a term would arise in just the same way in most, if not all, cases where a foreigner contracts to do something in this country the doing of which will or may render him liable to prosecution in his own country. To give effect to this argument would, in substance, involve introducing a new H principle into the law of England that it is a good defence to an action on a contract the proper law of which is English law for the defendant to show that his performance of his obligation in England would subject him to penal liability in his own country. No argument was submitted to justify such a principle and I would not be prepared to accept it.

It must be accepted that there is a contract of bailment between the appellant and the Bohemian Bank. The basis of such a contract can be found with some certainty. The bank, with the assent of the appellant, holds the appellant's securities for safe keeping in its depot with the respondents in London. I can find no other facts which must necessarily be taken into account in settling the nature of the contract. On that footing it is a contract under which delivery can be demanded in London and which must be governed by English law. I can find no sufficient reason for adding anything more to the contract. I realise A that there are so many suppositions and hypotheses involved and there is so much unreality in the case that my conclusions may well be erroneous, but I think that there is less unreality involved in the suppositions which I have made than in any others suggested, and my view would, therefore, be that the appeal should be allowed.

LORD RADCLIFFE: My Lords, I think that the appellant's appeal fails. B What he asks by his appeal is that we should restore the order of the court of first instance which directed the delivery to him of 800 shares of the Brazilian Traction Light and Power Co. in the possession of the respondents, and it is that relief to which I would hold him disentitled. It is plain that we are dealing with an anomalous set of circumstances when the person who is the sole beneficial owner of property cannot obtain the aid of the law to recover its possession. C To see how the anomaly arises requires some consideration of the facts of this case. For our purposes it can begin with the letter dated Dec. 28, 1938, which the Zivnostenska Bank at Prague wrote to the appellant at Prague, in which they stated that they were :

> " . . . crediting you with the undermentioned securities in the deposit D account which we recently opened for you . . . "

There followed a long list of securities, the first block of which appears to be Czechoslovakian, but of which later groups are characterised as domiciled at New York, Amsterdam and Tel Aviv. Lastly there is a group " dom. London " which includes the 800 Brazilian Co. shares. The letter ends with the words :

E

> " . . . we desire to say that you will have the aforesaid securities deposited with us for safe custody ".

As I take the view that we are bound to treat the Bohemian Discount Bank as having duly succeeded to the Zivnostenska Bank's obligations to the appellant as created by this letter of Dec. 28, 1938, it is well to pause to state what I F interpret them as being. Certainly there was a bailment. The bank had the safe custody of the securities and the right to possession until the bailment was determined. We know from the appellant's affidavit of July 31, 1939, that the Brazilian Co. shares had always been deposited in London and I think that we may safely treat the bailees as having at any rate authority to retain them there. In the absence of any direct evidence of custom or any challenge by the appellant G as to the propriety of what they did, I think that we may also treat their authority as allowing the deposit in London either with a banking correspondent, such as the respondents, the Midland Bank, by sub-bailment or with their own London branch, if they had one. The shares are described as " with current coupons ", and I suppose that we must envisage the depositary's duties as including the detachment of coupons on maturity, the collection of dividend in London, and H the transmission of it to Prague or elsewhere as directed. In this respect the contract is more than a mere contract of bailment. It was so much of a gratuitous bailment (since the bank, though they may have charged for their services, were in no sense hirers) as to be terminable at the will of the bailor, on which event of termination the bailees would become responsible to deliver the shares to the bailor or as he should direct. It follows that, so far as the contract of bailment was concerned, the appellant could properly be said to have the right to recover immediate possession from the bank.

So far as the contract of bailment was concerned. But at the time when the letter of Dec. 28, 1938, was written, as now, the law of Czechoslovakia had imposed a restriction on the duty of a bailee under such a contract to re-deliver on demand. That is proved by Dr. Hartmann's evidence. The restriction consisted in the currency regulation that forbade, among others, a holder in safe custody of foreign securities to transfer his possession without the consent of the National Bank. The terms of this regulation ought not to be treated as A
being themselves part of the contract, but, on the other hand, I do not know how to regard their legal significance except as modifying the relationship of any bailors and bailees who ought to be treated as having measured their rights and obligations under the bailment by the Czechoslovakian system of law. Now the proper law of the contract between the appellant and the Zivnostenska Bank was, as I see it, the law of Czechoslovakia. The arrangement was made B
in that country by two persons there resident and subject to its laws. The securities were held on the deposit account which the appellant opened with the bank in Prague and it was with that branch, therefore, that he would have to clear the matter if he wished to determine the bailment. These considerations outweigh any other in determining the proper law of the contract, but the consequence is that, having regard to the currency regulations, a bailment so C
created was not determinable at the will of the bailor so long as those regulations subsisted, but was determinable only with the permission of the National Bank.

A few months later the appellant left Czechoslovakia. The price of exile that was extorted from him was the transfer of all the securities that he possessed to the control of the Bohemian Bank. There is no reason to doubt that the German authorities then in power in Czechoslovakia intended that the securities D
should be liquidated in due course and the proceeds appropriated for their own purposes. On Mar. 29, 1939, the appellant signed the required agreement with the Bohemian Bank and on Apr. 17, 1939, the Zivnostenska Bank, no doubt in consequence of this agreement, notified the Midland Bank that the 800 Brazilian company shares should be placed :

> " . . . into the depot of the Bohemian Discount Bank and Society of E
> Credit, Praha, with your goodselves. This transfer is made by order and for account of the owner of these shares, Mr. Viktor Kahler, Praha 11, Vaclav. nam. 55, who transfers his securities account from our bank to the Bohemian Discount Bank and Society of Credit, Praha. The ownership of the above shares remains unchanged ".

The effect of the agreement of Mar. 29, 1939, and of this letter was much F
debated before us. I will content myself with saying that, in my view, the form of the appellant's statement of claim, as finally amended during the hearing in the Court of Appeal, leaves us no option but to treat the transfer of his security deposit account to the Bohemian Bank as a valid and proper transaction. Of course, other views of the legal effect of the whole arrangement might be taken. I do not think that they are open to us. I have no doubt that the appellant's G
advisers considered the alternative views and adopted that which seemed to them to give his case the best chance of success. But what is the consequence? I think that we must treat the Bohemian Bank as having been validly substituted for the Zivnostenska Bank as the bailees of the appellant's shares and as holding them for him on a deposit account similar in all respects to that which was transferred to them by the letter of Apr. 17, 1939. I think that the proper law H
of that new bailment was necessarily that of Czechoslovakia. No doubt, the appellant, who was leaving Czechoslovakia, perhaps for ever, would have chosen some other law, had he been free to choose. What the bank would or could have accepted is another matter. But, in truth, the speculation seems to me aimless for, had the appellant been free to choose, he would not have transferred his account to the Bohemian Bank at all. If we are to assume, as the appellant's case requires us to assume, that the securities were properly transferred from the

Zivnostenska Bank's depot with the respondents, the Midland Bank, Ltd., to the Bohemian Bank's depot with them, then I think that the law of the new bailment, as the law of the old bailment, was the law of Czechoslovakia.

The appellant now sues the respondents for the delivery of his securities. His claim was discussed before us as a claim in detinue. I think that it was rightly so described, but the answer of the respondents would have been the same if A his claim had been based on trespass or trover. First, he says that he is in direct contractual relation with the respondents and that his contract, being a terminable contract of bailment, entitles him to call for the delivery of his shares. The Court of Appeal have rejected his claim to be in any direct contractual relation with the respondents. I agree with all that they say on this head and I do not think it necessary to add anything. Secondly, he says that he is the absolute B owner of the shares, that the Bohemian Bank claim neither lien over nor interest in them, and that, therefore, he is entitled to the immediate delivery of what, after all, belongs to him and to no one else. To this the respondents reply that he is not entitled to the immediate possession of the shares, and that, if he is not so entitled, his claim must fail. It is not in dispute that the National Bank, having been applied to, have refused to consent to the release of the shares C from the Bohemian Bank to the appellant, but it is important that the respondents' objection is not based on the fact that they hold the shares to the order of the Bohemian Bank and that they cannot obtain that bank's consent to the delivery to the appellant. If the appellant had, indeed, the immediate right to possession, the respondents' possible embarrassments with the Bohemian Bank would not, as I see it, afford any defence, unless they could successfully D establish that his authority to the Bohemian Bank to place the shares with them estops him from calling on them to ignore that bank's refusal of consent. That line of argument has not been pursued before us and I do not consider it further. What the respondents rely on is a defect in the plaintiff's title to immediate possession. Here I think they do no more than assert a familiar legal principle. An action in detinue will not lie at the suit of a plaintiff who has not that title. E It would be an anomaly that the court should by its order transfer property into the hands of one who has not a legal right to immediate possession. It is true that in the case of a bailment which is terminable at the bailor's will the law will give the right of action to the bailor as well as to the bailee, but then such a bailor has nothing less than a right to immediate possession. On the other hand, a person may have all the existing rights of ownership in a F chattel and yet have no claim in detinue if by contract he is not entitled to immediate possession: see *Bradley* v. *Copley* (2).

It is, therefore, the appellant's right to possession that must be tried. By contract he has agreed that the Bohemian Bank should hold his shares in safe custody for him. There is nothing in the contract that would prevent him from calling for the shares at any time, but the law of Czechoslovakia to which the G contract is subject has so far modified his right so to recover possession of the shares as to make the consent of the National Bank a condition precedent. If, then, the courts of this country are to recognise that modification, the appellant lacks a present right to possession. It seems to me that we should ignore an established rule of our private international law if we were not to give effect to the currency regulation in question. If the proper law of the contract is the law H of Czechoslovakia, that law not merely sustains, but also, because it sustains, may also modify or dissolve, the contractual bond. The currency law is not part of the contract, but the rights and obligations under the contract are part of the legal system to which the currency law belongs. So to decide is to give effect to the same principle as was upheld by our courts when the obligations of the government of the United Kingdom under its American loan of 1917 were treated as modified by American legislation: see *R.* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* (7); or when Mr. Perry's life assurance policy was annulled by supervening legislation in the U.S.S.R.: see *Perry* v. *Equitable Life Assurance Society of U.S.A.* (8).

For my part I should not regard the application of this principle to this case as a concession of extra-territorial operation to foreign currency regulations. I should regard it rather as an insistence that in applying the proper law of a contract—a conception which is inescapable in private international law—it is the full complex of substantive law that must be applied. The difficulty more often lies in the attribution of the proper law, but, however that may be, I should not have been prepared to treat such currency regulations as we are concerned with here as if they were no more than the "penal or revenue laws" of another State the existence of which our courts are traditionally disposed to ignore. It follows from what I have said that I think that we are bound to treat the appellant as having ceded the lawful possession of his shares for an existing, though indeterminate, period, and to hold him, accordingly, disentitled to the relief that he claims. In the result, I have said no more on this head than was said in the Court of Appeal by EVERSHED, L.J., and SCOTT, L.J., but I think that it may be important in this peculiar case to emphasise that, in my opinion, it is not the respondents' failure to get their customer's consent to hand the shares to the appellant that affords them defence, but the defect in the appellant's own right to immediate possession.

Appeal dismissed with costs.

Solicitors: *Herbert Smith & Co.* (for the appellant); *Simmons & Simmons* (for the respondents).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

PRICE *v.* CITY OF LONDON CORPORATION.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning, L.J., and Hodson, J.), October 17, 1949.]

Tithe—Extinguishment—Detriment to officer—Compensation—Expectation of continuance in office—City of London (Tithes) Act, 1947 (*c.* xxxi), *s.* 16 (1).

The City of London (Tithes) Act, 1947, s. 16, provides: "(1) Every officer in office at the date of the passing of this Act who suffers substantial detriment to his livelihood by reason of the passing of this Act shall be entitled to compensation from the [City of London] Corporation for that detriment." At the date of the passing of the Act the plaintiff was the collector of tithes for the parishes of S., A. and E., and as such was an officer within s. 16 (1). He had held office in S. and A. for a considerable time, and, although tacitly or expressly the appointment was made annually, by custom those offices were treated as perpetual in the sense that the holder, so long as he was able to act, continued to act and the offices were commonly passed from father to son. The plaintiff was not first appointed to office in E., to which there was also in theory an annual appointment, until Dec. 17, 1945, and his letter of appointment referred to the bill which eventually became the City of London (Tithes) Act, 1947, and to the fact that, having regard to it, the appointment was not likely to be of long duration. The county court judge awarded compensation amounting to ten times the annual value of the appointments to S. and A., but in the case of the appointment to E. he awarded compensation only in respect of the uncompleted year for which the plaintiff had been appointed. On appeal,

HELD: in assessing the "substantial detriment" for the purposes of s. 16 (1) it was necessary to inquire not only what were the rights of which

the plaintiff had been deprived by reason of the passing of the Act, but also what were the plaintiff's expectations of remaining in office. While in the cases of S. and A. the plaintiff had on appointment reasonable expectation that he would continue to hold office indefinitely, in the case of E. he could have had no such expectation, and, therefore, the compensation in the latter case should be only in respect of the loss of the strict
A legal right to remain in office for the rest of the year for which he had actually been appointed.

Case referred to :

(1) *Ex parte Lee*, (1837), 7 Ad. & El. 139 ; 2 Nev. & P.K.B. 63 ; Will. Woll. & Dav. 471 ; 1 J.P. 343 ; 38 Digest 141, *1051*.

APPEAL by the plaintiff from an order of His Honour JUDGE A. R. THOMAS,
B in the Mayor's and City of London Court, dated May 23, 1949.

The plaintiff had been the holder of the office of collector of tithes in each of three parishes. In the cases of two of the offices prior to their abolition by the City of London (Tithes) Act, 1947, he had had reasonable expectation that he would continue to hold office indefinitely, but in the case of the third he was aware, on appointment, that the office was likely shortly to be abolished.
C JUDGE THOMAS held that it was proper in each case, in assessing the compensation to be paid for loss of office under s. 16 (1) of the Act, to take into account the loss of expectation of the plaintiff's continuing in office. The Court of Appeal now affirmed his decision. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

D *Blain* for the plaintiff.

Heathcote-Williams, K.C., for the corporation.

SIR RAYMOND EVERSHED, M.R. : By the City of London (Tithes) Act, 1947, a private Act of Parliament passed, to take the words of the title,

E
> " . . . for extinguishing tithes and tithe rates and other payments by way or in lieu of tithes in the City of London ; and for other purposes,"

it was provided, in s. 16 (1) :

> " Every officer in office at the date of the passing of this Act who suffers substantial detriment to his livelihood by reason of the passing of this
> F Act shall be entitled to compensation from the corporation [of the City of London] for that detriment."

It is conceded that the plaintiff, Mr. Cecil John Poley Price, falls within the description of an officer in office at the date of the passing of the Act, for by s. 16 (6) the word " officer " is defined as meaning " any clerk or collector appointed in connection with," among other things, " the collection of tithes."
G The Act of Parliament came into operation on Oct. 1, 1947, having received the Royal Assent on July 31, 1947. At both those dates the plaintiff was a collector appointed in connection with the collection of tithes in three parishes in the city of London, which I will refer to briefly as the parishes of St. Swithun, St. Antholin and St. Ethelburga. In the case of the first two of those parishes the plaintiff had held the office of collector for some considerable
H time. His appointment to the office in the parish of St. Ethelburga was dated Dec. 17, 1945, and was effected by a letter to the terms of which I will refer more fully presently. As I understand the evidence, the appointments in each of the three cases were, strictly speaking, annual appointments in the sense that at the beginning of each year, expressly or tacitly, the plaintiff was re-appointed, but I also understand that by the custom which existed in these matters the office which he held—and I confine myself for the present to the first two parishes—was regarded as a perpetual office in the sense that the holder,

so long as he was able to act, continued so to act, and, indeed, the office was commonly passed within a family from father to son.

Reverting to the terms of s. 16 (1), at first sight, as it seems to me, in assessing compensation for "substantial detriment" suffered by reason of the passing of the Act, it would be necessary to inquire what were the rights which the holder of the office had of which he had been deprived by the Act. If that were the correct approach exclusively in every case, the result would appear to be that the damage suffered would only be in respect of an uncompleted year for which the holder of the office had been appointed. He would have no right known to the law in respect of any future years, but so strict an interpretation of the statute would involve a neglect of the true facts and of common sense. When, therefore, the learned judge came to deal with the claim he took account of the fact—and, again, I am confining myself to the first two parishes—well-known by all concerned, that in the ordinary way a holder of this office would have the expectation of continuing in it more or less indefinitely. Proceeding on that view, and having regard to the age of the plaintiff, the learned judge arrived at a sum for compensation which multiplied the annual value of the office by ten, that is, he allowed a ten years expectation of office. Taking account, no doubt, of the vicissitudes of life, the possibility of death, and so on, ten years seemed to him to be a fair period for compensation on that basis. There has been no quarrel with his finding in that respect.

When, however, the learned judge came to apply himself to the office in respect of the parish of St. Ethelburga he came to the conclusion that there was no room for such an expectation of continued holding of the office as would justify any multiplication of the annual value by any number of years. That conclusion really turns solely on the terms of the plaintiff's appointment. I, therefore, at this stage, read the letter addressed to the plaintiff and signed by the then sole churchwarden of the parish, Mr. Hathaway Tucker. It was dated Dec. 17, 1945, rather more than eighteen months before the passing of the Act, and was as follows :

> "Dear Mr. Price, I understand that you are willing to accept the post of tithe clerk for the parish of St. Ethelburga the Virgin within Bishopsgate, and I am glad to appoint you to the post as from Jan. 1, 1946. A second churchwarden will doubtless be appointed next Easter. In view of the statement in this week's CITY PRESS it will be clear to you that the appointment is not likely to be of long duration."

We have not seen the issue of the newspaper alluded to, but I understand (and there is no dispute about this) that pursuant to standing orders of Parliament the promoters of the bill which eventually became the City of London (Tithes) Act, 1947—I do not say in exactly the form in which it was originally promoted—were bound to give notice in the newspapers of the proposal to introduce the bill. The reference in the letter is, undoubtedly, a reference to the notice then published that a bill was being promoted for the abolition of tithes in the city of London, a bill which, if it became law, would necessarily have the effect of putting an end to the office of tithe collector. In the light of the reference in that letter, what were the expectations ? The learned judge's conclusion is in the following terms :

> "I do not think one can say that when the appellant got the appointment [to St. Ethelburga] he really had any expectation of it going on for any particular time."

It seems to me impossible for us to differ from that conclusion. I think that when one reads the letter it becomes manifest that the appointment in this case was radically different from the other appointments in the important respect, that, whereas previously on appointment he had expected to continue in office indefinitely, the terms of this appointment made it quite plain that it was from the start intended to be—and it was accepted as being—very probably a short term appointment. As it seems to me, in view of the terms in which that letter was couched, counsel for the plaintiff is in this difficulty. To justify in the cases of St. Swithun and St. Antholin a figure which goes A beyond any legal rights which the plaintiff has, he must take account of the expectations which were entertained by the parties to the agreement from the beginning. In those cases something unknown and unprophesied at the date when the appointment was made has come into being and destroyed the hitherto accepted basis of those appointments. If, to justify the additional calculation in the first two cases, expectations are properly to be taken into B account, they cannot be excluded here, and the terms of the letter make it quite clear that no expectations and no promises were held out to the plaintiff when he was appointed beyond the expectation and promise that until, if at all, this Act was passed, he should hold office, but that he would not hold it beyond that period. In other words, the terms of his appointment negatived the notion that there was any kind of "freehold tenure," to use a C phrase used in the argument. The plaintiff must be taken willingly to have accepted this appointment on the strict legal basis of annual re-appointment. If that is correct, as it seems to me, no compensation within the language of s. 16 (1) could properly be arrived at which went beyond his strict legal rights. On that view, the learned judge in the Mayor's Court thought that all he could allow in respect of St. Ethelburga was a sum made up for the three D months October, November and December, 1947, in respect of which the plaintiff, though legally holding office, was deprived of the fruits of his employment. The figure he arrived at, £500 in all, allowed only so much in respect of St. Ethelburga.

My conclusion is that the learned judge was right and that this appeal should be dismissed.

E **DENNING, L.J.**: I agree. It is true that in *Ex parte Lee* (1) a different statute was under consideration, but that case expressed the same underlying principle, namely, that when assessing compensation for loss of office the tribunal should assess the compensation, not so much for loss of the legal right to the office, as for loss of the expectation of continuing in the office. It was held in that case that regard may be properly had to the fact F that at the date of the appointment the expectation of continuance was very little. LORD DENMAN, C.J., there said (7 Ad. & El. 142):

> "There could be no real loss, as it must have been known that the office would so soon cease."

So, here, the judge has found that at the time of the appointment the probability G was that the Act was going to be passed extinguishing tithe and that the plaintiff would lose his office in a very short time. The learned judge was right to take that into account. I agree, therefore, with my Lord that this appeal should be dismissed.

HODSON, J.: I agree.

Appeal dismissed with costs.

H Solicitors: *Samuel Price & Sons* (for the plaintiff); *Comptroller and City Solicitor*.

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

MOAT *v.* MARTIN AND ANOTHER.

[Court of Appeal (Sir Raymond Evershed, M.R., Denning, L.J., and Hodson, J.), October 17, 1949.]

Lease—Assignment—Landlord's consent—" Will not be withheld in the case of a respectable and responsible person "—Need to imply proviso that lease not to be unreasonably withheld—Landlord and Tenant Act, 1927 (*c.* 36), *s.* 19 (1).

By a lease of certain premises the tenant covenanted not to assign the premises without the landlord's consent, and it was further provided that " such consent will not be withheld in the case of a respectable and responsible person." The tenant assigned the lease to a respectable and responsible person without having obtained the landlord's consent. On a claim by the landlord for possession,

Held : on the true construction of the covenant no consent by the landlord was required where the assignment was to a respectable and responsible person, and, in consequence, s. 19 (1) (*a*) of the Landlord and Tenant Act, 1927, did not apply and the provision in the lease was not to be deemed to be subject to a proviso that the licence was not to be unreasonably withheld and so could be withheld on reasonable grounds.

[For the Landlord and Tenant Act, 1927, s. 19 (1), see HALSBURY'S STATUTES, Vol. 10, p. 390.]

Cases referred to :

(1) *Swanson* v. *Forton*, [1949] 1 All E.R. 135 ; [1949] Ch. 143 ; [1949] L.J.R. 632.

(2) *Lee* v. *K. Carter, Ltd.*, [1948] 2 All E.R. 690 ; [1949] 1 K.B. 85 ; [1949] L.J.R. 7.

(3) *Treloar* v. *Bigge*, (1874), L.R. 9 Exch. 151; 43 L.J.Ex. 95; 31 Digest 379, *5259.*

Appeal by the landlord from a decision of His Honour Judge Blagden sitting at West London County Court, dated May 12, 1949, dismissing the landlord's claim for possession on the ground of breach of a covenant not to assign. The Court of Appeal dismissed the appeal.

Heathcote-Williams, K.C., and *P. Freeman* for the landlord.
Hunter-Brown for the tenant and the assignee of the lease.

SIR RAYMOND EVERSHED, M.R. : This is an appeal by a landlord who sought to recover possession of certain premises in Cornwall Gardens, London, as on a forfeiture for breach of contract by the tenant. Due notice under the Law of Property Act, 1925, s. 146, has been served, but the learned judge in the court below came to the conclusion that there had been no breach of contract and on that account dismissed the action. The breach alleged was an assignment by the tenant, Major Martin, to a Mr. Thom without the previous written consent of Mr. Moat, the landlord.

When the case was opened, it appeared that the main question which the landlord desired to put before this court was of the same kind as that in *Swanson* v. *Forton* (1) and *Lee* v. *K. Carter, Ltd.* (2) being whether, having regard to the period then remaining unexpired of the original term and the other circumstances of the case, including the proper inference to be drawn as to the tenant's intention himself to go on residing on the premises, it was unreasonable for the landlord to withhold his consent when by so doing he would prevent a person other than the existing tenant enjoying the privileges of the Rent Acts after expiry of the term. The learned judge came to the conclusion that there was here an unreasonable refusal by the landlord, distinguishing this case from the two cases to which I have alluded. It must not be assumed from anything I say that I think the learned judge was wrong in his conclusion, but as it has turned out it has been unnecessary for this court to consider that matter.

A preliminary point has arisen on which the learned judge concluded in favour of the landlord. The preliminary point arises because the provision against assignment is, in the present case, in an unusual form. It reads :

> "The tenant agrees with the landlord as follows . . . Not to assign A underlet or part with the possession of the demised premises or any part thereof without the consent in writing of the landlord such consent will not be withheld in the case of a respectable and responsible person and to pay the landlord a fee . . ."

All persons conversant with this type of case will appreciate that the formula which I have read departs from the more usual provision which, making perhaps B a virtue of necessity, follows the terms of the Landlord and Tenant Act, 1927, s. 19 (1) (*a*), by saying "such consent not to be unreasonably withheld in the case of a respectable and responsible person." Here the provision is much more positive in the tenant's favour. It is : "such consent will not be withheld." The point was taken in the court below that, as Mr. Thom is by universal admission both respectable and responsible, the landlord has debarred himself C in any event from withholding his consent. The learned judge, however, came to the conclusion that a proper reading of s. 19 (1) (*a*) of the Landlord and Tenant Act, 1927, compelled him to qualify the apparently absolute obligation on the landlord not to withhold his consent by inserting the word "unreasonably" after the words "will not be" and before the word "withheld." With all respect to the learned judge I do not think he was right in taking D that view. It would, indeed, be rather surprising if it were right, for one must not lose sight of the fact that the purpose of Part II of the Landlord and Tenant Act, 1927, was to relieve tenants in certain respects and on certain conditions from the full strictness of their obligations. Section 19, on the face of it, is intended primarily to relieve the tenant from the result of arbitrary refusal by the landlord to give consent to assignment by requiring that consent to be E subjected to the proviso that it would not be unreasonably withheld. The learned judge came to the conclusion that though, no doubt, that was the primary intention of the section, nevertheless it did not in terms say that it only operated for the tenant's benefit, and, therefore, that if in particular cases it operated the other way, that could not be helped.

My view is that, properly construed, there is no real room for the applica- F tion of this section at all. It is obvious that the paragraph in the tenancy agreement which I have read may be construed in two ways. It may be said, on the one hand, that the words "such consent will not be withheld" amount to an affirmative, positive covenant by the landlord not to withhold consent in the case of a proposed assignment to a certain type of person. Alternatively, it may be said that the effect of the words "such consent will G not be withheld" does not impose a positive obligation or covenant on the landlord, but cuts down the tenant's obligation so as to make it inapplicable in the case of a proposed assignment to certain persons. In other words, in the case of an assignment to a respectable and responsible person there is no covenant by the tenant not to assign without consent. Since *Treloar* v. *Bigge* (3), in the ordinary case where the covenant is qualified by such words H as "such consent not to be unreasonably withheld" the effect is not to impose a countervailing obligation on the landlord, but is to limit or curtail the tenant's obligation under his covenant. In the present case there is a very unusual formula and it might be thought to be an exception to the general rule, but it is unnecessary to express a conclusion one way or the other because in either event, as it seems to me, s. 19 is inapplicable. Section 19 (1) provides :

> "In all leases . . . containing a covenant . . . against assigning . . . without . . . consent, such covenant . . . shall, notwithstanding any

> express provision to the contrary, be deemed to be subject (*a*) to a proviso to the effect that such . . . consent is not to be unreasonably withheld."

The first thing to be noticed about the section is that it applies only in cases where there is a covenant against assignment without consent. If the true view is that the covenant against assignment in this case does not apply at all in the case of assignment to a responsible person, then there is no covenant which binds the tenant, and, therefore, nothing in respect of which s. 19 can A
come into play. On the other hand, if there is a countervailing covenant that the landlord will not withhold his consent in certain circumstances, then that countervailing covenant is not a covenant against assignment. On that view there is no ground for reading into a covenant by the landlord not to withhold consent a proviso which is only required by the section to be inserted in a covenant by a tenant against assignment without consent. B

There would be other and formidable difficulties in so construing s. 19 as to require one to introduce the word "unreasonable" into the covenant in favour of the landlord. The result, in my judgment, is, with all respect to the learned judge in the court below, that this preliminary point is fatal in the circumstances of this case (Mr. Thom being admittedly a person who is reputable and responsible) to the landlord's contention. For reasons best C
known to himself the landlord chose to enter into a covenant in which he said quite positively and clearly that in the case of assignment to respectable and responsible persons he would not in any circumstances withhold his consent. I see no reason why he should not now comply with the terms of the bargain he made. The result is, in my view, that on this point the appeal must fail. I am not expressing any view on the points on which the learned judge decided D
in the tenant's favour and on which it is unnecessary in the circumstances for us to hear argument.

DENNING, L.J. : Under this covenant I take it to be clear that the tenant would in the case of any proposed assignment have to ask for the landlord's consent. To that extent, therefore, it is a covenant not to assign E
without consent within the opening words of s. 19, but in this covenant there is a provision that such consent will not be withheld in the case of a respectable and responsible person. That provision is not "to the contrary of" a proviso that the consent is not to be unreasonably withheld. It supports it and goes beyond it. The provision is, therefore, not negatived by s. 19 (1), (*a*), for that only negatives provisions "to the contrary," which this is not. I agree, therefore, F
that this appeal should be dismissed.

HODSON, J. : The county court judge's first impression was that the agreement which the parties had made was to be given its natural and ordinary meaning and that in those circumstances the landlord was out of court. That, I think, is really the correct view. The provision in this case is that the consent to assign will not be withheld at all, the circumstances of the G
case being that the proposed assignee is admittedly a responsible and respectable person. There is, therefore, no room to inquire whether the consent is being withheld reasonably or unreasonably. In my judgment, s. 19 (1) of the Landlord and Tenant Act, 1927, does not apply and I agree that the appeal must be dismissed.

Appeal dismissed with costs. H

Solicitors : *Maddisons & Lambs* (for the landlord) ; *Bannehr, Son & MacMin* (for the tenants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

O'NEILL *v.* O'NEILL AND PIGGOTT.

[COURT OF APPEAL (Bucknill, Cohen and Asquith, L.JJ.), October 17, 1949.]

Divorce—Appeal—Damages—Appeal by co-respondent—Appeal after decree absolute—Opportunity to co-respondent to appeal from decree nisi—Enlargement of time for appeal—Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 31 (1) (*e*)—*R.S.C., Ord.* 58, *r.* 15.

In a petition for dissolution of marriage on the ground of adultery a sum of £350 was awarded as damages against the co-respondent who had entered an appearance solely on the question of damages and costs. The decree *nisi* was pronounced on July 14, 1949, and was made absolute on Aug. 29. On Aug. 23 the co-respondent instructed his solicitors to appeal against the order for damages, but his advisers took the view that there was insufficient time to lodge an appeal within the six weeks after decree *nisi* allowed under R.S.C., Ord. 58, r. 15, and applied by notice of motion to the Court of Appeal for leave to appeal out of time.

HELD: the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (*e*), which prohibits appeals from an order absolute for the dissolution of marriage by any person who, having had time and opportunity to appeal from the decree *nisi*, has not done so, does not apply to an appeal against an order for damages, which is independent of, and not ancillary to, an order absolute for divorce: *Kent* v. *Atkinson* ([1923] P. 142) and *W.* v. *W. & D.* ([1948] P. 157), *applied*; and in the circumstances of the case the co-respondent should have leave to appeal.

[AS TO THE JURISDICTION OF THE COURT OF APPEAL IN DIVORCE APPEALS, see HALSBURY, Hailsham Edn., Vol. 26, p. 113, para. 222 and p. 116, para. 229; and FOR CASES, see DIGEST, Vol. 27, p. 305, No. *2826*, and 2nd DIGEST Supplement.]

Cases referred to:

(1) *Kent* v. *Atkinson*, [1923] P. 142; 92 L.J.P. 54; 129 L.T. 473; 27 Digest 305, *2826*.

(2) *W.* v. *W. & D.*, [1948] P. 157; [1948] L.J.R. 1794; 2nd Digest Supp.

APPLICATION by the co-respondent to enlarge the time for appeal against an order against him for damages in a suit for divorce.

The co-respondent in a husband's suit for dissolution of marriage entered an appearance solely on the claim for damages and costs and was represented at the trial to contest this issue. After an award of £350 damages had been made against him he allowed five and a half weeks to pass before instructing his solicitors to lodge an appeal against the amount of damages. Considering that there was insufficient time to lodge an appeal within the prescribed period of six weeks, his advisers applied by notice of motion to the Court of Appeal for leave to appeal out of time. The husband resisted the application on the merits and also contended that the Court of Appeal had no jurisdiction to extend the time for appeal. The Court of Appeal granted the application and ordered that the husband should have the costs of the application in any event.

H. S. Law for the co-respondent.
Petrie for the husband.

BUCKNILL, L.J.: This is a motion for leave to extend the time to appeal. It is made on behalf of John Piggott, who was co-respondent in a divorce suit which was heard at Gloucester on July 14, 1949. The husband asked for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent. Neither the wife nor the co-respondent disputed the adultery, but the wife entered an appearance on the question of custody and the co-respondent entered an appearance on the question of costs and damages. The husband claimed £500 damages. The co-respondent was represented by counsel at the hearing. The question of damages was fought out and the judge awarded the husband £350. The case was a district registry case in the Gloucester district.

The appropriate rule on the subject is Ord. 58, r. 15, which provides that no appeal from any order in any matter not being an action shall be brought after the expiration of six weeks unless the court or a judge at the time of making the order or at any time subsequently or the Court of Appeal shall enlarge the time. Two questions have been debated here—(i) that the court has no jurisdiction to extend the time, and (ii) whether this is a case in which it is proper for the court to extend the time.

On the first point counsel for the husband relied on the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1), which provides :

> " No appeal shall lie . . . (*e*) from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree *nisi* on which the order was founded, has not appealed from that decree."

He argued that the co-respondent had had time and opportunity to appeal from the decree *nisi* because, the decree absolute was made on Aug. 29 and he had six weeks from July 14 to that date in which to do so. What the co-respondent did was this. On the evening of Aug. 23 he consulted his solicitors with a view to instructing them to take the necessary steps to lodge an appeal, and he says that he was informed that his wishes were communicated to counsel who represented him on the hearing of the petition, that counsel took the view that there was then insufficient time to obtain the essential documents and lodge an appeal in the ordinary way, and he (counsel), therefore, settled a draft notice of motion for leave to appeal out of time. So it seems clear that there was time and opportunity to appeal from the decree *nisi* before the decree absolute was made, and, if s. 31 (1) (*e*) applies, it would appear absolutely to bar the co-respondent's right to appeal now, with the result that we could not give him leave to appeal.

In my view, s. 31 (1) (*e*) does not apply to a case of this kind. That seems to be clear from the two cases to which we have been referred. One was *Kent* v. *Atkinson* (1) where Hill, J., decided that the petition for damages in a case of adultery was independent of, and not ancillary to, the petition for divorce, the death of the wife pending suit did not destroy the cause of action at common law which arose when the wrong was done, and there was no reason why her death before action should have any different effect, and, therefore, the death of the wife did not prevent the husband filing a petition for damages unless there were overriding provisions to be found in the Act. That shows clearly that the claim for damages is independent of the petition for dissolution. The fact that we are giving leave to appeal does not in any way affect the decree absolute which has been made.

The other case is *W.* v. *W. & D.* (2), where Willmer, J., held that, as an appeal against damages was not an appeal against the decree for dissolution of marriage but only against the *quantum* of damages awarded, the petitioner was at liberty to have the decree made absolute although the appeal had not been heard. One can quite understand how essential it is to bar appeals after decrees absolute have been made except in the circumstances laid down in s. 31, but sub-s. (1) (*e*), in my view, does not apply to a case where there is only an application to appeal against an award of damages.

The second point is whether in the circumstances of this case we ought to give leave to appeal. I appreciate what counsel for the husband has said—that it is hard on the husband that he should have his award held up pending the hearing of the appeal. He will not, however, be seriously prejudiced because the money has been paid into court, and I understand that his costs have also been paid. It is a fine point, but there was only a very short overlap, which occurred during the Long Vacation, and I think if the solicitor had taken other steps—I do not say he was to blame for not taking them—he could by the evening of Aug. 25 have done what was necessary to lodge the notice of appeal within time on his client's instructions. Counsel took a different view. He thought there was not time and so he lodged a draft notice of motion for leave to appeal out of time. I think in all the circumstances it would be hard on the co-respondent to shut him out from a right to appeal.

COHEN, L.J.: I agree.

ASQUITH, L.J.: I also agree.

Application for extension of time for leave to appeal granted. Notice of appeal to be lodged in seven days. Husband to have costs of application in any event.

Solicitors: *Barlow, Lyde & Gilbert*, agents for *T. A. Matthews & Co.*, Hereford (for the co-respondent); *Williamson, Hill & Co.*, agents for *Russell, Orme & Dykes*, Ledbury (for the petitioner).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Applied. R. *v.* LUMSDEN. [1951] 1 All E.R. 1101.

R. *v.* PARKIN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 14, 1949.]

Criminal Law—Being found by night in a building with intent to commit felony—"In any building"—Prisoner with arm through window attempting to enter building—Larceny Act, 1916 (*c.* 50), *s.* 28 (4).

By the Larceny Act, 1916, s. 28: "Every person who shall be found by night . . . (4) in any building with intent to commit any felony therein; shall be guilty of a misdemeanour . . ."

The appellant was seen by night half-way up some piping at the side of a building with one of his hands through a window for the purpose of pulling himself into the building.

HELD: the words "being found in any building" must be construed in their ordinary sense; the appellant was found, not *in* the building but merely trying to get into it; and, therefore, he was not guilty of an offence under s. 28 (4).

[FOR THE LARCENY ACT, 1916, s. 28 (4), see HALSBURY'S STATUTES, Vol. 4, p. 828.]

APPEAL against conviction at West Kent Quarter Sessions of being found in a building with intent to commit a felony, namely, larceny. The appellant was found attempting to enter the building. The appeal was allowed and the conviction quashed.

W. I. Percival for the appellant.
Maxwell Turner for the Crown.

LYNSKEY, J., delivered the following judgment of the court. The appellant was convicted at West Kent Quarter Sessions of being found by night in a building with intent to steal, contrary to the Larceny Act, 1916, s. 28 (4), and was sentenced to four months' imprisonment. He now appeals against his conviction on the ground that on the facts, which were not in dispute, he was not found *in* any building with intent to commit a felony.

The circumstances are that shortly after midnight on July 16, 1949, a police officer passing near a cinematograph theatre saw the appellant half-way up some piping at the side of the building with his foot on the junction of two pipes and his head and shoulders close to a window. In the police officer's view, though he could not see clearly, the appellant had one of his hands through the window for the purpose of gripping the sill and pulling himself into the building.

At the trial a submission was made on the appellant's behalf that on those facts he was not *in* the building for the purposes of s. 28 (4). The prosecution, on the other hand, said that, if he had been charged under s. 27 (2) with breaking and entering, the fact that he had one arm through the window would be a sufficient entry for the purposes of constituting that offence. We have to construe this statute according to its clear words. The words of s. 28 are :

> " Every person who shall be found by night . . . (4) in any building with intent to commit any felony therein ; shall be guilty of a misdemeanour . . ."

The question is: What do these words " being found in any building " mean ? One has to apply the ordinary meaning to the words unless the context requires them to be given some unusual meaning. The ordinary meaning of the words in the section is that the person must be found *in* a building. The circumstances of this case show that the appellant was not found *in* the building but that he was found *outside* the building trying to get into it. Therefore, of whatever other offence he may have been guilty, he was not guilty of the offence with which he was charged, namely, being found in a building with intent to commit a felony. The appeal will be allowed and the conviction quashed.

Appeal allowed.

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Director of Public Prosecutions* (for the Crown).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

MOHANLAL HARGOVIND OF JUBBULPORE *v.* COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES AND BERAR, NAGPUR.

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Greene, Lord Morton of Henryton and Sir John Beaumont), June 22, 23, July 28, 1949.]

Income Tax—Allowance—" Expenditure . . . laid out or expended wholly or exclusively for the purpose of . . . business "—Raw material for manufacturing cigarettes—Contract to collect and remove leaves from forests—Indian Income Tax Act, 1922, *s.* 10 (2), *para.* xii (*as amended by Indian Income Tax* (*Amendment*) *Act,* 1939).

By the Indian Income Tax Act, 1922, s. 10 (2), para. xii (as amended by the Indian Income Tax (Amendment) Act, 1939), in computing the profits or gains of a business for the purpose of income tax an allowance is to be made for " any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly or exclusively for the purpose of such business."

The appellants, a firm of cigarette manufacturers, entered into short term contracts with the owners of forests in India with the object wholly and exclusively of supplying themselves with raw material for the purpose of their business by enabling them to pick and remove the leaves of tendu trees which they used instead of paper in making cigarettes.

HELD : on their true construction the contracts granted to the appellants no interest in land or in the trees or plants themselves, but merely a right to pick and carry away the leaves and appropriate them as their own property ; A the expression " expenditure . . . laid out or expended wholly or exclusively for the purpose of such business " must be construed in a business sense; and in a business sense the expenditure in question was on revenue, and not on capital, account, and so fell to be allowed under para. xii.

Alianza Co., Ltd. v. *Bell* ([1906] A.C. 18) and *Kauri Timber Co., Ltd.* v. *Taxes Comr.* ([1913] A.C. 771), *distinguished.*

B [AS TO PAYMENTS IN THE NATURE OF CAPITAL EXPENDITURE FOR INCOME TAX PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 158-161, paras. 325-327 ; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. *237-252.*]

Cases referred to :

(1) *Alianza Co., Ltd.* v. *Bell,* [1906] A.C. 18 ; 75 L.J.K.B. 44 ; 93 L.T. 705 ; C 5 Tax Cas. 172 ; *affmg.*, [1905] 1 K.B. 184 ; 74 L.J.K.B. 219 ; 5 Tax Cas. 60 ; *sub nom. Alianza Co., Ltd.* v. *Inland Revenue Comrs.*, 92 L.T. 184 ; *affmg.*, [1904] 2 K.B. 666 ; 73 L.J.K.B. 755 ; 91 L.T. 463 ; 28 Digest 47, *238.*

(2) *Kauri Timber Co., Ltd.* v. *Taxes Comr.*, [1913] A.C. 771 ; 83 L.J.P.C. 6 ; 109 L.T. 22 ; 28 Digest 47, *237c.*

D (3) *Coltness Iron Co.* v. *Black*, (1881), 6 App. Cas. 315 ; 51 L.J.Q.B. 626 ; 45 L.T. 145 ; 46 J.P. 20 ; 1 Tax Cas. 287 ; 28 Digest 6, *13.*

APPEAL from the High Court of Nagpur confirming an assessment to income tax.

The taxpayers appealed against a judgment confirming an assessment to income tax for the years 1940-1 and 1941-2. They claimed that money expended E under contracts with the Government of India and other proprietors of forests by which they were granted the right to remove and collect the leaves of tendu trees was a current expense for the purposes of their business and as such deductible for income tax. The decision of the income tax officer disallowing that claim was upheld by two income tax appeal tribunals and by the High Court at Nagpur. The Board now allowed the taxpayers' appeal.

F *Sir Roland Burrows, K.C.*, and *Handoo* for the taxpayers.

Millard Tucker, K.C., and *Subbarow* for the respondent commissioner of income tax.

The Board took time for consideration.

July 28. **LORD GREENE :** This appeal raises a short question as to G the application of s. 10 (2), para. xii, of the Indian Income Tax Act, 1922, as amended by the Indian Income Tax (Amendment) Act, 1939, in respect of assessments on the appellants for the years 1940-1 and 1941-2. That paragraph provides that in computing profits or gains of a business for the purpose of income tax an allowance is to be made for " any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or H expended wholly or exclusively for the purpose of such business." Certain expenditure claimed by the assessee to be a permissible deduction under this paragraph and admitted to have been made " wholly and exclusively for the purpose " of the business of the appellants was disallowed by the income tax officer. His order was confirmed successively by the Appellate Assistant Commissioner of Income Tax, Nagpur, and by the Income Tax Appellate Tribunal, Bombay. Application was made to that tribunal for a reference to the High Court of Judicature, Nagpur, of the question whether the appellants were entitled to the deduction in question and the High Court (Sir Frederick Grille, C.J. and Sen, J.) answered that question in the negative for the reasons given by them in their judgment in another case.

The relevant facts are as follows. The appellants carry on business at several places in the Central Provinces of India as manufacturers and vendors of country made cigarettes which are known as *bidis*. These cigarettes are composed of tobacco contained or rolled in leaves of a tree known as tendu leaves which fulfil a corresponding function in the finished cigarette to that played by a cigarette paper. The appellants obtain the tendu leaves which they require by entering into a number of contracts with the government and other owners of forests. Two of these contracts which were taken as typical of the rest are included in the record, one relating to a government forest and one to a forest belonging to the Rewa State. It is important to examine the terms of these documents. The former is dated Sept. 5, 1939, and is made between the divisional forest officer on behalf of the Secretary of State in Council and the appellants' representative described as the "forest contractor." Clause 1 identifies the subject-matter of the contract, which is described as "the forest produce sold and purchased under the agreement," as that specified in sched. 1 in the "contract area" therein indicated. By cl. 2 the quantity of the forest produce is defined as all the said produce "which may now exist or may come into existence in the contract area which the forest contractor may remove from the said area . . . during the period from Sept. 5, 1939, to June 30, 1941." Schedule 1A provides that "the contractor shall commence his work before the day of 193 , and shall, to the satisfaction of the office empowered to execute the contract on behalf of government, make continuous and adequate progress throughout the term of the contract." In this provision the dates by an obvious oversight are left in blank, but the date of commencement could not be later than Dec. 31, 1939. In the second of the two agreements, which with certain minor differences is substantially in the same form, the period of the operations is Oct. 1, 1938, to June 30, 1941, and the work is to be commenced on Oct. 1, 1938. This agreement recites an application for the grant of "the contract of collecting and removing" tendu leaves. The grant is a grant of the right to collect and remove them from the area described. In the case of each contract a sum payable by instalments is fixed as the consideration for the grant. In the former contract the contractor is allowed to coppice small tendu plants a few months in advance to obtain good leaves and to pollard tendu trees a few months in advance to obtain better and bigger leaves.

It appears to their Lordships that there has been some misapprehension as to the true nature of these agreements and they wish to state at once what in their opinion is and what is not the effect of them. They are merely examples of many similar contracts entered into by the appellants wholly and exclusively for the purpose of their business, that purpose being to supply themselves with one of the raw materials of that business. The contracts grant no interest in land and no interest in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which, of course, implies the right to appropriate them as their own property. The small right of cultivation given in the first of the two contracts is merely ancillary and is of no more significance than would be, *e.g.*, a right to spray a fruit tree given to the person who has bought the crop of apples. The contracts are short term contracts. The picking of the leaves under them has to start at once or practically at once and to proceed continuously. It is true that the rights under the contracts are exclusive, but in such a case as this that is a matter which appears to their Lordships to be of no significance.

The question, therefore, resolves itself into the short one :—Is expenditure of this character made in acquiring one of the raw materials of the appellant's manufacture capital expenditure within the meaning of this Act ? There is no definition of that expression which must, in their Lordships' opinion, be construed in a business sense save in so far as there may be rules of construction applicable to it. Their Lordships feel no doubt that in a business sense this expenditure is expenditure on revenue account and not on capital account just as much as if the tendu leaves had been bought in a shop. Under the contracts it is the tendu leaves and nothing but the tendu leaves that are acquired. It is not the right to A pick the leaves or to go on to the land for the purpose—those rights are merely ancillary to the real purpose of the contracts, and, if not expressed, would be implied by law in the sale of a growing crop.

In their Lordships' opinion, the High Court has adopted an approach to the question which has diverted its view from the real point and has attached too much importance to cases decided on quite different facts. Cases relating to the B purchase or leasing of mines, quarries, deposits of brick earth, land with standing timber, &c. referred to in the judgment and relied on in the argument before the Board do not appear to their Lordships to be of assistance, nor do their Lordships consider that the elaborate distinction between movable and immovable property drawn in the judgment affords in such a case as the present a reliable test.

The cases principally relied on in the judgment are *Alianza Co., Ltd.* v. *Bell* (1) C and *Kauri Timber Co., Ltd.* v. *Commissioner of Taxes* (2). The former was the case of a company whose object was treated as one to work and develop a bed containing a substance called caliche from which nitrates and iodine could be obtained by a process or manufacture. It was analogous to the purchase or leasing of a mine and was obviously capital expenditure. The claim was one equivalent to a claim to deduct the expenditure made in D acquiring the land for it was a claim to deduct the amount carried year by year to a sinking fund set up to meet the exhaustion of the caliche. This case appears to their Lordships to bear no resemblance to the facts of the present case which resembles much more closely *Coltness Iron Co.* v. *Black* (3) described and distinguished by CHANNELL, J., in his judgment in *Alianza Co., Ltd.* v. *Bell* (1) of the cost of material worked up in a manufactory. CHANNELL, J., said ([1904] E 2 K.B. 673):

> " . . . it is a current expenditure, and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several F years."

In the *Kauri Timber* case (2) the company's business consisted in cutting and disposing of timber. It acquired in some cases timber bearing lands; in other cases it purchased the standing timber. The leases were for 99 years. So far as the cases where the land was acquired were concerned, there could have been no doubt that the expenditure made in acquiring it was capital G expenditure. In the case of the purchase of the standing timber what was acquired was an interest in land. The purchasers bought the trees which they could allow to remain standing as long as they liked. As LORD SHAW OF DUNFERMLINE said in delivering the judgment of the Board ([1913] A.C. 776):

> " So long as the timber, at the option of the company, remained upon H the soil, it derived its sustenance and nutriment from it. The additional growths became *ipso jure* the property of the company."

In the present case the trees were not acquired, nor were the leaves acquired until the appellants had reduced them into their own possession and ownership by picking them. The two cases can, in their Lordships' opinion, in no sense be regarded as comparable. If the tendu leaves had been stored in a merchant's go-down and the appellants had bought the right to go and fetch them and so reduce them into their possession and ownership it could scarcely have been suggested that the purchase price was capital expenditure. Their Lordships see no ground in principle or reason for differentiating the present case from that supposed. Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the respondent should be ordered to pay the costs of the appellants of and relating to the reference to the High Court. The respondent will pay the costs of this appeal.

Appeal allowed with costs of the appeal and of the reference to the High Court.

Solicitors: *Hy. S. L. Polak & Co.* (for the appellants); *Solicitor, High Commissioner for India* (for the respondent).

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

PETERS *v.* PETERS.

[Probate, Divorce and Admiralty Division (Pilcher, J.), July 22, 1949.]

Divorce—Practice—Costs—Poor person—Security for costs—Payment by wife respondent of deposit to Poor Persons Committee—Subsequent application for security for costs—Amount of order against husband—Deduction of deposit from amount of security—R.S.C., Ord. 16, *r.* 28 (5), *r.* 28a.

A wife respondent in a divorce suit appearing as a poor person asked for an order that her husband should pay £10 10*s.* 0*d.* into court by way of security for her costs in respect of items recoverable on taxation. The registrar deducted from this sum £3 3*s.* 0*d.* due in respect of charges by the Law Society and made an order for £7 7*s.* 0*d.* The wife had already paid by way of deposit to the Poor Persons Committee the sum of £5 to cover the out-of-pocket expenses of the conducting solicitor in accordance with R.S.C., Ord. 16, r. 28 (5) and r. 28a. Both husband and wife appealed against the registrar's order.

Held: where a wife has handed to the Poor Persons Committee a sum to be devoted to paying the conducting solicitor's out-of-pocket expenses the proper way to deal with the matter, if subsequently she applies for an order for security for her costs in respect of items recoverable on taxation, is to deduct any sum so paid by her from whatever the proper sum may be in respect of which she would otherwise have been entitled to ask for security, and, accordingly, the appropriate method of procedure in the present case was to subtract the £5 deposit from the £10 10*s.* 0*d.* asked for by way of security and to order the husband to pay the balance, *viz.*, £5 10*s.* 0*d.*, into court or to give bond for that amount.

[As to a Wife's Costs in General in Divorce Suits see HALSBURY, Hailsham Edn., Vol. 10, pp. 724-727, paras. 1107-1115; and for Cases see DIGEST, Vol. 27, pp. 421-423, Nos. *4277-4292.*]

Case referred to:

(1) *Smith* v. *Smith and Rutherford,* [1920] P. 206; 89 L.J.P. 175; 123 L.T. 174; 27 Digest 423, *4291.*

Appeal from an order of the registrar ordering a petitioner husband to give security for his wife's costs in a defended suit for divorce.

The wife respondent applied for a certificate to defend a petition for divorce and paid to the Poor Persons Committee the sum of £5 as a deposit to cover the out-of-pocket expenses of the conducting solicitor. Subsequently, she asked for an order against her husband for £10 10*s.* 0*d.* as security for her costs, made up as follows: £3 3*s.* 0*d.* payable to the Law Society in respect of their administrative charges, £3 3*s.* 0*d.* for counsel's fees, and £4 4*s.* 0*d.* for anticipated out-of-pocket expenses for the respondent's witnesses. The registrar deducted the sum of £3 3*s.* 0*d.* in respect of the Law Society's charges and made an order for

£7 7*s.* 0*d.* Both parties appealed to the judge in chambers, and as a matter of principle was involved it was ordered that the hearing should be adjourned into open court for argument. PILCHER, J., now allowed the appeal of both parties and ordered the husband to give security for the sum of £5 10*s.* 0*d.*, being the balance left after deducting from the £10 10*s.* 0*d.* the sum of £5 the wife had paid as deposit to the Poor Persons Committee.

A *Merrylees* for the wife (respondent).

Bayne-Powell for the husband (petitioner).

PILCHER, J. : This is an appeal by the wife respondent from an order made by Mr. Registrar Townley Millers on June 22, 1949, ordering the husband to pay into court the sum of £7 7*s.* 0*d.* security for the wife's costs. The wife (who was represented before the registrar by one of the solicitors who act for B the Law Society) asked for £10 10*s.* 0*d.* to be the amount of the security. Counsel for the wife said that that sum was made up as follows :—£3 3*s.* 0*d.* being the sum which the Law Society are entitled to charge in respect of their administrative services in matrimonial causes which they manage ; £3 3*s.* 0*d.* in respect of counsel's fees, the case being a defended case ; and £4 4*s.* 0*d.* being the anticipated out-of-pocket expenses to be incurred in respect of witnesses whom C the wife desired to call. In the result, the registrar ordered security for £7 7*s.* 0*d.* It is clear from a note which he made that he took the view that the £3 3*s.* 0*d.* which the Law Society charges in respect of their services in a case of this kind should not be taken into account in estimating the sums for which the husband should give security.

The ordinary procedure is for every applicant for a poor person's certificate D to be asked to deposit the sum of £5 before the Poor Persons Committee investigate the merits of his case. That is done because often substantial time and trouble are taken in investigating a case which turns out to be unsuitable for prosecution and great difficulty is experienced after the investigation in getting the deposit from the would-be petitioner. The Poor Persons Committee hand this £5 to the cashier of the Law Society, not to the Poor Persons Department E of the Law Society, and not until the case is actually concluded does the cashier of the Law Society hand out any sum to the Poor Persons Department.

Under R.S.C., Ord. 16, r. 28 (5), the Poor Persons Committee

> " . . . may require a poor person in a matrimonial cause or in any other proceedings where in the opinion of the committee the special circumstances so require to deposit with them or as they shall direct a sum of money in F order to cover the out-of-pocket expenses of the conducting solicitor, and if such deposit shall in relation to the proceedings be found insufficient such further sum as the committee may direct. Every sum so deposited shall be utilised by the committee only for the payment to the solicitor of any out-of-pocket expenses (not including office expenses) properly incurred in relation to the proceedings and any surplus shall be repaid to the poor person."

G Rule 28A is a new rule and sub-r. (2) of that rule is in the following terms :

> " Where a solicitor employed by the Law Society as aforesaid is nominated by a committee as conducting solicitor for the purpose of the proceedings, the committee shall pay to the Law Society in respect of the proceedings the sum of £3 3*s.* 0*d.*, or such lesser sum as the Law Society may from time H to time prescribe, towards the cost of the employment of the conducting solicitor and of the department of the Law Society under his supervision."

It is under those two rules that the Poor Persons Committee have acted in the present case. The wife objected to the order and she appealed from it, contending that the registrar ought to have ordered by way of security the whole sum of £10 10*s.* 0*d.* which she claims to be the amount of her probable costs. Counsel also appeared on behalf of the husband against the order and said that £7 7*s.* 0*d.* was too much and that the proper way to deal with the matter was to take the wife's estimated costs at £10 10*s*. 0*d*. and to deduct from that the sum of £5 which she had paid by way of deposit to the Poor Persons Committee, which sum the committee in their turn had deposited with the cashier of the Law Society towards the out-of-pocket expenses generally in connection with the case. Counsel for the wife regarded the matter more as one of principle than as a dispute on the particular figures and was inclined to think that possibly the registrar might have arrived at the right figure for his £7 7*s*. 0*d*. for the reason which I will give presently.

I am satisfied that where the wife has actually handed to the Poor Persons Committee a sum to be devoted to paying the solicitor's out-of-pocket expenses, the proper way to deal with the matter when she subsequently makes an application for security for costs is to deduct any sum so paid by her from whatever the proper sum may be in respect of which she would otherwise have been entitled to ask for security. One does not need to cite authority for the proposition that a wife is nowadays granted security for her costs or part of them for the protection of the solicitor conducting her case. I need only refer to *Smith* v. *Smith and Rutherford* (1). In the present case the Law Society had in their hands a sum of £5 and the wife then estimated her costs at £10 10*s*. 0*d*. The appropriate method of procedure, therefore, would be to subtract the £5 from the £10 10*s*. 0*d*. and to order the husband to pay by way of security, or to give bond, for the balance, namely, £5 10*s*. 0*d*.

Counsel for the wife further said with justification that in some cases the Services Department of the Law Society asks the Poor Persons Committee to obtain from the petitioner a further deposit which, I suppose, in the ordinary way would be to deal with disbursements recoverable on taxation, but in some cases would be to deal with disbursements not so recoverable. As an instance of that type of disbursement there was given the charge of £1 usually made by the process server which the party would have to pay, whereas it is customary to allow only 10*s*. in respect of the services of the process server on taxation, so that the extra 10*s*. would be irrecoverable on taxation. That is an example of the type of disbursement not recoverable under the present practice which the Poor Persons Committee would ask the petitioner to cover. In a case where it appeared that one of the matters in respect of which the wife was asking for security was such an irrecoverable item it would be proper for the registrar to take into account the fact that that particular disbursement was irrecoverable, but, in the present case, where I have been told that the whole basis on which the registrar proceeded was that all sums were properly recoverable on taxation, that complication is not one with which I need concern myself. Proceeding on the general principle which I have already indicated, I think that both these appeals must be allowed and that the amount of security which the wife is entitled to have is not £10 10*s*. 0*d*. nor £7 7*s*. 0*d*., but £10 10*s*. 0*d*. minus £5—£5 10*s*. 0*d*.

A latitude must always be allowed to the registrar and I should have hesitated to interfere with this order if it was not clear from the note which he made at the time on what basis he proceeded. It is here clear that the registrar deducted from the £10 10*s*. 0*d*. which the wife claimed the sum of £3 3*s*. 0*d*. which he, not unnaturally, thought that the Poor Persons Committee had handed over to the Services Department of the Law Society. What had, in fact, occurred was that the wife had deposited £5 towards the costs of her case with the Poor Persons Committee who in their turn had handed this sum over to the cashier of the Law Society. Accordingly, I think both of these appeals will be allowed and security will be ordered in the sum of £5 10*s*. 0*d*. *Appeal of both parties allowed.*

Solicitors: *F. N. W. Lockyer*, Law Society's Services Divorce Department (for the wife); *R. L. Seton Pollock*, Law Society's Services Divorce Department (for the husband).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

Re SPICER (*deceased*). SPICER *v.* RICHARDSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), July 21, 22, 1949.]

Will—Soldier's will—Oral declaration—Testamentary intention—Reference to previous disposition—Evidence—Wills Act, 1837 (*c.* 26), *s.* 11.

Before proceeding overseas in 1944 and while in actual military service the deceased said, in the presence of the defendant and an independent witness : "If anything happens to me, everything is to be for 'Richie'" (a name by which he called the defendant). As he was making this statement, he pulled his paybook from his pocket and tapped it. The defendant and the other witness concluded from this gesture that he was referring to something which he had already written in the paybook, but all efforts to trace the paybook failed.

HELD : the words used by the deceased indicated what he wished to be done with his property after his death, and it was immaterial whether he knew his statement would have any testamentary effect ; it was equally immaterial whether those who heard the statement thought, or whether he thought, that he could only give effect to his words by referring to a will or a written declaration of his wishes in his paybook ; and, accordingly, his statement must be pronounced for as a soldier's will.

Re Stable, Dalrymple v. *Campbell* ([1919] P. 7), *followed*.

[AS TO PRIVILEGED AND NUNCUPATIVE WILLS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 198-201, paras. 325-328 ; and FOR CASES, see DIGEST, Vol. 39, pp. 332-337, Nos. *180-235*.

FOR THE WILLS ACT, 1837, S. 11, AND THE WILLS (SOLDIERS AND SAILORS) ACT, 1918, s. 1, s. 3, see HALSBURY'S STATUTES, Vol. 20, pp. 442, 455.]

Cases referred to :

(1) *In the Estate of Beech, Beech* v. *Public Trustee,* [1923] P. 46 ; 92 L.J.P. 33 ; 128 L.T. 616 ; 44 Digest 305, *1359*.

(2) *Re Stable, Dalrymple* v. *Campbell,* [1919] P. 7 ; 88 L.J.P. 32 ; 120 L.T. 160 ; 39 Digest 336, *228*.

ACTION by the mother of a soldier who died on military service overseas for probate of his estate on the ground that he died intestate. The defendant put forward a soldier's will made by oral declaration in August, 1944, before the deceased proceeded overseas. HODSON, J., found that the actual words used by the deceased were : "If anything happens to me everything is to be for 'Richie'" (the defendant) and pronounced for the will in that form.

Alan Orr for the plaintiff.

John Latey for the defendant.

HODSON, J. : The plaintiff is the mother of Mr. Frank Spicer deceased and she is claiming that he died intestate. The defendant, Dorothy May Richardson, contends that the deceased made his last will in or about the month of August, 1944, and by that she alone benefits. The will set up by the defendant is what is called a soldier's will. It is not alleged that the deceased ever made a will such as is required by the law relating to people other than those in actual military service.

The deceased died on Sept. 28, 1947. He was in partnership with the defendant, and for the last 26 years of his life he had lived with her in the same house, not only carrying on the same business but living with her on the terms of husband and wife. They were never married because Mrs. Richardson had a husband who had left her at the time of the 1914/1918 war and she did not know whether or not he was dead. The partnership business was a furniture removal business and accounts have been produced which show that the partners shared the profits equally. It also appears that they bought property jointly and, from the evidence of various witnesses, that not only were they living together but that they were on very affectionate terms. So far as there is any evidence of any discord between them, it is not in the least inconsistent with that general picture.

In 1930 the deceased filled up a printed form by which he purported to leave all his property to the defendant. He dated and signed the document, but his signature was never witnessed, so that the document is of no importance in this case except as an indication of what he wanted to do with his property in 1930. In 1937 his father died, and his mother, the plaintiff, became to some extent dependant for her support on him. From that time onwards he or Mrs. Richardson made payments to her of 10*s.* a week and Mrs. Richardson has continued those payments right up to the present time. In February, 1944, the deceased joined the army. He was over forty years of age and had served in the earlier war. I mention that fact as he would then have known something about a paybook and the pages of the paybook which then, as now, had to do with the making of a will. He was posted abroad to Europe on Aug. 25, 1944. His last leave at home was two days on Aug. 15 and 16, 1944. On the second of those two days, it is said, he made his will orally by a statement to the defendant and to another person, a Mrs. Miller, who has given evidence.

In the pleadings as originally drawn it was stated that at 11, Bath Road, Cheltenham, where the defendant and the mother of the deceased were living, he made a will by declaring that if anything happened to him everything was to be the defendant's. The evidence in support of that was the evidence of the defendant who used this language :

> " Before he left he was very upset and when he left he put his hand to his breast pocket, pulled out a little book, and said : ' If anything happens to me, everything belongs to you. Do as you like with it.' The book was a small one. I did not take all that notice. We were both very upset. Red or brown, I could not say."

Mrs. Miller was a friend who was in the house at the time sitting down by the defendant when this conversation took place. Her version of the language used was this : " He said if anything happened to him, everything was for ' Richie here,' " " Richie " being one of the names by which he called the defendant.

In cross-examination Mrs. Miller admitted that the impression that she gained from what was being said was that he was referring to something that he had already done. The language used, coupled with the gesture, which was spoken to both by the defendant and by Mrs. Miller, the tapping of his pocket and the producing of the book, indicated to them that he was talking about something which he had written, presumably in his paybook, and part of the argument for the plaintiff depends on that point. It is said that if in making these observations, if he ever made them—which is not admitted—he was merely referring to something which he had already done, he was not making a will, but was merely indicating what was the effect of a will which was already in existence. The case relied on to support that proposition is *In the Estate of Beech, Beech* v. *Public Trustee* (1), a decision of the Court of Appeal which had to do with two letters written by a soldier in actual military service clearly referring to elaborate testamentary dispositions he had already made. The letters paraphrased the effect of the will inaccurately, so that it was to the advantage of those contending for the admission of the letters as a soldier's will to get them admitted to probate. The court held that what the soldier was doing was merely referring, albeit inaccurately, to what he had already done by his will, and that is clear from the terms of the first letter and not so clear, but also to be inferred, from the terms of the second. In the first letter it was stated : " I daresay you would like to know that I have left you after me both Brandon and the Shawe estates, also the London house." That is clearly indicating what he had done, or thought he had done, by his will, and it was held by the court that that was not a will by a soldier but an indication of an existing testamentary disposition. If I accept the evidence of Mrs. Miller and the defendant, the disposition which the deceased made on the last day of his leave, in my judgment, goes beyond a reference to an existing disposition, and, standing by itself, is an indication of what was to be done with his estate after his death so as to come within the decision in *Re Stable, Dalrymple* v. *Campbell* (2) where HORRIDGE, J., said ([1919] P. 9) :

> " . . . it is not necessary, in order to establish the validity of a soldier's will, to prove that he knew he was making a will . . . The statement made A by the deceased man must, I think, be meant for a will, only in the sense that he intended deliberately to give expression to his wishes as to what should be done with his property in the event of his death."

I think language of this kind clearly stating what Mr. Spicer wanted to be done with his property after his death comes within that definition and it is immaterial whether, as HORRIDGE, J., pointed out, he knew it could have any testamentary B effect, and it is equally immaterial whether other people thought, or whether he thought, that he could only do that by referring to a document which was then in existence.

The case as originally presented before the writ was issued was put differently in a letter of Oct. 7, 1947, shortly after the death. The solicitors wrote to the officer in charge of records stating that " Mrs. Richardson of 11, Bath Road, C Cheltenham, has instructed us that the deceased made a will in his paybook " and that that " impression is probably correct." I need not deal, in view of the conclusion at which I have arrived, in great detail with the position of the paybook. Great efforts were made to find it, but it never was found, and the case which was adumbrated in the letter of Oct. 7 was not pleaded. In any event it would have been very difficult for the court to have arrived at a con- D clusion as to what was written in the paybook, if it had been necessary for the defendant to rely on that as being the last will. I need not say anything further about the question because, in my judgment, the statement made by the deceased when he was on the eve of embarkation for overseas to the defendant and to Mrs. Miller constituted a soldier's will made by him when he was in actual military service and having the effect of disposing of his whole estate in favour of E the defendant.

The plaintiff, who gave evidence about statements made by the deceased, and other witnesses who were called on her behalf, did not seem to me to carry the case any further than that the deceased was saying that his mother would be all right as he was making a contribution for her keep and he trusted Mrs. Richardson who, according to one piece of evidence, he had told to do what she F liked, and who, according to another piece of evidence, knew what to do. The fact that Mrs. Richardson has continued to make the payment of 10*s*. a week since the death seems to justify the trust which he reposed in her. I do not think that the mere statement that the deceased said that the plaintiff would be all right means more than that he intended she should have an allowance. It can hardly refer to an intestacy in favour of the plaintiff because those G words do not seem to be apt to describe the situation at all. They might be apt to describe a will made in favour of the mother, but they are hardly likely in the circumstances of this case to refer to more than the provision he was making for his mother.

In my judgment, the defendant succeeds in establishing an oral will as originally pleaded. The actual words of the will I think are most accurately H to be taken from the evidence of Mrs. Miller as follows : " Will made on Aug. 16, 1944, in these words : ' If anything happens to me, everything is to be for " Richie ".' " I pronounce for the will in that form.

Pronouncement of will in terms of the judgment. Costs out of the estate.

Solicitors : *Iliffe, Sweet & Co.*, agents for *Haddock, Pruen & Lintott*, Cheltenham (for the plaintiff) ; *Lovell, White & King*, agents for *Watterson, Moore & Co.*, Cheltenham (for the defendant).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

R. *v.* THOMAS.

[Court of Criminal Appeal (Humphreys, Hilbery and Croom-Johnson, JJ.), August 29, 30, 1949.]

Criminal Law—Murder—Autrefois convict—Previous conviction for felonious wounding with intent to murder—Subsequent death of person assaulted.

On May 2, 1949, the appellant was convicted of having, on Mar. 20, 1949, feloniously wounded his wife with intent to murder her. On June 2, 1949, she died as a result of her wounds and the appellant was indicted for murder. In answer to the indictment he pleaded *autrefois convict*, but the judge held that the plea had not been made out and the appellant was convicted of murder. On appeal,

Held : (i) although, to prove the murder, it was essential to prove the assault adjudicated on at the time of the conviction of felonious wounding, that conviction could not be pleaded in bar to the indictment for murder because the offence of murder only arose when the appellant's wife died.

Dictum of Hawkins, J., in *R.* v. *Miles* (1890) (24 Q.B.D. 433) ; *R.* v. *Morris* (1867) (L.R. 1 C.C.R. 90) ; and *R.* v. *Tonks* ([1916] 1 K.B. 443), *applied.*

(ii) on an indictment for murder the jury cannot find a verdict of guilty of wounding with intent to murder, and, therefore, the appellant had not been twice in peril of conviction of the same offence.

[As to the Pleas of autrefois convict or acquit as a Bar to Trial, see HALSBURY, Hailsham Edn., Vol. 9, pp. 152-154, para. 212 ; and for Cases, see DIGEST, Vol. 14, pp. 340-342, Nos. *3575-3597.*]

Cases referred to :

(1) *R.* v. *Miles,* (1890), 24 Q.B.D. 423 ; 59 L.J.M.C. 56 ; 62 L.T. 572 ; 54 J.P. 549 ; 14 Digest 341, *2594.*

(2) *R.* v. *Morris,* (1867), L.R. 1 C.C.R. 90 ; 36 L.J.M.C. 84 ; 16 L.T. 636 ; 31 J.P. 516 ; 10 Cox C.C. 480 ; 14 Digest 340, *3578.*

(3) *R.* v. *Friel,* (1890), 17 Cox, C.C. 325 ; 14 Digest 340, *3579.*

(4) *R.* v. *Salvi,* (1857), 10 Cox, C.C. 481, *n.* ; 14 Digest 340, *3577.*

(5) *R.* v. *White,* [1910] 2 K.B. 124 ; 79 L.J.K.B. 854 ; 102 L.T. 784 ; 74 J.P. 318 ; 14 Digest 106, *767.*

(6) *R.* v. *Tonks,* [1916] 1 K.B. 443 ; 85 L.J.K.B. 396 ; 114 L.T. 81 ; 80 J.P. 165 ; 14 Digest 337, *3555.*

Appeal against conviction.

On July 13, 1949, the appellant was tried and convicted on an indictment for murder before Devlin, J., at the Central Criminal Court. On Mar. 20, 1949, he inflicted serious wounds on his wife with a knife and for that offence he was convicted on May 2, 1949, of felonious wounding with intent to murder. At that time his wife was in hospital where she died on June 2, 1949, from her wounds. In answer to the indictment for murder the appellant handed in a plea of *autrefois convict* which, on the direction of the learned judge, was rejected by the jury. The trial on the indictment proceeded and the appellant was convicted and sentenced to death. On appeal the only point argued was whether or not the plea of *autrefois convict* was a bar in law to the indictment for murder. The court held that the plea was not maintainable and dismissed the appeal.

Paget, K.C., L. L. Rose and *T. R. Heald* for the appellant.
Hawke and *Bass* for the Crown.

HUMPHREYS, J., delivered the following judgment of the court. This is an application by Leonard Jack Thomas for leave to appeal against a conviction of murder and is treated as an appeal. The appellant was convicted at the Central Criminal Court on May 2, 1949, of having, on Mar. 20, feloniously wounded his wife, Florence Ethel Lavinia Thomas, with intent to murder her and was sentenced to seven years' penal servitude. At that time his wife was in hospital. She died on June 2 as the result of those wounds. On July 13 the appellant was indicted at the Central Criminal Court in accordance with the usual practice for the murder of his wife. I repeat A those words "in accordance with the usual practice" because it is the usual practice. Similar facts have occurred time out of mind, and the same results have followed. The appellant handed in as answer to the indictment a plea in bar, that is, a plea of *autrefois convict.* DEVLIN, J., after a long argument held that the plea was not made out, and he so directed the jury who followed his direction. The appellant was then tried on his plea to the indictment of Not B Guilty, and the jury convicted him of murder. From that conviction he has appealed to this court, the sole ground of appeal being that his plea of *autrefois convict* ought not to have been rejected. The whole question, therefore, is: Was the plea of *autrefois convict* a bar in law to the indictment for murder ?

The nature of the plea and the law relating to it sufficiently appear from the language of the plea itself which alleges that the King ought not further to C prosecute the indictment against the appellant because he has been lawfully convicted of the offence charged therein. Murder consists of the felonious killing of another with malice. It is plain that the appellant was not convicted on May 2 of that offence, nor anything which is substantially the same offence or crime as that charged in the indictment, nor could he have been since his wife was then alive. It follows that the plea of *autrefois convict* in the strict sense D of the term is bound to fail, and does fail. That would dispose of this case, but for the fact that before DEVLIN, J., and in this court counsel for the appellant has argued other grounds which, he says, do not depend on the plea of *autrefois convict,* but are of the same nature. He referred to a number of cases, mostly charges of assault, in which the courts have expressed their approval of the ancient maxim : "*Nemo debet bis puniri pro uno delicto,*" that is to say, that E no one ought to be punished twice for one offence, or, as it is sometimes written, "*pro eadem causa,*" that is, for the same offence, and have treated the earlier conviction as being a bar to the second indictment.

In *R.* v. *Miles* (1) which is, perhaps, the strongest case in favour of the argument for the appellant in regard to charges of assault, the accused was indicted on five counts. The first count charged him with unlawfully and maliciously F wounding Charles Living on Oct. 26, 1889 ; the second with inflicting grievous bodily harm on Living on the same day ; the third with assaulting Living and causing him actual bodily harm on the same day ; and the fourth with a common assault on Living on the same day. The fifth count charged a common assault on one Anstey, and on that count the accused was acquitted. The accused came up for trial before the Recorder of London on Dec. 16, 1889. To the first G four counts he pleaded Not Guilty, and also a plea in bar which alleged that, on Oct. 28, 1889, he, on the complaint of the said Charles Living, had been convicted before a court of summary jurisdiction at West Ham for that he, on Oct. 26, 1889, did unlawfully assault and beat the said Charles Living. That assault was the same as the assault which was charged in the fourth count of the indictment. After argument, the court upheld the plea, which they regarded as H an informal plea of *autrefois convict.* It is important in the present case to examine the reasons why the court so held. All the judges considered that the plea and the evidence established that there was one offence only committed by that person, one and the same assault, although in three of the counts that assault was alleged to have been accompanied by circumstances of aggravation. POLLOCK, B., in his judgment, spoke as follows (24 Q.B.D. 436) :

> "At the trial it was proved on behalf of the prisoner, and admitted by counsel for the prosecution, that the first four counts of the indictment

> referred to the same matter as the offence mentioned in the record. In substance, therefore, the plea and the evidence establish that there was but one offence, and that the acts done by the defendant in respect of which he was convicted, by whatever legal name they might be called, were the same as those to which the indictment referred . . . "

and he then quotes the Latin maxim. Charles, J., with whose judgment Lord Coleridge, C.J., and Grantham, J. concurred, referred (*ibid.*, 438) to the rule which I have previously mentioned as the

> " . . . well established rule at common law—that where a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence."

Hawkins, J., who gave the first judgment in the case, agreeing as he did with the propositions which I have read from the judgments of Pollock, B. and Charles, J. said (*ibid.*, 433) :

> " But it is not every summary conviction or acquittal for a common assault which will operate as a bar to an indictment for an offence in which that assault was an element."

That is precisely this case. No one will doubt that the assault committed on the deceased woman was an element in the charge of murder. It was one of the principal elements, but another element was the death of the woman. Hawkins, J. continued (*ibid.*) :

> " It could hardly be contended that a previous conviction for a common assault could be pleaded in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in the *felonious killing*."

In our judgment, that observation applies with equal force to the present case and is sufficient to dispose of this case so far as it depends on *autrefois convict*. It is right to say, though lawyers will not need the information, that when Hawkins, J. speaks of a common assault, his observations equally apply to every other form of assault. The point in *R.* v. *Miles* (1) was that there was one assault, and every count in the subsequent indictment charged that assault and nothing else, although there were circumstances of aggravation added to it.

Reference to the Interpretation Act, 1889, s. 33, was made by counsel for the appellant. That section provides :

> " Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law . . . the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

That Act may be said to state in the language dear to the persons who prepare and are responsible for the language of statutes what the common law says in very much shorter and simpler language. Certainly it adds nothing and detracts nothing from the common law. It was argued that we ought so to read the section that the last word " offence " should be read as meaning " act," and it was submitted that " act," " cause," and " offence " all mean the same thing. In our view, that is not correct. It is not the law that a person shall not be liable to be punished twice for the same act. No court has ever said so, and the Interpretation Act does not say so. Not only is it not the law, but it never has been the law, as appears from the decision of the Court for Crown Cases Reserved as far back as 1867 in *R.* v. *Morris* (2). In that case the court consisted of Kelly, C.B., Martin, B., Byles, J., Keating, J., and Shee, J. The case had been reserved by Pigott, B. The headnote is as follows (10 Cox C.C. 480) :

> "A previous summary conviction for an assault under 24 and 25 Vict., c. 100, s. 45, is not a bar to an indictment for manslaughter of the party assaulted, founded upon the same facts. Kelly, C.B. *dissentiente*."

Martin, B., with whose judgment Byles, J., Keating, J. and Shee, J. agreed, stated the facts (*ibid.*, 484):

> "Thomas Morris was convicted of an assault on Timothy Lymer, and committed to prison . . . He has undergone that punishment, and Timothy Lymer, the man assaulted, has since died in consequence of that assault. Now, this indictment is for the manslaughter of that man; and the question is, whether the suffering of the imprisonment for the assault is an answer to that indictment, and that depends on the meaning of the words 'for the same cause' in the statute."

"The same cause," it was stated on the authority of Martin, B. means the same thing as "the same offence." He continued (*ibid.*, 485):

> "The cause on which the justices adjudicated was not the same as that for which the prisoner has been convicted under this indictment. A new offence, in my opinion, arose when the man died. I therefore think that this conviction was right."

Byles, J. said this (*ibid.*, 485):

> "I am of opinion that the prior conviction . . . affords no defence to the subsequent indictment for manslaughter, the death of the deceased having occurred after the conviction, but being a consequence of the assault. The form and intention of the common law pleas of *autrefois convict* and *autrefois acquit* show that they apply only where there has been a former judicial decision on the same accusation in substance, and where the question in dispute has been already decided. There has, in the present case, been no judicial decision on the same accusation, and the whole question now in dispute could not have been decided, for at the time of the hearing before the magistrates whether the assault would amount to culpable homicide or not depended on the then future contingency whether it would cause death . . . The cause for the present indictment comprehends more than the cause in the former summons before the magistrates, for it comprehends the death of the party assaulted."

He adds that, therefore, it was not the same cause. At the end of the judgment he uses these words (*ibid.*, 485):

> "My brother Martin has already illustrated the mischief in civil cases by a reference to Lord Campbell's Act, and in criminal cases the mischiefs might be much greater. A murderer, for example, by suffering or obtaining a previous conviction for an assault, might escape the due punishment of his crime."

It is only right to refer shortly to the dissenting judgment of Kelly, C.B., and, with the most profound respect to the Chief Baron, it is necessary to say that his judgment, so far as I am aware, has never been quoted with approval in any case, and has never been followed. What he said was precisely what counsel for the appellant has argued, or, perhaps, it would be more accurate to say that counsel for the appellant has argued something founded on what Kelly, C.B. said in 1867, which was not the law and with which statement the other four judges disagreed. Kelly, C.B. said (*ibid.*, 482):

> "The assault, the unlawful act, with which he was charged"—that is the manslaughter—"is the same assault and one and the same act as that which caused the death of Lymer, and of which he has been convicted under the present indictment."

That was putting it the other way round. The original assault was the same assault as the one under which the appellant had been convicted under "the indictment." The answer is, of course, he was not convicted of assault under that indictment at all, he was convicted of manslaughter. KELLY, C.B. continued (*ibid.*, 482) :

> "I think, therefore, that the case comes within the precise words of s. 45 of the 24 and 25 Vict., c. 100 [Offences against the Person Act, 1861], which provides in such a case 'he shall be released from all further or other proceedings, civil or criminal, for the same cause.'" A

Counsel for the appellant relied on a passage in ARCHBOLD'S CRIMINAL PLEADING EVIDENCE AND PRACTICE, 31st ed., p. 135. The same phrase occurs, as I have been able to find out, in every edition of ARCHBOLD since 1889. The statement appears under the heading of "*Autrefois acquit*," and after referring to HAWKINS PLEAS OF THE CROWN, where it is stated B

> "It is an established rule of the common law that a man may not be put twice in peril for the same offence,"

the learned editor refers to the Interpretation Act, 1889, s. 33, and says : C

> "Perhaps this enactment would have been clearer if for the word 'offence' at the end had been substituted the words 'act or omission.' But it does no more than extend to statutory offences the common law rule as laid down in *R.* v. *Miles* (1)."

D

Exactly what that means I do not know, but I deprecate the use by any textbook writer of such an expression as "the Act should have done something which the Act does not do." It is clear that the word in the Act is "offence," and I deprecate this suggestion that the Act, to have made things clear, should have enacted something different. The answer is that it does not. At p. 136 of the same textbook, we find a different statement as to the law, and at p. 142 E we find a still further statement as to the law in regard to *autrefois convict*. They do not all agree with one another. In the opinion of the court, if the passage on p. 135 bears the interpretation which counsel for the appellant seeks to put on it, it is wrong.

R. v. *Morris* (2) was followed in *R. v. Friel* (3). That case came before WILLIAMS, J. at Liverpool Assizes. Friel had been summarily convicted under F the Summary Jurisdiction Act, 1879, of assault, and the person assaulted had subsequently died of the injuries caused by the act constituting that assault. A plea of *autrefois convict* was entered in answer to the indictment for manslaughter. It was held that the plea was not a good answer by the person so summarily convicted to the indictment for manslaughter. WILLIAMS, J., having taken time to consider an application that he should reserve the question for G judges, said this (17 Cox C.C. 326) :

> "I have looked at the authorities, and I think that it is plain on the authorities that a conviction or acquittal on an indictment for an assault cannot be pleaded in bar to a subsequent indictment for murder or manslaughter. This proposition is expressly laid down by BYLES, J., in delivering the judgment of himself and KEATING, J., in *R.* v. *Morris* (2). It is true that H KELLY, C.B., dissented, and is true that in that case the question to be decided was the construction and effect of 24 and 25 Vict., c. 100, ss. 44, 45, and was not the question of the effect of a previous conviction on an indictment, but the decision has, I believe, always been recognised as a decision on the common law question, and is so treated by HAWKINS, J., in the recent case of *R.* v. *Miles* (1), where he says it would hardly be contended that a previous conviction for a common assault could be pleaded

> in bar to an indictment for murder, though to prove the murder it might be essential to prove the assault adjudicated upon. For the offence of murder consists in the felonious killing. So also of manslaughter . . . This seems in accordance with principle. The indictment for manslaughter is not a charge in a new form based on the facts supporting the former charge, nor is it the former charge with the addition of matters of aggravation or of newly alleged consequences. It is a charge based on new facts ; and the circumstance that some of those facts have been made the basis of a former charge of a different class is immaterial. The difference is not of degree merely. The characteristic new fact here is the death. That death is a new fact, and not a mere matter of aggravation or a mere consequence, is plain from the consideration that in cases of manslaughter, where the charge is based on death resulting from culpable negligence, there is no criminal offence unless death ensues and gives rise to a charge of manslaughter. I wish to add that this view of the law that a prior conviction for assault cannot be effectively pleaded in bar to a subsequent indictment for murder or manslaughter, is confirmed by the great authority of STEPHEN, J., in his book on CRIMINAL LAW PROCEDURE, p. 173, who, though in terms he does not mention manslaughter, yet lays down the principle, and gives indictment for murder after a previous conviction for unlawful wounding as an illustration, and no reason has been suggested to me, or I believe could be suggested, why the doctrine thus illustrated should not include manslaughter as much as murder."

There are other decisions to be found in the books which are quite inconsistent D with the argument of counsel for the defendant. In *R.* v. *Morris* (2), there is a reference by way of note (L.R. 1 C.C.R. 93) to *R.* v. *Salvi* (4), who was indicted for the wilful murder of Robert Henderson Robertson. A plea of *autrefois acquit* was pleaded, to which the Crown demurred, and the plea was held bad in law. That case is not fully reported, and, perhaps, it would be more satisfactory not to rely on it, but on the facts it appears to have been precisely the present case. Salvi E had been indicted for wilful murder and it was proved that he had been acquitted on a charge of cutting and wounding with intent to murder. When he was charged with killing the person in regard to whom he had been acquitted on the charge of cutting and wounding, the court held unanimously that that was no answer and that he must be tried on the charge of murder. Those are precisely the facts of the present case.

F *R.* v. *Salvi* (4) cannot be said to assist in any way the argument of counsel for the appellant, but he developed another point. He said it is a recognised rule that a person not only may not be indicted for an offence of which he has already been convicted, or acquitted, but he must not be indicted for an offence regarding which he was in peril on the former occasion, though not convicted or acquitted, and, generally speaking, subject to certain narrow limits, that G may be accurate. It was contended that the appellant was convicted of wounding with intent to murder and that he could have been convicted by the jury on the murder indictment of that same offence. When counsel for the appellant made that statement, the members of this court—I think simultaneously—asked : " What is the authority for that ? " because none of us was aware that such a proposition had ever been put forward in a court of law. The answer H was : " I have no authority in support," and one of my brothers then asked this pointed question : " Can you tell the court of any case where it has been even suggested that a man who is tried on a charge of murder may be found Not Guilty of murder but Guilty of wounding with intent to murder ? " The answer was No, so this is an entirely new and novel proposition.

The ordinary rule is well known and unquestionable. The jury is bound to find a verdict, if they agree, of Guilty or Not Guilty on the indictment unless some statute, or, in very rare cases, the common law, permits them to find some lesser or different crime while acquitting on the actual charge in the indictment. There are numerous exceptions to the rule because many statutes have been passed, particularly within the last fifty years, which enable the jury to find a verdict, on an indictment charging crime A, of Guilty either of crime A, or of crime B, C, D or E. There are many such instances, but no one has ever suggested hitherto that there is either a statute or a common law rule by which a jury, on a charge of murder, can find the statutory felony of wounding with intent to murder, although they can certainly find manslaughter or an attempt, because the jury in every indictable criminal case have been able to find an attempt since 1851. That cuts away the basis of the argument of counsel for the appellant. Assuming, however, for the moment that a jury could find such a verdict, what would be the result ? Counsel for the appellant said that, if the jury could find wounding with intent to murder, the appellant was in peril of being convicted of wounding with intent to murder. That, it was submitted, was so decided in *R.* v. *White* (5), but that decision of the Court of Criminal Appeal has nothing whatever to do with *autrefois convict* or *autrefois acquit.* White was not convicted twice or acquitted twice ; he was only tried once. The headnote is ([1910] 2 K.B. 124) :

> " A person who upon an indictment charging him with murder is convicted . . . of an attempt to murder may be sentenced to penal servitude for life by virtue of the provisions of ss. 11 to 15 of the Offences Against the Person Act, 1861."

The prisoner was tried at the Birmingham Assizes on an indictment charging that he did murder one Mary Ann White. A wineglass was found close to the deceased woman in her house at Coventry containing lemonade with a small quantity of cyanide of potassium. The medical evidence showed that death was not due to poisoning. No trace of cyanide was found in the body. The prisoner was proved to have purchased some cyanide of potassium shortly before, and there was evidence from which, as the court held, the jury would be justified in inferring that the prisoner had put into the deceased's glass the cyanide that was found there, and that he did so with intent to murder her. The jury convicted him of an attempt to murder and he was sentenced to penal servitude for life. He appealed against conviction and sentence. The court disposed of the appeal against conviction on the facts of the case, saying, in effect, that there was ample evidence to justify the jury coming to the conclusion at which they had arrived. I do not think I need read the judgment because it has nothing to do with this case, and relates merely to the question whether a person convicted of attempting to murder on an indictment for murder can be sent to penal servitude or whether the offence of which he has been convicted is to be regarded in law as a common law misdemeanour—the attempt to commit a felony—and, therefore, giving rise only to two years' imprisonment. References were made in that case to various statutes. It is, however, only necessary to refer, I think, to one section of one statute, beyond saying that in 1851 the Criminal Procedure Act was passed which enabled juries to return a verdict in most cases of Not Guilty of the crime charged, but Guilty of the attempt. In 1861 there was a series of consolidation Acts, and one of them contained a number of new provisions and provided for what were called statutory felonies, that is to say, a number of methods by which a person might attempt to kill another were collected in different sections and were all made felonies. Some of them had been taken from old statutes and they were all put together in ss. 11, 12, 13 and 14 of the Offences against the Person Act, 1861. The question in *R.* v. *White* (5) was whether in the circumstances of that case the offence came within that list of statutory felonies, or should still be regarded as a common law misdemeanour, and the sole question was what sentence could be awarded ? Section 15 of the Offences Against the Person Act, 1861, which I think the court thought was decisive of the matter, is this :

> "Whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life."

That was held by the court to justify that any person charged with murder in regard to whom the jury find a verdict of Not Guilty of murder but Guilty of A attempted murder is thereby convicted of an offence for which he is liable to be kept in penal servitude for life. That is the whole of *R.* v. *White* (5), and I can only say that I do not understand the argument that that case is an authority for saying that on a charge of murder the jury can return a verdict of wounding with intent to murder.

It is necessary to refer to one more case so far as that case did deal to some B extent with the question what is to happen if a man is tried on a charge on which he has not been tried before, but where it is open to the jury on that charge to find him Guilty of some other charge of which, in fact, he has been already convicted. That case was *R.* v. *Tonks* (6). Counsel for the appellant frankly said, in referring to it both in the court below and in this court : "*R.* v. *Tonks* is my great difficulty," and I think a member of the court observed : "It is one C of your difficulties only, but it certainly is a difficulty." Mrs. Tonks had been convicted of the offence of wilfully neglecting her child in a manner likely to cause injury to its health, and she was sent to prison for that offence. While she was in prison, the child died—and died, we must assume, as the result of that neglect. She was then charged, in accordance with the usual practice, with manslaughter, having caused her child's death by neglect. It was the same neglect D that had been the substance of the case against her when she was convicted and sent to prison, but there was the added fact of the death. In that case there was no actual plea of *autrefois convict* handed in, but the Court of Criminal Appeal agreed that the court ought to look into the circumstances and, if a plea of *autrefois convict* would have been effective, to give effect to it although it was not on the file. LORD READING, C.J., gave the judgment of the court, the other E members of the court being LORD COLERIDGE and AVORY, JJ. It appeared that under the Children Act, 1908, s. 12, under which the accused had been originally convicted, there was a special provision that, if a person were charged with the manslaughter of a child as the result of neglect and the jury did not think that the child died as the result of the neglect but were satisfied that there was criminal neglect of the child, they might convict of that offence instead of F manslaughter. LORD READING made it clear that that only meant that, if the jury were not satisfied that the accused woman was guilty of manslaughter then they should decide whether she was guilty of something less, that is, neglecting her child. In his judgment LORD READING, C.J., said ([1916] 1 K.B. 449) :

> "On behalf of the appellant it was also urged that on the second trial she G was charged with the offence with which she had already been convicted, because the greater charge includes the less. But that contention ignores the most important fact of the subsequent death of the child, which occurred some days after her first conviction. At the date of the first trial for the offence of wilful neglect, whether it had taken place under the Summary Jurisdiction Acts or on indictment, it would have been impossible H to charge her with manslaughter because the death had not then occurred."

That, of course, is dead against counsel for the appellant on his first point. It is only one more authority to that effect. LORD READING continued (*ibid.*, 449) :

> "When the death occurs after the conviction for the lesser offence and an indictment for manslaughter is preferred, no difficulty arises, because proper effect can be given to s. 12 (4), by the judge telling the jury that they must, having regard to the special facts of the case, either come to the conclusion

> that the accused is guilty of manslaughter or return a verdict of acquittal. The judge could not, as he could in a normal case under the section where there had been no previous conviction for wilful neglect of the child, point out to the jury that it is open to them if they think fit to find the prisoner guilty only of the lesser offence on the indictment for the greater one. In our view it is wrong to say that a person indicted for the manslaughter of a child whose death has occurred after the conviction of the same person A for the wilful neglect of that child is twice put upon his or her trial for the same offence."

That case was quoted to DEVLIN, J., by counsel for the appellant on the argument on the question of *autrefois convict.* DEVLIN, J., directed the jury that they must either convict of murder or find a verdict of Not Guilty. That is B exactly what LORD READING, C.J., had said the judge should do. DEVLIN, J., did not tell the jury that they must take that course because the appellant had been previously convicted of anything, but he put it on the ground that the question whether the appellant intended the death of the deceased or to do her grievous bodily harm, which would make for the offence of murder, depended on the facts of the case. The prosecution said, that, if a man was found to C have attacked a woman with a knife and driven it into her in such a way that she was unable to move the lower part of her body and later died, there was ample evidence on which the jury could find that he knew, or must be taken to have known, that the probable consequence of his act would be either death or at least terrible injury to the woman. If, however, those facts were not found, there was no other ground on which the jury could find anything against the D appellant. Therefore, if the jury acquitted on the charge of murder, that meant that they did not accept the evidence, and should acquit the appellant. DEVLIN, J., so directed the jury, in mercy to the appellant. In our view, he was perfectly entitled to do that, and it is sufficient to say that we cannot accept the argument put forward by counsel for the appellant either that there was any power in the jury to find a verdict of wounding with intent to murder on the E charge for murder or that there has been anything wrong in the decision of DEVLIN, J., in advising the jury not to pay any attention to this plea of *autrefois convict.* The appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown). F

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

ZIVNOSTENSKA BANKA NATIONAL CORPORATION *v.* FRANKMAN.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord MacDermott, Lord Reid and Lord Radcliffe), June 22, 23, 27, October 20, 1949.]

Banker—Deposit of securities—Deposit of debentures at London branch of Czech bank—Condition that deposits be "subject to the legal measures" of country where deposited—Customer's claim for return of debentures—Re-delivery illegal under Czech law—Right of bank to refuse re-delivery.

The respondent, as personal representative of Mrs. F., claimed re-delivery in London of £300 debentures in a Czech company from the appellants, a Czech bank with its head office in Prague and a branch in London. In 1938 the debentures were held on Mrs. F.'s deposit account by the Anglo Prague Credit Bank (since amalgamated with the appellants), and in that year she was informed that the debentures were deposited at their London branch and remain there at her risk unless she otherwise ordered. Enclosed with the notification was a document setting out the conditions of the contract, the relevant clauses of which were as follows :—" 11. As regards such stocks and securities as were purchased at a stock exchange other than that of Prague or were received by any bank other than a Prague bank, we shall not have the same sent to us unless the customer has ordered the transmission thereof at his own expense and risk, but will leave the same, at the risk and expense of the customer, deposited with our correspondent, where they shall be subject to the legal measures of the respective country. This also applies in the case of our having credited the principal with such securities on a securities deposit account. In the event of our entrusting any securities to or leaving them in the custody of any third party—provided, of course, that we are otherwise authorised so to do—we shall only be responsible for our diligence in selecting the depositary, naturally subject to the provisions of the Law of Oct. 10, 1924, No. 241 of the Collection of Laws and Decrees. 50. The place of performance and payment in respect of all obligations resulting from the business connection with us, shall be considered to be the place of that department of our establishment which has carried out the relevant transactions with the customer, except in so far as any other special stipulation has been made in this connection." In 1939 Mrs. F. came to England where she resided until her death in 1945. The appellants, who asserted no beneficial interest in the debentures, refused to re-deliver them to the respondent because under Czech law the return of securities was only permissible with the consent of the National Bank of Czechoslovakia and this had been refused.

HELD : (i) that the contract under which the debentures were deposited was made in Czechoslovakia between a Czech bank and a Czech national, and the *lex loci contractus* was that of Czechoslovakia. Under the contract the *locus solutionis* was deemed to be Prague and so the *lex loci solutionis* was also that of Czechoslovakia.

(ii) condition 11 of the contract meant that securities deposited abroad were subject to the law of the country of deposit and not that the rights of the parties under the contract should be subject to that law.

(iii) under Czechoslovakian law it was illegal for the appellants to part with the debentures without the consent of the National Bank of Czechoslovakia, which leave had been withheld, and, therefore, the fulfilment of the contract involved the doing of an act in Czechoslovakia, (either the actual delivery of the debentures or the giving of authority for their delivery), which by the Czech law governing the contract was illegal, and the English courts would not enforce its performance.

Decision of the Court of Appeal ([1948] 2 All E.R. 1025) *reversing* ([1948] 1 All E.R. 337), *reversed.*

[As to Enforcement of Contracts Illegal by the lex loci solutionis, see HALSBURY, Hailsham Edn., Vol. 6, p. 272, para. 327 ; and for Cases, see DIGEST, Vol. 11, pp. 402, 403, Nos. *729-738*.]

Cases referred to :

(1) *Ralli Brothers* v. *Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 ; 89 L.J.K.B. 999 ; 123 L.T. 375 ; 11 Digest 397, *699*.

(2) *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. and Hungarian General Creditbank*, [1939] 3 All E.R. 38 ; [1939] 2 K.B. 678 ; 108 L.J.K.B. 861 ; 160 L.T. 615 ; Digest Supp.

(3) *Kahler* v. *Midland Bank, Ltd.*, [1949] 2 All E.R. 621.

Appeal from a decision of the Court of Appeal (*sub nom., Frankman* v. *Anglo-Prague Credit Bank*, ([1948] 2 All E.R. 1025), reversing a decision by Cassels, J. ([1948] 1 All E.R. 337) who held that the respondent was not entitled to enforce in an English court a contract made in Czechoslovakia between a customer (through whom he claimed) and the appellant bank under which £300 registered debentures in Skoda Works, Ltd., a Czechoslovakian company, were deposited at the customer's risk at the London branch of the bank. The Court of Appeal decided that the contract was enforceable in England and ordered the appellant bank to return the debentures to the respondent and to pay his costs in both courts.

On appeal to the House of Lords their lordships now set aside the judgment of the Court of Appeal and restored the judgment of Cassels, J., but ordered that the judgment of the Court of Appeal so far as it related to the costs of the appeal to that court should be undisturbed and that the appellants should pay the respondent's costs of the appeal to the House of Lords.

Sir Valentine Holmes, K.C., and *J. P. Ashworth* for the appellants.
Laski, K.C., G. Maddocks and *R. J. S. Thompson* for the respondent.

The House took time for consideration.
Oct. 20. The following opinions were read.

LORD SIMONDS : My Lords, this appeal from an order of the Court of Appeal which reversed a decision of Cassels, J., raises a question of some importance to bankers, though, as I think, its solution will be found to depend on the language of the particular documents by which the transaction to be considered by the House was carried out. The short question is whether the respondent, Hans Frankman, is, as the Court of Appeal held, entitled to have returned to him through the London office of the appellant bank three debenture bonds for £100 each issued by a Czechoslovak company known as Skoda Works, Ltd., and further to have executed by nominees of the appellant bank in whose names the bonds are registered all such transfers as are necessary to perfect his title to them.

I shall for convenience refer to the appellant bank, now known as Zivnostenska Banka National Corporation, as " the bank." The bank was incorporated in 1922 under the laws of Czechoslovakia with the name of the Anglo-Czechoslovak and Prague Credit Bank. Its head office was in Prague. In 1924 it established a branch in London at 48 Bishopsgate. Its name was changed first to Anglo-Prague Credit Bank, then to Prague Credit Bank, and ultimately to its present name. At the outbreak of war in 1939 the bank became an enemy for the purposes of the Trading with the Enemy Act, 1939. On Sept. 12, 1939, a licence was granted by His Majesty's Treasury to the London branch to carry on the business of the branch and it did so until Dec. 30, 1946, under the name of the Anglo-Prague Credit Bank London Office, under which name it was originally sued in the proceedings out of which this appeal rises.

At the end of 1946 the bank had ceased to be an enemy within the meaning of the Act and permission was given by His Majesty's government for control of the branch to be resumed by the bank.

In October, 1930, a branch of the bank at Trautenau in Czechoslovakia bought for the account of a Dr. Weiner, who lived there, £300 six per cent. Skoda Works debentures, notifying him of the fact by letter dated Oct. 14, 1930, of which I set out the following material passages :

> "We beg to inform you that in accordance with your instruction of the 8/10/1930 we have bought for your account the undermentioned securities, for which we have debited you according to statement. We are crediting you with the securities on your securities account. At the same time we take note of your authorisation to deal with the securities enumerated below as we choose and to deposit the same as we think best, even abroad. We do not mention to you the name of our foreign correspondent, with whom the securities acquired and mentioned below, are deposited, following your declaration according to which you exempted us from our obligation to do so."

The statement exhibited to the latter showed that the debentures had been acquired on the London Stock Exchange. It is conceded that Dr. Weiner was never the registered holder of them, but debentures to the nominal value of £300 of Skoda Works, Ltd., were (together with a large number of other debentures of the same issue) registered in the names of nominees of the bank and were held by the London branch in safe custody to the order of the head office of the bank in Prague. Dr. Weiner was at no time a customer of the London branch, which did not know his name in connection with these debentures. In or about 1935 Dr. Weiner died intestate and his sister, Paula Frankman, succeeded to his estate, which included the £300 debentures in question. Before March, 1935, she had by some means acquired £400 similar debentures. She, too, had lived at Trautenau and had an account with the Trautenau branch of the bank, but in 1935 she moved to Prague and transferred her account to the head office in that city. On Mar. 22, 1938, the head office wrote to her at an address in Prague, informing her that by order of their Trautenau branch they credited her with £700 six per cent. Skoda Works debentures (identifying them) on her deposit account with them held in London, and they enclosed in addition to their "business conditions" a declaration concerning the deposit of their securities abroad and specimen signature forms which they asked her to return duly completed. It would seem that Mrs. Frankman did not sign the declaration enclosed in the letter of Mar. 22, for on Apr. 27 the head office wrote to her again saying that, as she had not returned to them the declaration form relating to the place of custody of her £700 Skoda Works debentures, they had to inform her that they were deposited with their branch in London.

Before I refer to the "business conditions" which are, as I think, of crucial importance, I will finish the narrative of relevant facts. On May 24 the head office sold £400 of the £700 debentures and credited the account of Mrs. Frankman in Prague with the equivalent in kronen of the net proceeds. Similarly her same account was credited with interest on the remaining £300 debentures on May 30 and Dec. 1, 1935. In March, 1939, Mrs. Frankman came to England and there lived until she died in August, 1945. Her son, the respondent, Hans Frankman, had come to England in 1935 and he became a naturalised British subject in 1945. Letters of administration of his mother's estate were granted to him on May 24, 1946. In that capacity he, through his solicitors, required the London branch of the bank to deliver up the debentures to him. Some question at first arose in regard to a possible claim by the Custodian of Enemy Property, but this difficulty was removed and it remained only for the London branch to obtain the consent of the head office, for whom the debentures were held in safe custody, to the delivery of them to the respondent. This consent was refused. Without it the London branch declined to act, and, accordingly, the respondent commenced these proceedings claiming the return of the debentures or their value and damages for their detention. It may be observed that this claim was in the appropriate form to an action of detinue, but ignored the fact that, the debentures being registered in the names of nominees of the bank, further relief was required beyond that claimed if the debentures were to become effectively the property of the respondent. The ground of the refusal by the bank, which asserted no beneficial interest in the debentures, was that under and by virtue of Czechoslovak Finance Regulations (*viz.*, Foreign Exchange Law No. 92 of Apr. 11, 1946) delivery of them by the bank to the respondent was only permissible with the consent of the National Bank of Czechoslovakia and that that consent had been asked for by the bank and had been refused. The single question for the consideration of the House is whether the ground of refusal is a valid one and at this stage I must return to the " business conditions " which, so far as they are relevant, govern the contractual relations of the parties. I do not understand it to be questioned that the rights of the respondent in relation to the bank are not different from those of his mother through whom he claims.

Of the business conditions which were enclosed in the bank's letter to Mrs. Frankman of Mar. 22, 1938, two only need be quoted—conditions 11 and 50. It was suggested that condition 50 had no relevance to a transaction which in part consisted of the keeping of bonds in safe custody for a customer, but I see no ground for this suggestion. I, therefore, set out these two conditions :

> " 11. As regards such stocks and securities as were purchased at a stock exchange other than that of Prague or were received by any bank other than a Prague bank, we shall not have the same sent to us unless the customer has ordered the transmission thereof at his own expense and risk, but will leave the same, at the risk and expense of the customer, deposited with our correspondent, where they shall be subject to the legal measures of the respective country. This also applies in the case of our having credited the principal with such securities on a securities deposit account. In the event of our entrusting any securities to or leaving them in the custody of any third party—provided, of course, that we are otherwise authorised so to do—we shall only be responsible for our diligence in selecting the depositary, naturally subject to the provisions of the Law of Oct. 10, 1924, No. 241 of the Collection of Laws and Decrees.
>
> 50. The place of performance and payment in respect of all obligations resulting from the business connection with us, shall be considered to be the place of that department of our establishment which has carried out the relevant transactions with the customer, except in so far as any other special stipulation has been made in this connection."

I think that it clearly emerges from these conditions of a contract, made, it is to be remembered, between a bank in Prague and a Czechoslovakian citizen then resident at Trautenau, that first and last the law of the contract was Czechoslovakian law. It was the head office which carried out the " relevant transaction " with Mrs. Frankman, and, accordingly, the place of performance in respect of all obligations under the contract was under condition 50 to be considered to be at the head office. Beyond all doubt the *lex loci contractus* was that of Czechoslovakia. If, as condition 50 prescribes, the *locus solutionis* is deemed to be Prague, so also must the *lex loci solutionis* be the law of Czechoslovakia. It appears to me probable that it was largely in order that the bank might assert this applicability from first to last of the municipal law of that branch which carried out a transaction, that condition 50 was made a term of the contract. But it is said that this view is inconsistent with condition 11 if under that condition securities are deposited with a correspondent of the bank outside Czechoslovakia. Two points are made. In the first place, it is contended that the provision that in such a case the securities shall be "subject to the legal measures of the respective country" excludes the application of the law of Czechoslovakia. I do not think that this is so. I do not read the provision as affecting the legal rights or obligations of the parties except so far as may be necessary for the protection of the bank. It might be laid to their charge that they had not taken due care of securities left in their custody, if, being deposited with a correspondent in another country, they became subject to some penal or confiscatory measure. It is, I think, to avoid the possibility of such a liability that the bank makes this provision. Secondly, it is said that condition 11, where it operates, imports a contractual term that, if securities are deposited with a correspondent of the bank in a foreign country (say, in London) and the customer has not at his own risk and expense ordered their transmission to Czechoslovakia, or, presumably, to some other place, then the bank remains under an obligation to let them remain where they are and (as a corollary) delivery can be validly demanded from that foreign correspondent. Then, it is said, the performance of the bank's obligation must take place, in the example given, in London, and the law applicable to such performance must be the law of England. This is, I think, the view of the transaction taken by the Court of Appeal, but apart from the fact that this view ignores condition 50, which is to me conclusive, I cannot accept the interpretation of condition 11 on which it is founded. I think that this condition excuses the bank from liability if, in the absence of instructions to the contrary, they think fit to leave securities with their correspondent abroad, whether a branch or an independent depositary, but I do not think that the condition denies them the right to have them transmitted to Czechoslovakia if in their discretion they think that a safer course to take. Clearly, I think, the customer could under these conditions demand delivery in Prague, though a question might then arise whether, if the securities were in London at the time of demand, the transmission to Prague should not be at his risk and expense. I do not doubt that in such a case it might as a matter of practical convenience, if the customer so wished, he arranged that the delivery should take place wherever the securities happened to be, but this does not mean that, as a matter of legal obligation, the bank are bound by these conditions to keep securities abroad or to deliver them up in any place except at the office where the transaction is carried out. If the conditions were different, so might be the result. That is why I said at the beginning of this opinion that the issue of this case turned on the particular instruments by which the transaction was carried out.

It follows from what I have said that, in my opinion, the proper law of the contract by which the rights and obligations of the parties are determined is in every aspect of it the law of Czechoslovakia. Upon this assumption I think that the judgment of the Court of Appeal cannot stand. In common with other nations the Czechoslovakian State has from time to time made laws for the protection of its currency and for the control of foreign exchange. I have already referred to the law in force at the relevant date, *viz.*, the Foreign Exchange Law No. 92 of Apr. 11, 1946, which substantially re-enacted earlier laws. The evidence of Doctor Kulhanek, who was called as an expert in the law of Czechoslovakia, proved that it was illegal by that law for the bank to part with the securities in question to the respondent without the leave of the National Bank of Czechoslovakia, which leave, as I have already said, had been withheld. The fulfilment of the contract, therefore, involves the doing of an act in Czechoslovakia, *viz.*, either the actual delivery of the securities or the giving of an authority for their delivery, which is, by the law of Czechoslovakia, itself the law of the contract, illegal. It is, I think, clear that the courts of this country will not enforce such performance: see *Ralli Brothers*

v. *Compania Naviera Sota y Aznar* (1), and contrast *Kleinwort's Case* (2). It was urged that, even if the law of Czechoslovakia was the proper law of the contract and by that law the bank could not legally deliver up the debentures, yet the courts of this country should not enforce that law. It was sought to apply to the circumstances of the present case the principle that an English court will not enforce a penal or confiscatory law of another country. I do not exclude the possibility of this principle applying where it appears that the law which is sought to be enforced or relied on is in reality confiscatory, though in appearance regulatory of currency, but I see no reason why it should be applied in the case of a law which does not appear to differ in material respects from the legislation contemplated by the Bretton Woods Agreement which is now part of the law of this country. A

I am, accordingly, of opinion that this appeal should be allowed and that the action brought by the respondent should be dismissed. In the special circumstances which have been brought to the notice of the House I think that the order of the Court of Appeal so far as it relates to the costs of the appeal to that court should be undisturbed and that the bank should pay the respondent's costs of the appeal to this House. B

LORD NORMAND: My Lords, on the facts stated by my noble and learned friend on the Woolsack the contract of bailment between the parties was a contract between a Czechoslovakian bank and a Czechoslovakian citizen resident in Czechoslovakia. It is said, however, that the contract itself stipulates that the bonds were to be kept for safe custody in London, and that the place of re-delivery, the *locus solutionis*, is the bank's London branch, and that it follows that the appellant, as present owner of the bonds, is entitled to demand and receive them in London without regard to the law of Czechoslovakia, provided that he imposes no uncovenanted burden on the bailee and does not detract from his covenanted reward. The question is whether this proposition is well founded. C D

I think it well to emphasize that the contract was one between a bank and its customer and that it was for mutual advantage and not for the advantage of the customer alone. Nor was it a contract merely for safe custody. The bonds were English securities bought in London, and the interest on them was collected there. They remained in London, not so much for reasons of safety as because that was the most convenient and business-like arrangement, but the bank did not oblige itself to keep the bonds in London. It informed Mrs. Frankman by letters of Mar. 22 and Apr. 27, 1938, that it held the bonds in London and at its branch there, but it gave no undertaking that it would not remove them from London. It is, on the contrary, plain from the terms of the form of declaration which accompanied the letter of Mar. 22 that the bank was in its own interest seeking its customer's authority to deposit the bonds "even abroad" at its own discretion. In the same letter, the bank enclosed its business conditions. Condition 11 deals only with the costs and risks of the custody. It makes it a condition of the contract that the bank need not transmit the bonds to Prague except by the customer's order and at her expense and risk, and that it will leave them deposited at her expense and risk with "the bank's correspondent where they shall be subject to the legal measures of the respective country." This is a condition conceived in the interests of the bank and for its protection, and it imposes no obligations on the bank. In two respects there has been some misunderstanding possibly, even by the Court of Appeal, of the terms of this condition. "Our correspondent" is not to be identified with the bank's branch in London. The correspondent might be another bank in London, and since the condition is part of a form of general application it might happen that the condition applied to a deposit of securities with a foreign bank at a place where the appellant bank had no branch. The other misunderstanding is that it has been supposed E F G H that this condition makes the law of the country of the place of deposit the governing law of the contract, but the words " where they shall be subject to the legal measures of the respective country " warn the customer that the bonds themselves are at the risk of the legislation or administrative action in the country where they are situated and they have no bearing on the law of the contract. Condition 11, therefore, does not support the respondent's case.

The respondent next says that condition 50 has no application to contracts of deposit. This contention is without any foundation. The place of the condition in the document of which it is part is among general conditions affecting the bank's business with customers of whatever nature the business may be. It was intended by the bank and must have been understood by the customer, if she read it, to apply to the deposit of the bonds which was the sole subject-matter of the letter with which the copy of the conditions was enclosed. The meaning of condition 50 is clear beyond reasonable doubt. The only departments of the bank's establishment which had carried out any transaction with the customer were its branch at Trautenau and the head office in Prague, but the customer had ceased to be a Trautenau customer and had become a Prague customer, so for her the department indicated was plainly the bank in Prague. The words " with the customer " must be taken to have their full significance and I cannot treat them as the equivalent of " on behalf of the customer " as the argument of the respondent requires. The relevant transactions were the transactions by which the shares were acquired and deposited by the bank. Here then is an express stipulation that the place of performance and payment in respect of all obligations under the contract is to be Prague. I do not think that this condition would necessarily have stood in the way of the respondent's receiving physical delivery in London, but it was the bank in Prague which was to make delivery, and it was to that bank that he had to apply for delivery in terms of the condition. The result of this analysis, if it is sound, is that the *locus solutionis* is Prague and that the contract is from first to last and in all its aspects a Czechoslovakian contract.

From that it follows that the Czechoslovakian law applies and that it is one of the incidents of the contract that it is subject to a municipal law which, as has been held in *Kahler* v. *Midland Bank, Ltd.* (3), requires that performance by delivery can only be made with the permission of the National Bank of Czechoslovakia. I would, therefore, allow the appeal.

LORD MACDERMOTT : My Lords, the relationship between the respondent and the appellants is that of bailor and bailee and the right of the former (as personal representative of his mother, Mrs. Paula Frankman) to the return of the debenture bonds, of which he is the owner, necessarily turns on the contract of bailment which was entered into by Mrs. Frankman in the early part of 1938, and the effect thereon, if any, of the relevant Czechoslovakian foreign exchange legislation. The contract was made in Czechoslovakia between a resident Czechoslovakian and a Czechoslovakian bank and I entertain no doubt that, at least so far as its construction is concerned, the governing law is Czechoslovakian. On that law there is the evidence of Dr. Otto Kulhanek, though your Lordships are, of course, at liberty to form a view on the accepted translation of the material documents.

The relevant facts and circumstances have already been set forth and I need not repeat them. They raise three questions for determination which I may state thus :—(1) Is it open to the respondent to ignore the appellants' head office in Prague and to have his rights settled as between himself and the appellants' branch office in London where the bonds are ? (2) If not, what is the proper law governing the delivery of the bonds to the respondent ? and (3) Does that law justify the retention of the bonds by the appellants ?

As to (1) : The importance of this question lies in the fact that, although the appellants are but a single legal entity, the Czechoslovakian foreign exchange law regards their London branch as an exchange foreigner and their head office as an exchange citizen, the result being that, if the respondent, himself an exchange foreigner, is entitled to look to the London branch alone, the delivery of the bonds which he now seeks would not involve any contravention of Czechoslovakian law, and the respondent would not have a good defence to the claim. This question depends, in my opinion, on the true construction of conditions 11 and 50 of the contract. Condition 11 is, I think, only material in so far as it throws light on the meaning of condition 50. In effect condition 11 authorises the appellants not to bring to their head office securities (such as these bonds) which have not been purchased at the Prague Stock Exchange or received by a Prague bank save on the order and at the risk and expense of the customer, but to keep such securities deposited elsewhere " where they shall be subject to the legal measures of the respective country." There can be no doubt that under this condition, and as Mrs. Frankman did not otherwise order, the appellants were justified in keeping the bonds as they did at their London branch, and it may, therefore, be said that as regards the duty to *keep* in safe custody the actual place of performance was at that branch. It may also be observed in passing that, though the present case is not concerned with a sub-bailment to some third party, condition 11 contemplates that safe custody may be provided for in that way. The words I have quoted were relied on as showing that the law of the place of deposit was intended to govern the performance of the obligations arising out of the bailment. I cannot accede to this view. In my opinion, these words are only a warning that securities kept in another country will, as a matter of course, be subject to any law of that country which may apply to them. I do not think they have any further significance or bearing on the question under discussion.

I come, then, to condition 50. [HIS LORDSHIP read the condition and continued :] The respondent's first contention was that this stipulation was confined to money transactions and had no relation to deposits for safe custody. In my opinion, this contention is ill-founded. When the contract is examined, the arrangement of its terms—a matter relied on by the respondent—does not support the submission, and there is nothing that I can see in condition 50 itself to warrant such a limiting interpretation. The respondent's second, and principal, contention was that this condition made the appellants' London branch " the place of performance," and, therefore, the place where the bonds were to be restored to the possession of the bailor. The " relevant transactions with the customer " were, it was said, the safe-keeping of the bonds, and, as that obligation had been carried out at the London branch, it, the argument proceeded, was the " department of our establishment " referred to in the condition, and, so, the place of performance. My Lords, this view accords neither with the evidence of Dr. Kulhanek nor with what seems to me to be the true meaning of condition 50.

The London branch, may, in one sense, be said to have kept the bonds *for* Mrs. Frankman, but it did not carry out any relevant transaction *with* that lady. On the proper interpretation of the condition the relevant transaction with her was, in my opinion, the contract of bailment, and the department of the appellants' establishment which carried it out was their head office at Prague and no other. So read, this condition recognises and declares an established banking practice, namely, that a customer who does business with one branch of a bank cannot, in the absence of some special provision, call as of right on another branch to complete or clear that business, but, read as the respondent would have it, the condition would work a far-reaching departure from that practice and one which it would be strange to find in a series of printed " business conditions " obviously designed for general use. I do not leave out of account the fact that the expression " the place of performance . . . of all obligations " is wide and, if read literally, capable of including the safe-keeping in London as authorised by condition 11. In my opinion, however, this consideration does not suffice to displace the construction for which I have already expressed a preference. Condition 50 is, I think, clearly aimed at fixing (in the absence of special stipulation) a particular place of performance, and for that reason the word " performance " must, as it appears to me, be taken to connote, in relation to deposits for safe custody, not every act of performance in the due course of the bailment, for that—as condition 11 goes to show—might involve several places, but the act of performance which completes the transaction in question and in which the customer or his nominee participates. So construed, condition 50 is not in conflict with condition 11 and can be applied as readily where there is a sub-bailment, or succession of sub-bailments as where the deposit has been committed to a branch to which the customer is a stranger. For these reasons I would answer question (1) in the negative.

Next, as to question (2). What is the proper law governing the delivery of the bonds ? If the view I take as to the construction of condition 50 is correct, it must follow that the parties to the contract have agreed that Prague is to be considered as the place for delivery up of the bonds. That being their expressed intention I can see no ground for saying that the proper law in this connection is other than that of Czechoslovakia, and I would answer question (2) accordingly.

This brings me to question (3). Does the law of Czechoslovakia justify the appellants in their refusal to hand over the bonds ? On the evidence I think it must be accepted that by the Czechoslovakian foreign exchange legislation in force at all material times the appellants' head office could not lawfully deliver the bonds to their owner without the consent of the Czechoslovakian National Bank, and that such consent has been withheld. That being the position, the bailment has not been effectually terminated and the respondent lacks a right to immediate possession. This question must, therefore, be answered in the affirmative. It is an answer that the respondent may not find it easy to appreciate having regard to the course of events since 1938. It seems, however, inescapable so long as the relevant legislation and the attitude of the National Bank remain unaltered ; the material terms of the contract still subsist and there is no room for doubt as to the law which they attract. For these reasons I agree that the appeal should be allowed and the judgment of CASSELS, J., restored.

LORD REID : My Lords, the respondent is the owner of three £100 debentures of the Skoda Works. He inherited them from his mother, Mrs. Paula Frankman, and it is not disputed that he is the beneficial owner of these securities and that neither the appellants nor anyone else have any interest in them. These securities are at present held in London for the respondent by the appellants who are a Czechoslovakian bank. They are held in the names of nominees of the bank, but I do not think that that fact materially affects the issue in this case. In this action the respondent seeks to obtain delivery of these securities and the appellants have refused to deliver or transfer them, the ground of their refusal being that such delivery or transfer would be illegal under the law of Czechoslovakia without the consent of the National Bank of that country, which consent has been refused. This illegality arises under the same foreign exchange law of Czechoslovakia as that which has just been considered by your Lordships in *Kahler* v. *Midland Bank, Ltd.* (3). I have already expressed my opinion that this law is not one which the English courts are bound to disregard and the same reasoning as that which I have expressed in *Kahler's* case leads to the same conclusion here that the appellants would commit an offence under the law of Czechoslovakia if they now delivered or transferred these securities to the respondent either in that country or in England. The question for decision in this case is whether the appellants are entitled to rely on that fact as giving them a good defence to this action.

In 1938 the respondent's mother, Mrs. Frankman, owned seven of these Skoda debentures including the three which are the subject of this action. At that time Mrs. Frankman was residing in Prague and the seven debentures were held for her in London. I do not think that it is necessary to consider in detail anything that happened before Mar. 22, 1938. At that date the securities were held by the Anglo-Prague Credit Bank. That bank has since been amalgamated with the appellants so that as regards any contract to which that bank was a party the appellants are substituted in their place. On Mar. 22 the Anglo-Prague Credit Bank wrote to Mrs. Frankman from their Prague office a letter in German of which the following is a translation :—

> " Mrs. Paula Frankman, 22.3.38.
> Prague 2,
> Smecky 26,
> Ladies Club Register.
>
> We beg to inform you that by order of our Trautenau branch we credit you with 8220 £700 six per cent. Skoda Works debentures cum. coupon 1/6/1938
> 3/100 Nos. 261991-3
> 4/100 Nos. 272422-24
> and 268606 on your deposit account with us held in London.
>
> We enclose in addition to our business conditions a declaration concerning the deposit of the securities abroad and specimen signature forms which please return to us duly completed.
>
> Assuring you of our best attention at all times.
> We remain,
> (Signed) Anglo-Prague Credit Bank."

It would seem that Mrs. Frankman did not answer this letter, and on Apr. 27 a further letter was sent to her from the same office as follows :

> " As you have not returned to us the declaration form sent to you on the 16th ultimo relating to place of custody of your £700 six per cent. Skoda Works debentures we have to inform you that the above mentioned securities are deposited with our branch in London. Requesting you to take note of this fact."

It does not appear that Mrs. Frankman answered this letter either. She remained silent, but I think that it must be held that these letters and the business conditions therein referred to constituted and defined a contract between the bank and Mrs. Frankman. I leave out of account the declaration referred to because it was never signed. I need not re-state the course of events between that date and the raising of the present action. I think that it is clear that the contract made in Prague in 1938 is still in force between the respondent and the appellants as regards the three debentures owned by the respondent and that nothing which has occurred since that date has altered the terms of the contract.

The decision of this case must depend on the interpretation of that contract. Two of the business conditions which form part of it are specially important. They are conditions 11 and 50. [His Lordship read the conditions and continued :] If the true meaning of the contract is that the only place at which Mrs. Frankman was entitled to demand re-delivery of her securities was Prague, then I think that the appeal must necessarily succeed. If the appellants were to deliver these securities in Prague to the respondent who now represents Mrs. Frankman, they would commit an offence under the law in force there because the consent of the National Bank has not been given.

I think that it is now settled law that, whatever be the proper law of the contract, an English court will not require a party to do an act in performance of a contract which would be an offence under the law in force at the place where the act has to be done, but, if in the circumstances the respondent has a right to require the securities to be delivered to him in London, then it is necessary to go further and inquire whether his right to such delivery must be held to be governed by the law of England or by the law of Czechoslovakia. With these considerations in view I proceed to examine conditions 11 and 50 and the letters. I take condition 50 first because on one view it would be decisive.

It was argued that condition 50 has no application to a deposit of securities for safe keeping because all the conditions which specifically relate to such deposit are grouped near the beginning of the conditions, and condition 50, which is far removed from them, must be intended only to apply to topics dealt with in conditions in its vicinity. I do not think that there is any substance in this argument. Condition 50 is by its terms a general condition and there appear to be other general conditions in its neighbourhood. It occurs near the end of the conditions and that is a natural place to put a condition intended to have general application. The bank's obligations as bailee of these securities must, I think, be held to have "resulted from the business connection" between it and its customer. That being so, condition 50 stipulates that the place of performance and payment shall be the place of "that department of our establishment which has carried out the relevant transactions with the customer." It is transactions with the customer that matter, not transactions for the customer. The bank certainly carried out certain transactions for the customer in London, but they carried out no transactions with Mrs. Frankman except through their Prague office. The debentures being held in the name of nominees, the London office did not even know that Mrs. Frankman was their owner. All that the London office ever did was to acquire and hold the securities on instructions from the Prague office. No doubt in the ordinary course the London office would also have collected the interest, but again that interest would have been dealt with on instructions from the Prague office. With the greatest respect to the learned judges of the Court of Appeal I am unable to see how the London office can be said by doing these things to have been carrying out any "transaction with the customer." Condition 50 would, therefore, apply unless some "other special stipulation" can be found or unless some qualification of its apparently general meaning is necessary to bring it into line with the rest of the conditions. It was argued that a "special stipulation" can be found in the letters which I have quoted. I do not think so. The letters informed Mrs. Frankman where her securities were being held, but I do not think that they were intended to vary or can be held to have varied the business conditions to which they referred.

The condition which is said to require a qualification of the apparent meaning of condition 50 is condition 11. I think that, assuming that the translation is exact, there is a strong argument that under this condition the bank would not be entitled to move the customer's securities without his consent and this may throw some light on the place where the customer is entitled to demand delivery. A customer dealing with the Prague office would certainly be entitled to demand delivery there if he chose to order transmission of his securities to Prague at his own expense and risk, but could he demand delivery anywhere else? Could he say to the bank: "I want my securities in London. You are holding them there for me in your own office. You are not entitled to put me to the expense and risk of having the securities sent to Prague for delivery to me and then having them sent back again to London where I want them. Your business conditions were never intended to require such an unbusinesslike procedure"? That raises a question which I find it unnecessary to decide.

I am prepared for the purposes of this case to assume in the respondent's favour that, notwithstanding the terms of condition 50, he may have a right to require delivery of these debentures in London. Then it is said that, if that is so, such delivery would not be an offence under Czechoslovakian law. It appears that for the purpose of the Czechoslovakian foreign exchange law foreign branches of Czech undertakings are regarded as separate undertakings, and so the London branch of the appellants' bank is an "exchange foreigner" within A the meaning of that law. The respondent is also an "exchange foreigner" and transactions between exchange foreigners in London are not prohibited. Therefore, it is said that delivery to the respondent by the London branch would not be an offence. I think that this argument leaves out of account the fact that the respondent's contract is not with the London branch. The respondent's contract is with the appellants in Czechoslovakia and the London branch could B not deliver in performance of that contract except on instructions from Prague. Such delivery, though in London, would, I think, be delivery by an exchange citizen to an exchange foreigner and as such be prohibited by Czech law. It is, therefore, necessary to inquire whether the parties' contractual rights with regard to such delivery are governed by the law of Czechoslovakia or by the law of England. C

Apart from certain words in condition 11 which I must now consider, I would hold without difficulty that these rights are governed by the law of Czechoslovakia because the proper law of this contract and of every part of it is the law of Czechoslovakia. The contract was made in that country between two parties resident there. It is true that the property with which it was concerned was, at that time, in England, but it was at least in the option of D one party to have it moved at any time and to demand re-delivery of the property in Czechoslovakia. The phrase which is said to point to a different conclusion is in condition 11 where the bank stated that they will leave the securities deposited with their correspondent "where they shall be subject to the legal measures of the respective country." As I understand the argument it is that this does not merely mean that "they" (*i.e.*, the securities them- E selves) shall be subject to the laws of the country where they are deposited, but means that the rights of the parties under the contract with regard to these securities shall also be governed by the law of the country where they are deposited at least for so long as they remain deposited there. This argument has found favour with the learned judges of the Court of Appeal. As it is at this point that, with the greatest respect, I feel bound to part company with them, F I ought to quote their words. LORD GODDARD, C.J., said ([1948] 2 All E.R. 1030):

> "Those shares were to be held in London according to the laws of England. Therefore, any consideration of what is the proper law of the contract is provided by the condition itself and the proper law of the contract is the law of England and not the law of Czechoslovakia." G

ASQUITH, L.J., said ([1948] 2 All E.R. 1031):

> "This appeal would seem to turn on the application to the facts of this case of the rules of English and private international law. Two conclusions, among others, seem to me to result from that application—first, that the contract entered into between Mrs. Frankman and the bank in 1938 H was governed by Czechoslovak law, the *lex loci contractus*, but secondly, that, if and so far as, construed by that law, the contract provided for obligations to be performed in England, such obligations were intended to be governed by, and should be treated by English courts as governed by, the municipal law of this country, the *lex loci solutionis*. Such obligations are, accordingly, not affected by Czech domestic legislation . . ."

I would agree with LORD GODDARD, C.J., that, in one sense at least, securities deposited in London were under condition 11 "to be held in London according to the law of England," but, with respect, I would not agree that it follows that "the proper law of the contract once these debentures are deposited and so far as their deposit is concerned is the law of England and not the law of Czechoslovakia." I would agree with ASQUITH, L.J., in his first conclusion that the contract was governed by Czechoslovakian law, but I would respectfully disagree with his second conclusion that, if and in so far as the contract provided for obligations to be performed in England, such obligations were intended to be governed by the law of England.

Many, if not most, of the obligations under the contract were to be performed in Czechoslovakia, but, assuming that delivery might be obligatory in certain circumstances in England, some of the obligations of the contract were to be performed in England. I do not think that in such circumstances there is any rule or presumption that those obligations which are to be performed outside the country of the contracting parties shall be construed or governed by the law of the place of their performance. The parties can so agree if they choose, and such an agreement need not be in express terms. It may appear on a proper construction of the contract as a whole, but there must at least be something from which such an agreement can reasonably be inferred. I do not think that it is expressed in or can be inferred from the words of condition 11. Those words are a reminder from the bank to the customer that, if the customer chooses to leave his securities lying abroad, his securities will be subject to the hazards of the local law of the place of their deposit. I do not think that in themselves the words of condition 11 mean anything more. Is there, then, anything in the context to indicate a wider meaning? I cannot find it. In ordinary circumstances one would hardly expect the parties to intend a wider meaning. There is no apparent reason why the parties should find it attractive that rights under the contract with regard to deposited property should vary according to the place where that property might be at the time, and should, so long as that property was deposited abroad, be settled by a law with which the parties were, perhaps, unfamiliar, but should be settled by the law of their own country as soon as the property was brought back there. In 1938 circumstances in Czechoslovakia were far from ordinary and it may well be that Mrs. Frankman intended that her property deposited outside that country should not be held under a contract which had any relation to the law of that country, but it is not so clear that that would be the intention of a Czechoslovakian bank. I cannot find that any sufficient inference as to the intention of both parties can be drawn from the abnormal circumstances of the time to justify an interpretation being put on the contract which could not otherwise be justified, and, therefore, I must hold that the proper law of the contract—the law of Czechoslovakia—applies throughout whether the deposited securities remain abroad or are brought back to Prague. If that is so it follows, for the reasons which I have stated in *Kahler* v. *Midland Bank, Ltd.* (3) and need not repeat, that, as re-delivery in present circumstances would be illegal according to the law of Czechoslovakia and that for a reason which the English courts are not bound to disregard, there is a good defence to this action. Accordingly, I agree that this appeal must be allowed.

LORD RADCLIFFE: My Lords, the issue of this appeal depends on the view that is taken of the contract which Mrs. Paula Frankman made with the appellants in the year 1938. I think that CASSELS, J., in the High Court took the correct view of that contract. It is only because we are differing from the unanimous view of the Court of Appeal that I add a few words.

In 1938 Mrs. Frankman was a national of Czechoslovakia resident in that country. In March of that year she seems to have transferred her account from the appellants' Trautenau branch to a branch of theirs at Prague, and on Mar. 22 that office wrote to her stating that they credited her with the Skoda Works debentures that are now in question "on your deposit account with us held in London," and enclosed their business conditions and a declaration concerning the deposit of securities abroad. We must treat her as having accepted the conditions and out of this material we have to ascertain what the contract was. Certainly condition 11 and condition 50 are important for this purpose. I do not think it necessary to set them out again. No doubt, the primary object of condition 11 is to protect the appellants and to make it plain that they are not to be blamed for having left on deposit abroad securities that have been purchased abroad, unless their customer has expressly instructed them otherwise, but it is said that it also results from this condition that, if a customer does not so instruct them, they are bound to keep the securities where they purchased them—in this case London. I do not think it necessary to decide whether this contention is right or wrong, since, even if they had bound themselves to keep the securities in London until otherwise directed, I do not think that the proper law of this contract would be any the more English.

Condition 50 is, of course, relied on by the appellants. I cannot accept the respondent's argument that its position in the list of business conditions render it inapplicable to contracts of safe custody of securities. I think that it does apply to them as a general condition governing all business relations between the bank and a customer. It is very difficult to escape from the consequence that Prague is the stipulated place for delivery of the securities if the bailment is determined, for Prague and Prague alone is the "place of that department of our establishment which has carried out the relevant transactions with the customer." Nor do I find it easy to see how any "special stipulation" to the contrary can be said to have been made, but here again I do not think it essential to determine the point. Even if it were right to suppose that under this contract Mrs. Frankman could demand delivery of her securities in London, since they were in London, it could only be on the authority and with the direction of the Prague branch whose customer she was. The London branch neither had nor was expected to have any direct responsibility to her. Whatever else condition 50 secured, it secured at least this, that, consistently with banking practice, a customer could only resort for the clearance of his business to that branch of the bank with which the business was done. And that is enough to determine this appeal. I find it impossible to treat this contract, so construed, as anything but a contract the proper law of which is the law of Czechoslovakia. I think it impossible to read the words in condition 11, "where they shall be subject to the laws of the respective country", as importing that English law was to be the proper law of this contract. These words are no more than a warning, for the protection of the bank, that securities left on deposit abroad will be exposed to the incidence of local legislation. Nor do I think it an admissible construction of condition 50 to treat the London branch of the appellants as the branch "which has carried out the relevant transaction with the customer." However far one may go in regarding London as the place in which this contract was expected or even was required to be performed, the circumstances of the contract as a whole are such that the law of England cannot be held to displace the law of Czechoslovakia as the proper law of this contract. It is here that I differ from the views of the learned judges of the Court of Appeal. The place of performance is, of course, an important consideration in determining the proper law of a contract, and if the whole contract is to be performed in one place, as often it is not, that consideration is, I think, that much the more important, but it would be to ignore decided cases of high authority if we were to regard the place of performance as in any sense determining the proper law as a matter of rule, whether it be for the contract as a whole or for one or more parts of the contract.

But if the proper law is the law of Czechoslovakia we are faced with the same issue as arose in the case of *Kahler* v. *Midland Bank, Ltd.* (3), and I would make the same answer. It is unnecessary to repeat what I said there. We have in this case the evidence of Dr. Otto Kulhanek, a doctor of law of Prague University. I think that his evidence establishes that the Czechoslovakian currency regulations do draw a distinction between the appellants' A Prague office and its London branch. The legal entity remains the same, but the appellants, as the London branch, being exchange foreigners, may effect transactions which would be forbidden to them when acting as their Prague office and as such exchange citizens. Dr. Kulhanek was, however, explicit that under these regulations a release to the respondent, even if the operation was consummated by physical delivery in London, would be regarded as a B transfer between an exchange citizen and an exchange foreigner, because Mrs. Frankman was the customer of the Prague office, not the London branch, and the release would accordingly be forbidden unless the prior consent of the National Bank of Czechoslovakia had been obtained. The physical situation of the bonds he regarded as irrelevant for this purpose. I think that we ought to accept his interpretation of the law on this point, and it seems C to me to present a reasonable view of the scope of the regulatory system. The London branch of the appellants may deal with its customers, if they are exchange foreigners, without the Czechoslovakian regulations seeking to control the appellants, but the Prague office may not deal with its own customers through the hands of the London branch except under the control of the National Bank.

D In the result, I think that we ought to come to the conclusion that the contract of safe deposit between Mrs. Frankman and the appellants, to the benefit and obligations of which the respondent has succeeded, cannot be treated as terminable at the will of the bailor. It must be treated as terminable only with the consent of the National Bank, and that consent is not forthcoming. If the contract that governs the bailment is not presently E terminable, it is impossible to allow the respondent to ignore the contract and to sue the appellants *in rem* for the recovery of what is indisputably his property.

Appeal allowed. Order of the Court of Appeal for payment by appellants of costs of appeal to that court to remain undisturbed. Appellants to pay costs of respondent's appeal in the House of Lords.

F Solicitors: *Freshfields* for the appellants; *W. R. Bennett & Co.* agents for *Barrow-Sicree & Co.*, Manchester, for the respondent.

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

G

DHULIPALA KAMESWARA RAO *v.* WYLES.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 19, 1949.]

Drugs—Dangerous drugs—Custody—"Locked receptacle"—Drugs left in H *unlocked case in locked motor car—Dangerous Drugs Regulations,* 1937 (*S.R. & O.*, 1937, *No.* 560), *reg.* 5 (2), (*as amended by Dangerous Drugs Regulations,* 1948 (*S.I.*, 1948, *No.* 2653), *art.* 4).

By the Dangerous Drugs Regulations, 1937 (S.R. & O., 1937, No. 560), reg. 5, as amended by the Dangerous Drugs Regulations, 1948 (S.I., 1948, No. 2653), art. 4, it is provided: "(2) Every drug or preparation in the actual custody of a person authorised by virtue of this regulation shall, except when the necessities of the practice of the profession, function or employment by virtue of which that person is authorised as aforesaid otherwise require, be kept in a locked receptacle which can be opened only by him or by some other person authorised by virtue of this regulation."

The appellant, a registered medical practitioner and a person legally authorised to be in possession of drugs to which the Dangerous Drugs Act, 1920, applied, left his motor car in a car-park near a picture theatre, leaving in the car, the doors of which he had locked, an unlocked leather case containing drugs. The car was stolen and, when later it was recovered, it was found that the drugs had been removed.

HELD: a motor car was not a "receptacle" within the meaning of reg. 5 (2), and, therefore, the appellant had committed an offence under the regulation.

CASE STATED by the stipendiary magistrate for the city of Birmingham.

An information was laid before the magistrate by the respondent, a chief inspector of police, against the appellant, a medical practitioner, that he did fail to comply with reg. 5 (2) of the Dangerous Drugs Regulations, 1937, as amended by the Dangerous Drugs Regulations, 1948, in that he left drugs in an unlocked case in a motor car, the doors of which were locked. The appellant was found Guilty and fined £5, and the Divisional Court now dismissed his appeal.

Bourke for the appellant.

Vernon Gattie for the respondent.

LORD GODDARD, C.J.: This is a Case stated by LORD ILKESTON, the stipendiary magistrate for Birmingham, before whom the appellant was charged with a breach of the Dangerous Drugs Regulations, 1937 (S.R. & O., 1937, No. 560), reg. 5, as amended by the Dangerous Drugs Regulations, 1948 (S.I., 1948, No. 2653), art. 4. Reg. 5 (2), as amended, provides:

> "Every drug or preparation in the actual custody of a person authorised by virtue of this regulation shall, except when the necessities of the practice of the profession, function or employment by virtue of which that person is authorised as aforesaid otherwise require, be kept in a locked receptacle which can be opened only by him or by some other person authorised by virtue of this regulation."

The appellant is a medical man, and, therefore, is authorised to be in possession of dangerous drugs, which, in my opinion, can be said to be in his actual custody even although at any particular moment of time he has not actually got his hand on them. In the present case he put the drugs in a case which was not locked, put the case in his motor car, and drove to a picture theatre. Before entering the theatre he locked his car. The car was stolen, the lock having been forced, and the drugs were taken out.

The regulation is not, perhaps, very happily worded. It is possible that it might be worded differently or more strongly, but we have only to consider the facts of this particular case. I am deciding this case merely on those facts, and I am not speculating as to what might be the result if different facts had been found, such as that this case had been locked or if the motor car had contained a locker in which these things were kept. First, I think that the regulation contemplates that drugs of this sort are to be kept regularly in some receptacle, and not that it can be said that at any particular moment, because a lock is turned somewhere, that there is a compliance with the regulation. It is impossible to say that a motor car is a receptacle within the meaning of this regulation. If it is, as was put by counsel for the respondent in argument, it would be just as true to say, if a doctor left his drugs lying about in a house and locked the front door, the back door and the windows, that they were in a locked receptacle. No one, I think, would call a motor car a receptacle for drugs any more than he would call a house a receptacle for them. One has to give the regulation an interpretation which will make sense of it and, unless the words compel one to take another view, construe it in a way to effect the purpose which the legislature must have had in mind. It is impossible to say that a motor car which must be locked and unlocked according to whether the person is in it is a receptacle, and there is no suggestion that the appellant keeps his motor car locked at all times whether he is in it or not. I put my judgment entirely on the ground that a motor car cannot be regarded as a receptacle, and that I think was the view taken by the learned magistrate. I agree with him, and this appeal fails.

CROOM-JOHNSON, J.: I agree with the order which is proposed, and for the same reasons.

LYNSKEY, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Le Brasseur & Oakley*, agents for *Augustus W. Dickson & Berry*, Birmingham (for the appellant); *Sharpe, Pritchard & Co.*, agents for *M. P. Pugh*, Birmingham (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. *v.* ASKEW.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 14, 1949.]

Criminal Law—Sentence—Preventive detention—When an appropriate sentence—Length of sentence—Criminal Justice Act, 1948 (*c.* 58), *s.* 21 (2).

The appellant was convicted of attempting to obtain money by false pretences and was sentenced to seven years' preventive detention. There were eight previous convictions recorded against him, the last being in 1938.

HELD: preventive detention was not an appropriate sentence in the circumstances, and a sentence of imprisonment should be substituted.

Per curiam: In many instances courts have been passing sentences of preventive detention in cases where, but for the substitution of imprisonment for penal servitude by the Criminal Justice Act, 1948, s. 1 (1), the sentence would have been penal servitude for the same number of years. The court thought it right to emphasise that, in its opinion, it was not the intention of the Act of 1948 to substitute preventive detention for the old sentence of penal servitude. Preventive detention ought to be awarded only in cases where, before that Act, there would probably have been a charge and finding that the prisoner was an habitual criminal. Such a sentence ought to be passed only where prolonged detention was necessary for the protection of the public. It should be regarded as an exceptional sentence and not one to be given merely instead of imprisonment. Where it was given, it ought to be for a long period.

APPEAL against a sentence of seven years' preventive detention on conviction of attempting to obtain money by false pretences.

The appellant had eight previous convictions, but between the present and the last previous sentence he had had a clean record for nine years. The appeal was allowed and a sentence of eighteen months' imprisonment was substituted for the sentence of preventive detention. The facts appear in the judgment of the court delivered by Lord Goddard, C.J., who, on Oct. 18, 1949, made some general observations on the subject of preventive detention which follow the judgment.

Bechhofer Roberts for the appellant.
The Crown was not represented.

The following judgment of the Court was delivered by

LORD GODDARD, C.J.: The appellant was convicted before the learned recorder of West Ham of attempting to obtain a sum of £150 by false pretences. There was also a charge against him of unlawfully being in possession of some petrol coupons, which was dealt with by the magistrate, and he was sentenced to six months' imprisonment.

The learned recorder, having heard that the appellant had had eight previous convictions, ordered him to be detained in preventive detention for seven years for the misdemeanour of attempting to obtain money by false pretences, although he was aware of the fact that the appellant's last sentence was as far back as 1938 and that for nine years he had gone absolutely straight. We cannot allow a sentence of seven years' preventive detention, in the circumstances of the case, to stand, and the court has decided to set aside that sentence and to substitute for it a sentence of eighteen months' imprisonment to date from conviction.

Sentence varied.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant).

Oct. 18. **LORD GODDARD, C.J.**, made the following observations on the subject of preventive detention: Since the beginning of these sittings we have had before us more than eighty cases. The majority have been appeals against sentence, and in a substantial number the sentence passed has been one of preventive detention. A common sentence of this description has been one of five years, and this court feels that in many instances courts are passing this class of sentence in cases where, but for the recent substitution of imprisonment for penal servitude by the Criminal Justice Act, 1948, the sentence would have been penal servitude for the same number of years. We think it right to emphasise that, in our opinion, it was not the intention of s. 21 (2) of the Act of 1948 to substitute preventive detention for the old sentence of penal servitude. If a court is of opinion that a given number of years is the appropriate sentence, it does not by any means follow that because the prisoner has the requisite number of previous convictions the sentence should be one of preventive detention rather that imprisonment, still less does this follow because of a report from the Prison Commissioners that the prisoner is suitable for this form of sentence. Their report is merely as to his suitability if the court deems it right to pass such a sentence. Preventive detention ought to be awarded only in cases where before the Act of 1948 there would probably have been a charge and finding that the prisoner was a habitual criminal. Before the Act it will be remembered that, as in such a case at least three years' penal servitude had first to be given, the total length of detention would have been at least eight years. Preventive detention ought to be passed only where prolonged detention is necessary for the protection of the public. It may well be that, when a sentence of five years' imprisonment would ordinarily be passed, the court may consider that the particular circumstances require an additional term because of the criminal proclivities of the offender and so give seven or ten or even more years preventive detention. Possibly, if a sentence of two or three years' imprisonment would ordinarily be regarded as appropriate, preventive detention for five years might in some cases be deemed justifiable, but the court is of opinion that preventive detention should be regarded as an exceptional sentence and not one to be given merely in lieu of imprisonment. Where it is given it ought to be for a long period. As a rule five years would only be appropriate in the case of a man of advanced age who habitually commits crime, it may be of a petty nature, who must, therefore, be kept in custody, but who, it may be hoped, will not end his life in prison. There have been very few cases of this nature before the court in which they have disapproved of the length of sentence, but several in which, in their opinion, it should have been ordinary imprisonment and not preventive detention. If the latter sentences continue to be given at the present rate it would seem that the Prison Commissioners may be put into difficulties in finding the requisite accommodation in the places set aside for this form of detention.

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

NOTE.

R. *v.* BARRETT.

[Court of Criminal Appeal (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 14, 1949.]

Criminal Law—Sentence—Corrective training—When appropriate sentence—Length of sentence—Criminal Justice Act, 1948 (*c.* 58), *s.* 21 (1).

Application for leave to appeal against conviction and sentence of five years' preventive detention on charges of possessing housebreaking implements by night and attempted shopbreaking.

The applicant, who was 36 years old, had four previous convictions, three for shopbreaking and one for receiving, and had just been released from prison when he committed the offence for which he was sentenced. The court, while holding that, in general, where imprisonment was an appropriate sentence preventive detention should not be awarded, decided that in the present circumstances the application should be refused.

No counsel appeared.

LORD GODDARD, C.J., made observations in regard to preventive detention similar to those reported in *R.* v. *Askew* (*supra*) and continued : Very much the same considerations apply to sentences of corrective training, which is intended for what I may call extended Borstal treatment. Since a person of 21 years or over who is in need of training, by virtue of the Criminal Justice Act, 1948, s. 48 (1), can no longer be sent to Borstal, it is a good thing, no doubt, to send him for corrective training. If his record shows that his tendency is to lead a criminal life, it is as well to make the sentence of corrective training of substantial length and to bear in mind that the usual remission will be granted if the prisoner behaves himself. In such cases, it is of little use giving a sentence of a length which will not enable real reform to be attempted.

Application refused.

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

CHAPMAN *v.* O'HAGAN.

[King's Bench Division (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 18, 19, 1949.]

Street Traffic—In charge of motor vehicle while under the influence of drink—Disqualification for holding licence—"Special reasons" for not disqualifying—Ignorance of combined effect of drink and drugs—Road Traffic Act, 1930 A
(*c.* 43), *s.* 15 (2).

A motorist, having sustained an injury to his leg, took drugs not knowing that he would thereby be rendered more susceptible to the effect of alcohol. Later he took an amount of beer and whisky to which he was accustomed. The combined effect of the drugs and alcohol rendered him unfit to drive a car. He was convicted of being in charge of a motor vehicle while under B
the influence of drink so that he was incapable of having proper control of the vehicle, but he was not disqualified for holding a licence, the justices being of the opinion that his ignorance of the combined effect of the drugs and the alcoholic drink constituted "special reasons" within the Road Traffic Act, 1930, s. 15 (2). On appeal,

Held: this circumstance was one which the justices were entitled to C
consider as constituting "special reasons" for not disqualifying the motorist, and, as they had not acted perversely, the court would not interfere with their exercise of their discretion.

[For the Road Traffic Act, 1930, s. 15 (2), see HALSBURY'S STATUTES, Vol. 23, p. 623.]

Case Stated by Essex Justices. D

At a court of summary jurisdiction sitting at Halstead the respondent was charged with having been, while in charge of a motor vehicle on a road, under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to the Road Traffic Act, 1930, s. 15 (1). On Mar. 28, 1949, the respondent pleaded Guilty to the charge, and was convicted and ordered to pay a fine of £10 and costs. The justices ordered that his driving E
licence be endorsed, but they found that the taking of drugs had rendered him more susceptible to the effect of the alcohol, and that his ignorance of what would be the combined effect of the drugs and the alcohol constituted a special reason within s. 15 (2) why he should not be disqualified. The appeal of the prosecution was dismissed. The facts appear in the judgment of Lord Goddard, C.J. F

E. J. P. Cussen for the appellant, an inspector of police.

G. Pollock for the respondent.

LORD GODDARD, C.J.: This is another case which raises the often very difficult question whether justices are justified, having convicted and fined a man for being in charge of a motor car when he was unfit to drive owing to G
drink or drugs, in finding special circumstances entitling them to refrain from disqualifying him for holding a driving licence.

The respondent, who was a veterinary surgeon, having some injury to his leg, administered to himself a drug generally called "M. & B.", and also phenobarbitone, which is a drug of the hypnotic variety. Having taken those drugs at 6 p.m. he went to a public house and there consumed some whisky and some H
beer of an amount to which he was accustomed. At 10.10 p.m. he was seen staggering near his car, which would seem clearly to point to the fact that he was under the influence of drink or drugs or, probably, both. At 11.5 p.m. he was found sitting in the driving seat of the car which had been driven from one side of the road on to the pathway on the other side, and at that time he was under the influence of drink or drugs to such an extent that he was unfit to drive the car. The justices, however, came to the conclusion that there were special

reasons entitling them to refrain from disqualifying him because they considered that he did not know that the effect of taking alcohol after the drugs would have a more serious effect on him than if he had taken the same amount of alcohol and no drugs.

It is a borderline case, and I think that, if the case had come before me, I should have had no difficulty in holding that there was no special circumstance. A On the other hand, I feel a difficulty in saying that we can reverse the justices' decision unless we conclude that it was perverse, and I am certainly not prepared to say it was perverse. I think they have given their best consideration to the case, and have come to a conclusion on a matter in which they have a discretion, and even if I disagree, as I do, with the way in which they exercised their discretion, I do not think that is sufficient ground in law for upsetting their B decision. Accordingly, I have come to the conclusion, after considerable hesitation and with some reluctance, that this appeal must be dismissed.

CROOM-JOHNSON, J.: I have the greatest possible doubt in this case. It looks to me as though the justices had really examined the question whether there was any good reason why the respondent should, after taking his accustomed quantity of alcohol, have become under the influence of drink, and C one sympathises with them in the conclusion to which they came on the very peculiar facts of this case. The difficulty I feel is that the offence charged is that the respondent was in charge of a car when he was not in a fit and proper condition to drive it. I doubt whether the justices considered the facts at the proper moment of time when they considered whether there was material which entitled them to exercise the discretion which is given to them under the statute. However, D it is a very exceptional case, and I do not feel sufficiently certain of the view that I have expressed to come to the conclusion that I ought not to concur in the judgment which is proposed. In those circumstances, I do concur in it.

LYNSKEY, J.: I agree. As I understand the law, for reasons to be "special" within s. 15 (2) of the Road Traffic Act, 1930, they must be special E to the facts constituting the offence. The offence here was that of being under the influence of drink or drugs to such an extent as to affect the respondent's ability to control the car. It is an essential ingredient of the offence that the justices should be satisfied that the defendant was drunk at the material time. If there are facts which show that his drunkenness was induced by the malicious act of some third party, or, as in this case, by ignorance of the effect of certain F drugs on alcohol, those are matters which the justices are entitled to consider as special circumstances. Once there are special circumstances, the discretion whether or not the defendant shall be disqualified is that of the justices, and as long as they act within the terms of their discretion and on the facts and not perversely this court cannot interfere. I think this is a borderline case. If I had been trying it myself, even if I thought there were special circumstances, I should G have said that the aggravating circumstance of the respondent's taking control of the car knowing he was under the influence of drugs was sufficient to prevent the exercise of the discretion in his favour. But that is a matter for the justices. One cannot say they misdirected themselves, and in these circumstances, in my view, we cannot interfere with their decision, and this appeal must be dismissed.

H *Appeal dismissed with costs.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Arthur Morgan*, Chelmsford (for the appellant); *Griffinhoofe & Brewster*, agents for *Smith, Morton & Long*, Halstead, Essex (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

EDLER *v.* AUERBACH.

[King's Bench Division (Devlin, J.), July 7, 8, 11, 27, October 12, 1949.]

Landlord and Tenant—Lease—Illegal user of premises—Permission to use premises for professional purposes—Regulation forbidding such use without consent of local housing authority—Enforceability of lease—Illegal object of lessor not pleaded, but disclosed, and dealt with, in evidence—Defence (General) Regulations, 1939 (S.R. & O., 1945, No. 1361), *reg.* 68ca (1).

Landlord and Tenant—Fitness of premises—Innocent misrepresentation inducing contract—Recovery of rent paid—Implied warranty—Unilateral mistake—Money had and received.

By the Defence (General) Regulations, 1939, reg. 68ca (1): "No person shall except with the consent of the local housing authority use for purposes other than residential purposes any housing accommodation which has been used for residential purposes at any time since December 31, 1938 . . ."

When negotiating for the letting of rooms on the second floor of premises, which to his knowledge had been used for residential purposes from January to August, 1939, the lessor told the prospective lessee that it was all right for him to let them for office purposes and that they had not been used for residential purposes after Dec. 31, 1938. In the lease subsequently made, in March, 1947, the lessee covenanted to use and occupy the rooms for professional purposes and not otherwise. On learning of the position the local housing authority informed the lessor that the occupation of the premises was a contravention of the Defence (General) Regulations, 1939, reg. 68ca (1), and the lessor applied for consent to user for professional purposes. On May 22 the authority gave consent to the use of the ground and first floors (used by the lessor) for professional purposes and decided to take no action to enforce the regulation in respect of such use of the second and third floors by the existing tenants on an undertaking by the lessor to re-allocate accommodation on the ground and first floors to enable the tenants to release the other two floors for residential use. In an action by the lessee claiming repayment of rent which he had paid, he contended (*a*) that the agreement was null and void for illegality, and, alternatively, (*b*) that the agreement was voidable by reason of an innocent misrepresentation made by the lessor that the premises had not been used for residential purposes since Dec. 31, 1938; (*c*) that the agreement was entered into under a mutual mistake of fact respecting such user or (in an amendment to the statement of claim) on a unilateral mistake; and (*d*) that there was an implied term or warranty in the agreement that the lessee could use the premises for professional purposes and that the warranty had been broken. The lessor counterclaimed (*inter alia*) for the balance of the rent due under the tenancy agreement. Evidence of the lessor's knowledge of the truth when making his misstatement was given on behalf of the lessee without objection from the lessor, and was also dealt with by the lessor in his evidence.

Held: (i) the agreement was not *ex facie* illegal because (*a*) the covenant as to user, being really a negative covenant (*i.e.*, not to use the premises otherwise than for professional purposes), did not impose any obligation on the lessee to use the premises at all, and (*b*) the agreement did not require the lessee to enter into occupation without first obtaining the consent of the local housing authority to professional user, and, therefore, the agreement did not necessarily involve an infringement of the Defence (General) Regulations, 1939, reg. 68ca (1).

(ii) the covenant as to user was not *per se* evidence that the parties contemplated an unlawful performance because they might have intended to obtain the consent of the local authority.

(iii) the lease was unenforceable by the lessor because, though not intending to break the law himself, he intended that the lessee, as his innocent instrument, should break it ; by granting the lease he had taken an overt step in carrying out his illegal intention and the fact that his attempt to break the law was frustrated was immaterial ; and, even if the subsequent consent of the local housing authority legalised the professional use of the premises, the lessor's conduct disentitled him from obtaining the aid of the court to enforce the agreement.

Alexander v. *Rayson* ([1936] 1 K.B. 169), *applied.*

(iv) although the illegal object of the lessor was not pleaded, the facts in regard thereto had been given in evidence for the lessee without objection by the lessor and had been fully dealt with in evidence by the lessor, so that all the relevant circumstances were before the court ; although it was submitted, after the evidence was completed, that it ought not to have been received and that the court should disregard it, public policy required that the court should not ignore an illegality which had been brought to its attention, and, therefore, it must refuse to allow the lessor to enforce the agreement.

North-Western Salt Co., Ltd. v. *Electrolytic Alkali Co., Ltd.* ([1914] A.C. 461), *considered.*

(v) the rent paid by the lessee was properly paid under a valid agreement and the lessor's illegal object did not by itself give any right of action to the lessee ; as the misrepresentation regarding user of the premises after 1938 was pleaded only as innocent misrepresentation, and as innocent misrepresentation was not a ground for the rescission of an executed lease, the lessee was not entitled to rescission : *Angel* v. *Jay* ([1911] 1 K.B. 666), *followed* ; on a demise of real property there was no warranty implied by law that the property was fit for the purpose for which it was let, and this principle applied whether the premises were physically or legally unfit, and, therefore, the plea of implied warranty failed : *Hart* v. *Windsor* (1844) (12 M. & W. 68), *followed* ; on the facts, there was no mutual mistake and, although there was a unilateral mistake on the lessee's part, the effect of the mistake was exhausted when the lease was made, and the rent was paid, not because of the mistake, but because the lease compelled it ; as the lessee had not pleaded fraudulent misrepresentation, the misrepresentation must be assumed to be innocent and, on such assumption, there was nothing unjust or unconscientious in allowing the lessor to retain the money, and, therefore, the rent was not recoverable as money had and received ; and, accordingly, the claim for recovery of rent paid under the lease failed.

[As to Lettings for Illegal Purpose, see HALSBURY, Hailsham Edn., Vol. 20, pp. 224, 225, para. 245 ; and for Cases, see DIGEST, Vol. 31, pp. 150, 151, Nos. *2858-2864.*]

Cases referred to :

(1) *Waugh* v. *Morris,* (1873), L.R. 8 Q.B. 202 ; 42 L.J.Q.B. 57 ; 28 L.T. 265 ; 12 Digest 236, *1940.*

(2) *Alexander* v. *Rayson,* [1936] 1 K.B. 169 ; 105 L.J.K.B. 148 ; 154 L.T. 205 ; Digest Supp.

(3) *North-Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.,* [1914] A.C. 461 ; 83 L.J.K.B. 530 ; 110 L.T. 852 ; Digest, Pleading 12, *85.*

(4) *Rawlings* v. *General Trading Co.,* [1921] 1 K.B. 635 ; 90 L.J.K.B. 404 ; 124 L.T. 562 ; Digest Supp.

(5) *Angel* v. *Jay,* [1911] 1 K.B. 666 ; 80 L.J.K.B. 458 ; 103 L.T. 809 ; 13 Digest 474, *236.*

(6) *Hart* v. *Windsor,* (1844), 12 M. & W. 68 ; 13 L.J.Ex. 129 ; 2 L.T.O.S. 440 ; 8 J.P. 233 ; 31 Digest 127, *2613.*

(7) *Bottomley* v. *Bannister*, [1932] 1 K.B. 458, 459 ; 101 L.J.K.B. 46 ; 146 L.T. 68 ; Digest Supp.

(8) *Fibrosa Spolka Akcyzna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122 ; [1943] A.C. 32 ; 111 L.J.K.B. 433 ; 167 L.T. 101 ; 2nd Digest Supp.

Action for money received by the defendant for the use of the plaintiff (*i.e.*, for rent paid under mistake or for a user of premises which was illegal under the Defence (General) Regulations, 1939, reg. 68CA (1)) ; for a declaration that an agreement was null and void ; for rescission of the agreement ; and for payment to the plaintiff of a sum paid under the agreement. Counterclaim for rent due under the agreement, and for damages for breach of covenant to deliver up in good repair and for damage done to the premises.

The plaintiff, a solicitor, was the lessee of two rooms on the second floor of premises at 9 Mansfield Street, London, let to him by the defendant, an accountant, by an agreement dated Mar. 31, 1947. The whole premises had been used for residential purposes until the outbreak of war in 1939, after which they were uninhabited. The defendant, in the course of inquiries by him about the premises in 1945, was shown a letter stating that the house was inhabited in the ordinary way until September, 1939. At that time he intended to use the second and third floors as his residence and the rest of the house for his business (which, by proviso (*b*) to reg. 68CA (1), would prevent the regulation from applying). He went into occupation in November or December, 1945, but, finding the cost of conversion for residential purposes prohibitive and the grant of a licence unlikely, he abandoned the idea of residence and used the premises as an office in breach of the regulation. On May 1, 1946, he obtained a lease of the premises which permitted him to use the premises either as a private dwelling-house or for the purpose of offices, and under it he covenanted to obtain any necessary consent of the local housing authority under reg. 68CA (1) in respect of the use of any part of the premises for purposes other than residential. He took no steps, however, to obtain such consent. He then decided to sub-let the second and third floors of the premises. In March, 1947, in the course of negotiations for a letting, he informed the plaintiff that it was all right for him to let the premises for office purposes and that they had not been used residentially after Dec. 31, 1938. The plaintiff was satisfied and made no further inquiries, and on Mar. 31, 1947, he signed a lease of two rooms on the second floor for a term of six months from Mar. 31, 1947, and thereafter until determination by either party giving to the other six months' notice. The rent was £525, payable quarterly in advance, the first payment to be made as from Apr. 10, 1947. The plaintiff covenanted to use and occupy the premises for professional purposes and not otherwise. He paid £111 1*s.* 2*d.* rent on Apr. 11, 1947. Having decided to sub-let one of the rooms, he made an application to the appropriate authority for a licence for electrical work to be done on the premises. As a result, the local housing authority made inquiries and discovered that the whole of the house had been used for residential purposes from January to August, 1939. The town clerk informed the defendant that his occupation of the ground floor was a contravention of the regulation, and the defendant, after expressing surprise that the premises had been used for residential purposes in 1939, applied for the authority's consent to business user. Both the plaintiff and the defendant attended the hearing of the application by the committee of the local authority on May 22, when consent was granted to the defendant for the use of the ground and first floors for professional offices, and it was decided, as the plaintiff had apparently made a *bona fide* error, to take no action to enforce the regulation in respect of the use of the second and third floors for other than residential purposes by the existing tenants, on an undertaking being given by the defendant that he would endeavour to re-allocate the accommodation on the ground and first floors to enable those tenants to release their existing accommodation for use for residential purposes. The plaintiff gave notice to determine his tenancy on Mar. 31, 1948, and brought proceedings to have the lease declared null and void and rescinded and to recover the rent he had paid. DEVLIN, J., held that the plaintiff was not entitled to recover the rent paid, but that the defendant was debarred from suing on the tenancy agreement.

Lloyd-Jones, K.C., and *R. J. S. Harvey* for the plaintiff.

A *W. Russell Lawrence* for the defendant.

Cur. adv. vult.

Oct. 12. **DEVLIN, J.,** read the following judgment. The Defence (General) Regulations, 1939, reg. 68CA (1), which came into force on Oct. 20, 1945, provides :

B

> " No person shall except with the consent of the local housing authority use for purposes other than residential purposes any housing accommodation which has been used for residential purposes at any time since Dec. 31, 1938 . . . "

This action concerns a lease of premises which fall within this regulation.

By an agreement dated Mar. 31, 1947, the defendant let to the plaintiff some C rooms on the second floor of 9, Mansfield Street, London, and the plaintiff agreed to use them for professional purposes only. The plaintiff now contends that the agreement is null and void for illegality. Alternatively, he says, first, that the agreement is voidable by reason of an innocent misrepresentation made by the defendant that the premises had not been used for residential purposes since Dec. 31, 1938 ; secondly, that the agreement was entered into on a mutual D mistake of fact respecting such user ; and, thirdly, that there was an implied term or warranty in the agreement that he could use the premises for professional purposes and that the warranty has been broken.

[His Lordship stated the facts and found as a fact that the defendant knew that the premises had been used for residential purposes in 1939 and that he had informed the plaintiff that they had not been so used when negotiating the E lease. His Lordship proceeded] : I am now in a position to consider the question of law which arise in this case, and I shall take first the issue of illegality. It is well settled that an agreement may be unenforceable either because on the face of it it cannot be performed without breaking the law, or because, although capable of being performed legally, it was made with the object of breaking the law. The statement of claim pleads *ex facie* illegality only. It contains no allega- F tion about the object of the agreement or about the state of mind of either party. I am bound to deal with any sort of illegality, but I must first consider the case as pleaded. In my judgment, it fails. The regulation does not touch the letting of premises. It deals only with their use. The lease contains a covenant by the tenant to use the premises for professional purposes and not otherwise. Though positive in form, this is really a negative covenant. It should more correctly G be phrased as a covenant not to use the premises otherwise than for professional purposes. Counsel for the plaintiff rightly concedes that it cannot be construed as imposing any obligation on the tenant to use the premises at all. The plaintiff can legally perform all his obligations under the agreement. He can get no benefit from it, because he could not, assuming the prohibition in the regulation to be absolute, enter into occupation, but that is immaterial.

H This is enough to dispose of the point, but, since the prohibition is not absolute, it is unnecessary to take quite such a legalistic view of the position. The regulation forbids non-residential user without the consent of the authority. There would be nothing remarkable in a man taking a lease in this form if he had previously satisfied himself that consent would be granted or if he was willing to take the risk of its refusal. The agreement would be *ex facie* illegal only if expressly or impliedly it required the tenant to enter into occupation without first obtaining consent to professional user.

Counsel for the plaintiff argues alternatively that, if the agreement could be performed lawfully, the covenant as to user is at least clear evidence that the parties contemplated an unlawful performance. That is to say, they contemplated that the premises should be used for professional purposes and that would be an unlawful use. The object of the agreement was, therefore, unlawful, and it is immaterial, counsel for the plaintiff argues, whether the parties appreciated that their object was unlawful. Thus, he says, there is no need to investigate the state of mind of either the plaintiff or the defendant. He can establish that the agreement had an illegal object from the document itself and without going outside his pleading. The fallacy in this argument is in the assertion that the covenant by itself shows that the parties contemplated an unlawful performance. It might if the prohibition were absolute, but, as I have pointed out, it is consistent with the hypothesis that the parties intended first to obtain the consent of the local authority. Whether or not they had such an intention can be shown only by extraneous evidence. The covenant by itself proves nothing. I am not accepting the view that, when the agreement is one which can be performed lawfully, it does not matter that the parties may not have intended to break the law if their object or intended mode of performance is in fact illegal. Such authority as there is suggests the contrary: see *per* BLACKBURN, J. (L.R. Q.B. 208), delivering the judgment of the court in *Waugh* v. *Morris* (1). But I need not determine that point.

Before I consider the other issues raised on the pleadings, it is convenient that I should complete what I have to say on illegality. I am satisfied that the defendant knew that his use of 9, Mansfield Street, was a breach of the law. Since he was using it illegally throughout 1946 without attempting to regularise his position by applying for the council's consent, I infer that he had no intention of making the application. Doubtless he thought that the risk of refusal was greater than the risk of discovery. When at the end of 1946 he decided to sublet part of the premises for office accommodation, I am satisfied that he did not intend that either he or the plaintiff should apply for the council's consent. If he had, he would not have deceived the plaintiff about the position. Accordingly, when he granted the tenancy he expected and intended that the premises demised would be used by the tenant for an illegal purpose. It is, I suppose, notorious that a higher rent is obtainable for premises of this class if let for offices than if the user is restricted to dwelling.

The relevant principle of law is expressed by the Court of Appeal in *Alexander* v. *Rayson* (2) as follows ([1936] 1 K.B. 182):

> "But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject-matter for an unlawful purpose . . . In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it."

Counsel for the defendant submits that I ought not in the circumstances of this case to apply this principle at all. Subject to this objection, which I shall consider later, he distinguishes it in three ways. First, he says that there is here no question of the defendant himself using the demised premises illegally. The only person who could use them is the plaintiff. This is a distinction of form, but not, I think of substance. If both parties intend to use the subject-matter illegally, it is clear that the agreement is enforceable by neither. If one party intends to use the subject-matter illegally, it is clear that the agreement is not enforceable by him. If one party intends that the other should use the subject-matter illegally, I think that it is a logical and necessary extension of the principle that the agreement should be unenforceable by the first party. The plaintiff in this case is the innocent instrument through which the defendant sought to effect his intention that the law should be broken, and the defendant's position is, therefore, no better than if he were using the subject-matter himself. Secondly, it is said that all that is shown against the defendant is an intention to break

the law and that is not enough to attract the principle : see *Alexander* v. *Rayson* (2) ([1936] 1 K.B. 189). I do not think that this is a case of mere intention. The granting of the lease which permitted only professional use was itself an overt step in carrying out the illegal intention which the defendant had already formed. Indeed, when the defendant, having deceived the plaintiff, had granted him the lease, there was nothing left for him to do. The breach of the law would
A follow naturally the steps he had taken. There was more than an intent to break the law, there was an attempt to break it, and the fact that the attempt was frustrated, because before the premises were actually used the council discovered the position, is immaterial. Thirdly, the defendant says that on May 22 the council consented, in effect if not in form, to the plaintiff's professional use of the premises, and, accordingly, the lease can be enforced by the defendant after
B that date. I think that this plea fails. I doubt that the council's resolution legalises the professional use of the premises, but, assuming that it does, what has to be considered in the application of this principle is not whether the premises can legally be used for the purpose contemplated, but whether the defendant's conduct has been such as to disentitle him from obtaining the aid of the court to enforce the agreement to his own advantage. The agreement was part of the
C illegal scheme conceived by the defendant. It succeeded to this extent, as is clear from the minute of the meeting of the appropriate committee of the council on May 22, that, if the committee had not considered the plaintiff as being in actual occupation by reason of a *bona fide* error, they would not have given him any relief. To allow the defendant to take advantage of a consent obtained in those circumstances would give him a profit from his own wrong,
D but, in truth, neither success nor failure of the scheme matters. Neither would atone for the fact that it was conceived in wrongdoing. That is what matters and what debars the defendant from invoking the aid of the court.

I turn now to the objection that I ought not to be considering any illegality except that which is pleaded. I accept the submission of counsel for the defendant that the illegality which I have found depends on the knowledge or intention
E of the defendant, that this is not pleaded, and that it ought to have been pleaded if it was to be relied on. Counsel then cites *North-Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.* (3). That case authorises, I think, four propositions : first, that where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not ; secondly, that where, as here, the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that
F it has an illegal object should not be admitted unless the circumstances relied on are pleaded ; thirdly, that where unpleaded facts, which, taken by themselves, show an illegal object, have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it ; but, fourthly, that where the court is satisfied that all
G the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not. The last proposition is the most important for the purpose of this case and I think that it fairly synthesises the relevant *dicta*. The court must pronounce on the transaction if, in the words of VISCOUNT HALDANE, L.C. ([1914] A.C. 469), the " case has been completely presented ", or, in LORD
H MOULTON's words (*ibid.*, 476) : " the contract and its setting be fully before the court." What I have expressed as the third proposition is not so much an exception to the principle as an exemplification of it. The court must be satisfied of the illegality of the transaction. That means that it must be satisfied that it knows all the relevant facts. On any issue that is raised on the pleadings the court may safely assume that the relevant facts will be brought before it by one side or the other. Where notice of the issue is not given on the pleadings, there is a danger that that assumption may break down, and the decision in *North-*

Western Salt Co., Ltd. v. *Electrolytic Alkali Co., Ltd.* (3) is a warning against overlooking that danger. In *Rawlings* v. *General Trading Co.* (4) ([1921] 1 K.B. 645), Scrutton, L.J., treated the decision as making it clear :

> " . . . that where all the facts are before the court, and it can see clearly that it is contrary to public policy to enforce the agreement, the court should act, though the pleadings do not raise the point."

This *dictum* is in a dissenting judgment, but the point of dissent was whether the agreement in that case was in restraint of trade or not.

I must now apply these propositions to the circumstances of this case. The plaintiff called Mr. Malden [of John A. Rutter & Son, estate agents, who were acting for the defendant when he was negotiating for the lease of the premises in 1945] and the only point of his evidence was to establish that the defendant at all material times knew quite well that the premises were subject to reg. 68ca. Fraudulent misrepresentation is not pleaded. The only issue in the statement of claim to which the defendant's state of mind might relate is mutual mistake and Mr. Malden's evidence was inconsistent with the plea on that point. Nevertheless, his evidence was taken without objection. If objection had been made, I think that I should have upheld it. It was not until after his evidence, including cross-examination, had been completed that counsel for the defendant submitted that it ought not to have been received and that I ought to disregard it. That is, in effect, inviting me to ignore an illegality that has been brought to my attention. I cannot do that. When the court comes to know of an illegality, public policy requires that it should refuse any help to the wrongdoer, and public policy cannot be circumvented by the court fictitiously deeming itself not to have heard that which in truth it has heard. Things might be different if the illegality depended on evidence received after an objection made in time had been wrongly overruled, but I have not to consider that.

If the matter had been left there, I might, applying the third of the propositions which I have expressed above, have concluded that I had heard only one side of the case and have refused to act on Mr. Malden's evidence, even though unchallenged, but the defendant went into the box and dealt fully with the point. I am satisfied that I have all the relevant material before me. Indeed, it was not suggested that I had not or that there was any aspect of the point insufficiently exposed. I am satisfied that the evidence leads clearly and inevitably to the inferences I have set out above and that I must refuse to allow the defendant to enforce the tenancy agreement. Accordingly, the counterclaim, in so far as it consists of a claim for rent, fails, as it would have failed in *Alexander* v. *Rayson* (2) ([1936] 1 K.B. 191), had it been pursued. Similarly, the other claims in para. 12 of the counterclaim which depend on the terms of the lease must fail. It is agreed, and I hold, that para. 13, which claims compensation for damage done to the structure of the building during the removal of a bath, arises independently of the lease. The issues raised by that paragraph and para. 9 of the reply will be referred to an official referee for determination. The illegality does not affect the validity of the lease : see *Alexander* v. *Rayson* (2) ([1936] 1 K.B. 184), and so para. 3 of the prayer in the statement of claim fails. *Prima facie* the rent, which the plaintiff is seeking to recover, was properly paid under a valid agreement and the defendant is entitled to retain it : see *Alexander* v. *Rayson* (2) (*ibid.*, 191). The defendant's illegality prevents him from enforcing his rights under the lease, but does not by itself give any right of action to the plaintiff. If the plaintiff is to sustain his claim, he must show a good cause of action entitling him to repayment of the money either as a liquidated sum or by way of damages or equitable relief based on rescission or otherwise, and I must, therefore, resume consideration of the causes of action pleaded in the statement of claim.

I take, first, misrepresentation about the user of the premises in 1939. I find the misrepresentation proved, but it is pleaded only as innocent misrepresentation and can, therefore, lead only to the remedy of rescission. *Angel* v. *Jay* (5) clearly decides that innocent misrepresentation is not a ground for the rescission of an executed lease. I treat the decision as binding on me, and so need not consider the effect of the plaintiff's acts after the lease was executed, and, indeed, after May 15 when he discovered the truth. This claim fails. Mutual mistake of fact about the user of the premises fails also, because on the facts I have found that the mistake was not mutual. Paragraph 7 of the statement of claim pleads an implied warranty that the plaintiff could use the premises for professional purposes. The relevant principle of law was enunciated by PARKE, B. (12 M. & W. 87) in *Hart* v. *Windsor* (6) :

> " . . . there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let."

This principle, which was quoted with approval by SCRUTTON, L.J. ([1932] 1 K.B. 468) in *Bottomley* v. *Bannister* (7), has often been applied in cases where the premises are physically unfit for the purpose. I think it is equally applicable where premises are, so to speak, legally unfit. It is the business of the tenant, if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purpose for which he wants to use them, whether such fitness depends on the state of their structure or the state of the law or on any other relevant circumstances. Even if in the ordinary case of this type the law implied a warranty, it must still remain true that it is based on the presumed intention of the parties. Where, as in this case, the point is expressly dealt with and a specific representation is made during the negotiations leading to the agreement, it seems to me that the plaintiff's case must be an express collateral warranty or nothing. If the representation is made with the intention that it should be a warranty, it will be one. If it was made without such an intention, how is the intention, which is necessary for implied warranty, to be presumed ? The refusal of an express warranty would clearly negative any implication. I think that what I might call the withholding of it must have the same effect. No express warranty is pleaded here, doubtless because the plaintiff did not regard the statement as a warranty. If he had, it would be difficult to explain how, as a solicitor with a knowledge of these distinctions, he did not ask for it to be incorporated in the draft agreement he was then considering. In my judgment, the plea of implied warranty fails.

I take next the plea that the money was paid for a consideration that has failed. The money was paid because it was due under a valid lease, under which an estate passed to the plaintiff. The defendant has not broken or repudiated any covenant in the lease. The plaintiff, once implied warranty is negatived, has got all that he bargained for. He may have derived no benefit from the consideration which he got, but that is not the same thing as failing to get it. Next, there is a plea that the money was paid under a mistake of fact. This is pleaded sufficiently widely in the writ, but in the prayer of the statement of claim it is restricted to mutual mistake. During the trial I permitted an amendment to the statement of claim to enable the plaintiff to rely on unilateral mistake. The mistake relied on is the plaintiff's mistake in supposing that the premises had not been used for residential purposes since Dec. 31, 1938. I think that the plaintiff made this mistake, but I do not think that he paid the money because of it. The effect of the mistake was exhausted when the lease was made and the plaintiff made the payment because the lease compelled him to do so. The lease could be rescinded only if the mistake was mutual. Presumably the plaintiff would not contend, leaving illegality, which is irrelevant on this point, on one side, that he could escape payment of rent and at the same time hold the defendant to his obligations under the lease. But if the tenant is released from paying rent and the landlord released from his obligations, it would amount to a rescission of the lease on the ground of unilateral mistake.

If the plaintiff had known from the start the facts showing illegality, he could have resisted the first payment of rent on the same ground as that on which the counterclaim has been dismissed. It may at first sight seem odd that he should not now be allowed to recover it. It may be that, if the plaintiff had pleaded that he made the payment under the mistaken belief that the lease was enforceable by the defendant, he could have recovered it. I do not have to consider this point. It is not the mistake pleaded, and, if the necessary amendment had been asked for, I should not have allowed it. The facts necessary to support it would have involved the allegation that the defendant at the material time knew of the 1939 residence and was engaged in a deliberate attempt to defeat the law. The allegation of knowledge would almost inevitably have turned the plea of innocent misrepresentation into one of fraudulent misrepresentation. It is one of the unfortunate aspects of this case that I have been compelled, as I think, on grounds of public policy to give effect to what is tantamount to a finding of fraud against the defendant although fraud is not pleaded. In so doing I must be careful to limit myself to that which public policy requires, namely, the denial of relief to the defendant. In the matter of the relief to be granted to the plaintiff, he must be held most strictly to his pleading.

This last point is relevant also to the final plea raised by the plaintiff. This is the action of money had and received which counsel for the plaintiff invoked in wide terms, pleading that the defendant had been unjustly enriched and that it would be unconscientious of him to retain the money. Counsel relied on the passage in Lord Wright's speech ([1942] 1 All E.R. 137) in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* (8). I am not going to explore the boundaries of the action for money had and received. I do not think that any question of injustice or unconscientiousness arises in this case or that the law need fear any reproach if it refuses relief. The plaintiff can legitimately complain that he was misled by the defendant ; that is his real grievance. It was open to him to allege and, if he could, to prove that the defendant had acted fraudulently, and, if he had proved it, the law would grant him a remedy. Since he does not allege it, it would be unjust to the defendant to assume that he acted otherwise than innocently. It is never easy to decide which of two innocent men should bear a loss that has fallen on them both, for it must be remembered that, while the plaintiff has paid his rent without benefit to himself, the defendant, if the rent was repaid, would have given up without any return the use of his premises from the beginning of the lease until the plaintiff elected to claim relief. It would be inequitable, therefore, to grant the plaintiff unconditional relief. Equity will grant relief, but only on terms as to restitution with which in this case the plaintiff cannot comply. The last plea of the plaintiff's is in reality, therefore, only a plea that the well-settled principles on which relief is granted for innocent misrepresentation should be overturned, and as such it must fail.

There will be judgment for the defendant on the claim and, save as to para. 13 [referred to the Official Referee], for the plaintiff on the counterclaim.

Judgment for the defendant on the claim and for the plaintiff on the counterclaim. No order as to costs (except that costs on issue referred to the Official Referee be dealt with by him).

Solicitors : *R. Edler & Co.* (for the plaintiff) ; *Norman Hart & Mitchell* (for the defendant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

Re DUKE OF NORFOLK'S WILL TRUSTS. PUBLIC TRUSTEE *v.* INLAND REVENUE COMMISSIONERS.

[Chancery Division (Wynn-Parry, J.), October 13, 19, 1949.]

Estate Duty—Continuing annuity—Bequest of annuity for joint lives and life of survivor—Property passing on death of first of beneficiaries to die—Finance Act, 1894 (c. 30), *s.* 1; s. 2 (1) (*b*).

The Finance Act, 1894, s. 1, provides: "In the case of every person dying after the commencement of this Part of this Act, there shall . . . be levied and paid, on the principal value . . . of all property . . . which passes on the death of such person a duty, called 'estate duty' . . ."

Section 2 of that Act provides: "(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . ."

A testator, who died on Feb. 11, 1917, bequeathed to the trustees of his will an annuity to commence from his death and to continue payable during the joint lives of his brother A. and his brother's son B. and the survivor of them, and to be paid to A. during his lifetime and after his death to B. On May 18, 1947, A. died leaving B. him surviving, and the Inland Revenue Commissioners claimed estate duty in respect of the cesser of the annuity calculated on the "slice" principle under s. 2 (1) (*b*) and s. 7 (7) of the Act of 1894.

Held: estate duty was chargeable in connection with A.'s death under s. 1 in respect of the value of the continuing annuity for the life of B.; s. 1 and s. 2 (1) (*b*) were mutually exclusive; and, as the property passed under s. 1, it could not be deemed to pass under s. 2 (1) (*b*).

Re Cassel ([1927] 2 Ch. 275), *followed.*

Re Palmer ([1916] 2 Ch. 391), *explained.*

Cowley (*Earl*) v. *Inland Revenue Comrs.* ([1899] A.C. 198), *considered.*

[As to Property Passing on the Death, see HALSBURY, Hailsham Edn., Vol. 13, pp. 232-237, paras. 222-226; and for Cases, see DIGEST, Vol. 21, pp. 7-10, Nos. *21-42*.]

Cases referred to:

(1) *Re Cassel's Will Trusts*, [1946] 1 All E.R. 32; [1947] Ch. 1; 2nd Digest Supp.

(2) *Re Palmer*, [1916] 2 Ch. 391; 85 L.J.Ch. 577; 115 L.T. 57; 21 Digest 35, *220*.

(3) *Re Cassel*, [1927] 2 Ch. 275; 96 L.J.Ch. 483; 137 L.T. 785; Digest Supp.

(4) *Cowley* (*Earl*) v. *Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, *27*.

(5) *Re Northcliffe*, [1929] 1 Ch. 327; 98 L.J.Ch. 65; 140 L.T. 300; Digest Supp.

(6) *Christie* v. *Lord Advocate*, [1936] 1 All E.R. 443; [1936] A.C. 569; 105 L.J.P.C. 65; 154 L.T. 441; Digest Supp.

Adjourned Summons to determine the basis on which estate duty became payable on the death of Viscount Fitzalan.

By his will, the testator, Henry, Duke of Norfolk, *inter alia* provided a fund on trust out of the income therefrom to "pay any annuity or annuities which may be bequeathed by any codicil hereto." By a first codicil to his said will the testator bequeathed to his trustees an annuity of £3,000 to commence from the day of his death and to continue payable during the joint lives of his brother Viscount Fitzalan and his said brother's son, Henry Edmund Talbot, and during the life of the survivor of them, and he directed that his trustees should stand possessed of the said annuity on trust to pay the annuity to Viscount Fitzalan during his life on protective trusts. The testator in the same codicil further declared that after the death of Viscount Fitzalan, on certain (in the events, irrelevant) conditions, the trustees should pay the annuity to Viscount Fitzalan's said son during his life on similar protective trusts. By a second codicil the amount of the annuity was reduced to £2,000. On Feb. 11, 1917, the testator died. On May 18, 1947, Viscount Fitzalan died, and the protective trust had not operated to determine the payment to him of the annuity of £2,000. Viscount Fitzalan was survived by his son. The summons raised the question whether on the death of Viscount Fitzalan estate duty became payable (*a*) under the Finance Act, 1894, s. 1, and only on the value (calculated under s. 7 (5) of the said Act) of a continuing annuity of £2,000 for the life of the son, or (*b*) under s. 2 (1) (*b*) of the said Act on the capital value (ascertained according to s. 7 (7)) of the proportion of the testator's estate required to produce an annuity of £2,000. WYNN-PARRY, J., held that duty was payable under s. 1.

Russell, K.C., and *H. A. Rose* for the plaintiff, the Public Trustee.

J. H. Stamp for the defendants, the Inland Revenue Commissioners.

Cur. adv. vult.

October 19. **WYNN-PARRY, J.**, read the following judgment. By the first codicil to his will the late Duke of Norfolk (to whom I will refer as "the testator") bequeathed to the trustees of his will an annuity of £3,000, reduced by his second codicil to £2,000, to commence from his death and to continue payable during the joint lives of his brother, the late Viscount Fitzalan, and his brother's son, the present Viscount Fitzalan, and the survivor of them. The testator died on Feb. 11, 1917, and his brother, the late Viscount Fitzalan, died on May 18, 1947. The question raised by this summons is whether, on this death, estate duty is payable under s. 1 of the Finance Act, 1894 (to which I will refer as "the Act"), on the value of a continuing annuity of £2,000 for the life of the son, the present Viscount Fitzalan, or under s. 2 (1) of the Act on the capital value of the proportion of the testator's estate required to produce an annuity of £2,000. It is conceded on behalf of the Inland Revenue Commissioners that on the true construction of the first codicil there is created only one continuing annuity, that that annuity is property within the meaning of s. 1 of the Act, which is settled, and, therefore, that estate duty could be claimed under that section on the basis which I have mentioned, but it is argued on behalf of the commissioners that there is an alternative course open to them—that they need not levy the duty under s. 1, but may levy the duty under s. 2 (1) (*b*) of the Act as on the cesser of an interest.

There is a practice which has grown up and which, up to the present time, has prevailed in the Estate Duty Office in regard to joint or successive interests in a single annuity. This practice has been conveniently stated by ROMER, J., in *Re Cassel's Will Trusts* (1) ([1946] 1 All E.R. 34) in these words :

> "The practice may be illustrated in the following way: If an annuity of £x a year is bequeathed to A. for life, then to B. for life, then to C. for life, on the death of A. (B. and C. surviving) estate duty is charged as on the passing of property (*viz.*, a share of the annuity) and not as on the cesser of an interest. The same principle would be applied on the death of B., leaving C. surviving, and estate duty would not be levied on a cesser of interest (*i.e.*, on a capital value basis) until the death of C. The same practice is adopted where joint beneficial interests are created in one annuity. Thus, in a letter from the Estate Duty Office which is in evidence in the present case, it is stated that, as the official practice now stands, the interests of Mrs. Joshua's two daughters, which arose on the death of their mother, would be treated as being in one annuity. This practice

evidently did not prevail at the time of *Re Palmer* (2), for, had it done so, duty would not have been charged on the death of Ronald Palmer on a cesser of interest basis so far as the £3,000 annuity there under consideration was concerned. It may have sprung up as a result of some of the observations which fell from the Court of Appeal in that case ".

In this instance the Inland Revenue Commissioners desire to depart from this A practice and to be free to do so in any particular case in the future. The question is whether or not they are entitled to do so ; or, to put it in another way, is the practice rightly to be regarded only as a practice, from which, therefore, they can depart, or is the so-called practice an accurate interpretation of the legal position, in which case there can be no right to depart from it ? In these circumstances the case has, rightly I think, been described as a test case.

B So far as this court is concerned the matter is, I think, concluded against the Inland Revenue Commissioners by *Re Cassel* (3). In that case :

> " The testator bequeathed ' Brook House and contents ' and the stables held therewith, the leases of which would expire in 1995, to trustees upon trust to allow Mrs. Cassel to have the use and enjoyment thereof for life, and after her death upon the like trust for the benefit of Lady Louis C Mountbatten for life. The testator directed : ' the rent outgoings rates and taxes for the time being payable in respect of the said messuage and premises and keeping the same and the contents thereof insured against fire and burglary and in a proper state of preservation shall always be paid by my trustees out of the income of my residuary personal estate '. Mrs. Cassel, the first tenant for life of Brook House, died September 16, 1925, D and was succeeded as tenant for life by Lady Louis Mountbatten. The summons asked how the estate duty, payable on Mrs. Cassel's death in respect of the benefit of the annual expenditure on Brook House, should be borne as between Lady Louis Mountbatten and the testator's residuary estate, and how assessed ".

E RUSSELL, J., expressed the view that had he been unassisted or unimpeded by previous authority, he would have said that the case was only brought into charge under s. 1 of the Act by virtue of the provisions of s. 2. He said ([1927] 2 Ch. 279) :

> " I should have thought that where a life interest in A. ceased by A.'s death, with the result that an interest in B., which during A.'s life was F reversionary became an interest in possession, no property passed on A.'s death. A.'s interest merely ceases, no part of it is transferred to B., or passes to B. I should have thought that such a case fell directly within the provisions of s. 2 (1) (*b*), and only came within the charging s. 1 by virtue of s. 2 ".

G He then proceeded to state how, if that had been the correct view, the principal value would have been ascertained under s. 7 (7) of the Act, observing that such a method would have been in accordance with the decision of the Court of Appeal in *Re Palmer* (2). RUSSELL, J., however, was driven to the conclusion that he was prevented from holding that the case before him was not a s. 1 case but a s. 2 case by the decision of the House of Lords in *Earl Cowley* v. *Inland Revenue* H *Comrs.* (4). He then considered what was the property which passed on Mrs. Cassel's death, and held that it was the benefit of the annual sum payable under the special clause. He said (*ibid.*, 280) :

> " In substance, the trustees are bound for a period of time to apply an annual sum of varying amount for the benefit of the person for the time being entitled under the will to the enjoyment of Brook House and contents. What passes is the right to enjoy the benefit of that annual sum. That is the property which passed on the death of Mrs. Cassel ".

The learned judge then dealt with the question how the principal value of that property was to be ascertained under s. 7 (5), as supplemented by sub-s. (8). He pointed out (*ibid.*, 281) that the machinery provided by these sub-sections did not exactly fit the case before him, but observed: "Nevertheless the machinery must be made to fit, and I think it can be made to fit". He then stated the basis on which the principal value was to be ascertained.

In following and applying the decision of Russell, J., in *Re Cassel* (3) I am not embarrassed by the decision of the Court of Appeal in *Re Palmer* (2), because, as is pointed out by Russell, J., the question between s. 1 and s. 2 of the Act was not before the court. He said (*ibid.*, 282):

> "The Inland Revenue was not represented. The question was simply this—how as between the persons interested in residue was the burden of the estate duty already paid as on a s. 2 case to be borne? The hands of the court were tied to that extent. The case had to be treated on the footing of s. 2 being the section to be considered, and not s. 1".

In the later case of *Re Northcliffe* (5), which concerned in substance aliquot shares in a residuary trust fund, Maugham, J., described *Re Cassel* (3) as a very exceptional case. It is plain, however, from a consideration of his judgment that the respect in which Maugham, J., regarded the case as being exceptional was the difficulty which arose, after Russell, J., had been driven to hold that the case was a s. 1 case, in applying the machinery under s. 7, sub-ss. (5) and (8), by reason of the fluctuating nature of the annual sum involved. Again, in the still later case of *Christie* v. *Lord Advocate* (6), Lord Russell of Killowen (as he had then become) referred to his decision in *Re Cassel* (3) and made clear that the respect in which he regarded that case as being exceptional was as I have indicated. I cannot do better than quote his own words ([1936] 1 All E.R. 447):

> "... *Re Cassel* (3) was cited. That was indeed a very special case, in which, it having been decided that the *Cowley* case (4) compelled me to treat it as falling within s. 1 of the Act, it became apparent that no capital sum could be earmarked as producing either actually or notionally an annual sum which necessarily varied in amount within elastic limits. I indicated, as best I could, the lines upon which a valuation might be fairly reached. The case is certainly no authority justifying a departure from the principles laid down in the *Cowley* case (4) where, as here, a tenant for life of an aliquot share of settled property dies, and is succeeded by others who immediately enter into the enjoyment of the income of the same share. In this connection I would refer to the remarks of Maugham, J., in the case of *Re Northcliffe* (5) ([1929] 1 Ch. 331) which deal with the death of a tenant for life of an aliquot share of residue, and which appear to me relevant to a consideration of the present case".

In *Earl Cowley* v. *Inland Revenue Comrs.* (4) it is made plain that ss. 1 and 2 are mutually exclusive and that s. 2 is to be invoked only if s. 1 by itself cannot be invoked.

Counsel for the Inland Revenue Commissioners contended that the principle emerging from *Earl Cowley* v. *Inland Revenue Comrs.* (4) is only to be applied where each section operated on the same property, and relied on the circumstance that in that case the property consisted of an equity of redemption, whereas in the present case the property caught by s. 1 was the benefit of the continuing annuity while the property fastened on by s. 2 was the whole of the testator's estate. I do not so read the opinions of their Lordships. In my judgment, on the particular death in question, the question has first to be put in regard to this annuity: Does property pass? If it does, then *cadit quaestio*, the duty will be payable under s. 1. One is not entitled to go on and ask whether, in regard to this annuity, property could be deemed to pass under s. 2 as on the cesser of an interest. The determination that property passes under s. 1 makes it needless to consider and prevents one from considering whether in regard to the same annuity an interest has ceased under s. 2.

In my judgment, the argument advanced by counsel for the Inland Revenue Commissioners was in effect considered and rejected by RUSSELL, J., in *Re Cassel* (3). The choice in that case was the same as that before the court in this case. As s. 1 applied, the property subject to duty was the benefit of the annual sum payable under the special clause, calculated by reference to the estimated market value thereof, and the person liable for the duty was Lady Louis Mountbatten as the person entitled to the benefit of the special clause after the death of Mrs. Cassel. On the other hand, if s. 2 (1) (*b*) had applied, wholly different considerations would have arisen. The calculation would have been made under s. 7 (7) on what has been called the " slice " theory to ascertain the value of the benefit arising from the cessor of Mrs. Cassel's interest, and subject to the question of interest the estate duty would have been payable out of the residuary estate. Yet RUSSELL, J., felt no difficulty in applying the principle underlying *Earl Cowley* v. *Inland Revenue Comrs.* (4).

For these reasons, I am of opinion that, so far as this court is concerned, the question is concluded by the decision of RUSSELL, J., in *Re Cassel* (3), and I, therefore, propose, in answer to question 1 of the summons, to declare that on the death of the late Viscount Fitzalan estate duty became payable under s. 1 of the Act, and only on the value of a continuing annuity for the life of his son, the present viscount.

Order accordingly. The parties had entered into an agreement as to the payment of costs.

Solicitors : *Nicholl, Manisty, Few & Co.* (for the plaintiff) ; *Solicitor of Inland Revenue.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

PICKETT *v.* FESQ.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 21, 1949.]

Currency Control—Export—Deliberate offence—Penalty—Dismissal of charge under Probation of Offenders Act, 1907 (*c.* 17), *s.* 1 (1)—*Exchange Control Act,* 1947 (*c.* 14), *s.* 22 (1).

The respondent, an elderly woman of small means, was apprehended by a customs officer when attempting to leave England taking with her 85 Bank of England notes of £1 denomination. She said that she knew she was permitted only to take £5 sterling out of the country, but that " it was a matter of life and death " to her to take the money to Italy to her son who had no work and was in debt. Before the justices, the respondent pleaded Guilty to a charge of having attempted to take out of the country the notes, the export of which was prohibited by the Exchange Control Act, 1947, s. 22 (1). The justices dismissed the information under the Probation of Offenders Act, 1907, s. 1 (1) on the ground that there existed the extenuating circumstances set out in that sub-section. On appeal,

HELD : the respondent's deliberate offence against the Exchange Control Act, 1947, could not be regarded otherwise than as serious and any sympathy which might be felt for her could not be permitted to obscure its gravity, and, therefore, the case would be remitted to the justices with an intimation that it was their duty to impose a penalty.

[As to Dismissal or Conditional Discharge under the Probation of Offenders Act, 1907, see HALSBURY, Hailsham Edn., Vol. 21, pp. 622, 623, para. 1081 ; and for Cases, see DIGEST, Vol. 33, p. 364, Nos. *738-740*.]

Case referred to :

(1) *Phillips* v. *Evans*, [1896] 1 Q.B. 305 ; 65 L.J.M.C. 101 ; 74 L.T. 314 ; 60 J.P. 120 ; 39 Digest 246, *296*.

Case Stated by Sussex justices.

At a court of summary jurisdiction sitting at Lewes an information was preferred by the appellant, a chief preventive officer of Customs and Excise, that the respondent was knowingly concerned at Newhaven in a fraudulent attempt at evasion of the laws and restrictions of the customs relating to certain prohibited goods, namely, 85 £1 Bank of England notes, the export of which was prohibited by the Exchange Control Act, 1947, s. 22 (1), contrary to the Customs Consolidation Act, 1876, s. 186, whereby and by force of the said s. 186, the Finance Act, 1935, s. 15, and the Finance Act, 1943, s. 12, the respondent had for such offence forfeited the sum of £255 for which the Commissioners of Customs and Excise had elected to sue. The information was heard on May 10, 1949, when the respondent pleaded Guilty and the following facts were admitted. On Apr. 26, 1949, the respondent, who was then about to leave England for Dieppe, was asked by a customs officer how much currency was in her possession, and she declared £5 in English money, 400 Italian lira and 300 French francs. On examination of the respondent's bag, it was discovered that underneath some clothing there was a sealed envelope containing 85 £1 Bank of England notes. When asked for an explanation the respondent stated : " I was aware I could only take out £5. I did not declare the £85 as I knew they would not let me take it out. It was a matter of life and death for me to take the money to Italy. It was intended for my son out there." The 85 £1 notes were seized. The respondent, an elderly woman, was a person of good character. Her total income was about £60 a year and she was supported by one of her sons. The respondent had intended to obtain traveller's cheques, but, owing to her bad health and forgetfulness, she had omitted to do so. The justices were of the opinion that having regard to the character, antecedents, age, health and mental condition of the respondent, it was inexpedient to inflict any punishment, and, having regard to the extenuating circumstances, they dismissed the information under the Probation of Offenders Act, 1907, s. 1 (1). The Divisional Court now allowed the appeal and remitted the case to the justices with the direction to convict and inflict a penalty.

H. L. Parker for the appellant.
The respondent did not appear.

LORD GODDARD, C.J. : By the Summary Jurisdiction Act, 1879, s. 16 :

> " If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the court of summary jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment,—(1) The court, without proceeding to conviction, may dismiss the information, and . . . may order the person charged to pay such damages, not exceeding 40*s*., and such costs . . . as the court think reasonable . . . "

Many cases were brought before this court where justices had purported to exercise the power given them by that section, and this court corrected the decision of justices where a case had been dismissed as trivial when it could not properly be so described. A well-known case on that point is *Phillips* v. *Evans* (1). There are many other cases, all of which will be found in Stone's Justices

MANUAL, and I need not refer to them. This court has always exercised the power of correcting a wrong decision and ordering the justices to inflict a penalty if they think the circumstances of the case are such that the justices ought not to have dealt with it under s. 16.

Section 16 of the Act of 1879, was repealed by the Probation of Offenders Act, 1907, s. 10, and replaced by s. 1 of the later Act. Section 1 provided :

A

> " (1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punish-
> B ment or any other than a nominal punishment, or that it is expedient to release the offender on probation . . . "

the court may dismiss the information or discharge the offender conditionally.

The justices in the present case purported to act under s. 1 (1). Since Aug. 1, 1949, s. 1 (1) of the Act of 1907 has been replaced by the Criminal Justice Act, 1948, s. 7, which provides :

C

> " (1) Where a court by or before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, the court may make an order
> D discharging him absolutely . . . "

The main difference between that section and the Probation of Offenders Act, 1907, s. 1, in effect is that under the latter provision the court could refrain from convicting. The illogical situation which used to arise has often been pointed out in this court, and Parliament has altered the law now by providing that there must be a conviction, but the defendant can be discharged without any penalty.
E That Act was not, however, in force at the time when the justices heard this case, and they purported to act under the Probation of Offenders Act, 1907.

The respondent, who was an elderly woman and for whom in many respects I dare say a good deal of sympathy can be felt, committed an offence against the Exchange Control Act, 1947. That Act was passed to protect sterling in the serious financial situation which exists in this country at the present time, and
F it is of the utmost importance that its provisions should be observed by all citizens, that, if they do not observe the stringent provisions of the Act, they should be brought before the courts, and that the courts should deal resolutely and properly with them. If circumstances of sympathy are to be introduced into a matter of this sort, it would in a great number of cases be possible for the court to overlook deliberate offences against the Act. In my judgment,
G such a thing would not be right.

If a person commits an offence against this statute, a statute for the breach of the provisions of which very heavy penalties have been provided by Parliament, the offence is serious. It is almost impossible to suppose that there could be circumstances which would justify a court in treating such an offence as trivial. It may not generally be known how rigid and far reaching are the pro-
H visions of the Exchange Control Act, 1947. It has been pointed out by high authority that if a person plays a game of cards in this country with a person who does not live in one of the scheduled territories—as, for instance, an American—and at the end of the game he hands him 5*s.* which he has lost to him, he is really committing an offence. I do not suppose that in those circumstances anybody would say that a serious offence had been committed or that there would be likely to be a prosecution, but the Act is wide enough to cover such a case. Parliament has thought fit in its wisdom to treat this matter as one of very grave

public importance, and offences under this Act cannot be regarded as other than grave and serious.

The respondent was charged with taking out of the country 85 £1 notes, the export of which was prohibited by s. 22 (1) of the Act of 1947. I suppose everybody by this time knows that it is an offence to take out of this country in £1 notes more than £5 sterling. She does not pretend that she was doing this in ignorance, because when she was stopped and this money was found concealed in her bag, she said : " I did not declare the £85 as I knew they would not let me take it out ". That is an admission of a deliberate offence. She was smuggling this money out of the country after having taken precautions which she thought would deceive the customs officials. The fact that it was a matter of life or death to her to take the money to Italy, as she says, simply means she had every reason to commit the offence if she could.

If she had applied, she might have got a licence to take something in some form. Whether the Treasury or the Bank of England would have given her permission, I do not know. She did not apply for it. She knew that it was unlikely that she would get permission to take out as much as £85, and she decided to smuggle it. There are many matters in this story which the justices have set out which show that she is a person who is deserving of some sympathy, perhaps, but sympathy cannot be allowed to gloss an offence of this gravity. The penalty for which she was liable was £255, three times the value of the money which she was smuggling, and, in addition, the money is forfeited. Furthermore, she was also liable to imprisonment for a period not exceeding two years. That being the offence, the justices say that because she was a woman of good character—and very often people who commit currency offences are in what we may call the " police-court " sense, people of good character, *i.e.*, there are no convictions against them—they dealt with her as they did.

There is no ground whatever for saying that this is a case in which the justices would be justified in applying the Probation of Offenders Act, 1907, s. 1. They say that they were of the opinion that it was inexpedient to inflict any punishment " having regard to the character, antecedents, age, health and mental condition of the respondent ". As far as mental condition is concerned, the mental condition of the woman is shown by what she did and said. She knew quite well she was committing an offence. There is no ground for saying she did not know what she was doing. There was nothing in her health, antecedents or age which could possibly mitigate the offence. The result is that the case must go back to the justices with an intimation that it is their duty to impose a penalty. It is not for this court to indicate what penalty is to be inflicted, but that a penalty must be inflicted, and that that penalty must not be a nominal one, there is no doubt. For these reasons, this appeal must be allowed.

CROOM-JOHNSON, J. : I agree.

LYNSKEY, J. : I agree.

Appeal allowed. Case remitted with a direction that it was the duty of the justices to impose a penalty. No order as to costs was asked for.

Solicitor : *Solicitor, H.M. Customs and Excise* (for the appellant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

WOODSIDE HOUSE (WIMBLEDON), LTD. *v.* HUTCHINSON.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning, L.J. and Hodson, J.), October 18, 19, 1949.]

Rent Restriction—Transfer of liability for rates—" Corresponding reduction " in rent—Relevant date—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c*. 17), *s*. 2 (3), *proviso*.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (3) : " Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which a dwelling-house is held are on the whole less favourable to the tenant than the previous terms, the rent shall be deemed to be increased . . . Provided that, for the purposes of this section, the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent."

In 1942 the landlords let to the tenant a flat, to which the Rent and Mortgage Restrictions Act, 1939, applied, for a term of three years at a rent of £180 a year, the landlord undertaking to pay the rates which then amounted to £41 a year. On Oct. 1, 1946, the landlords transferred to the tenant the burden of paying the rates which, at that date, amounted to £61.

HELD : the " corresponding reduction " in the rent under the proviso to s. 2 (3) was a reduction by the amount of the rates payable at the date of the transfer of the liability to the tenant, *viz*., Oct. 1, 1946.

Per curiam : the landlords could, on giving notice to the tenant, adjust the rent to a sum equivalent to that of the standard rent less the amount of rates payable in 1939.

Observations as to the terms and contents of the notice to the tenant.

[FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 2 (3), see HALSBURY'S STATUTES, Vol. 10, p. 334.]

APPEAL by the landlords from an order of HIS HONOUR JUDGE HANCOCK sitting at Kingston-on-Thames County Court, dated May 12, 1949, declaring that, the landlords having transferred the liability for the payment of rates to the tenant, the " corresponding reduction " in the rent provided by the proviso to s. 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, had to be ascertained at the end of each year so that the net adjusted rent plus the actual rates for the year amounted to the standard rent. The Court of Appeal now allowed the appeal, holding that the amount of the reduction of the rent ought to correspond to that of the rates payable at the date of the transfer of the liability to the tenant. They further held, however, that the landlords were not thereby prevented from subsequently increasing the rent to the net standard rent on notice being given by them to the tenant of their intention so to do. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

L. A. Blundell for the landlords.
Neil Lawson for the tenant.

SIR RAYMOND EVERSHED, M.R. : This appeal has raised a question of what, under the provisions of s. 2 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is meant by the phrase " a corresponding reduction ". The case is peculiar, and it may well be that it has only arisen because when the landlords attempted to serve notices for permitted increases in the rent they failed to observe the appropriate forms which have to be used, with the result that no permitted increases had successfully been added to the standard rent when the dispute between the parties which is now before the court arose.

The case relates to a flat, 15, Woodside House, Wimbledon, of which the tenant at all material times was a Mr. Hutchinson. In 1942 the parties entered into a contract of tenancy for three years. The contractual rent was £180 per annum, and the landlords undertook to pay both the general rate and the water rate. That tenancy expired in June, 1945, and since that date the tenant has remained in possession and has enjoyed the privileges of a statutory tenant. It is conceded that, although the contractual rent was £180 per annum, the standard rent, which had to be fixed in relation to the year 1939, was and is £190 per annum. In October, 1946, the landlords transferred to the tenant the burden of paying the rates which they had hitherto undertaken and discharged. The amount of the rates payable in respect of this flat in 1939 was approximately £41. As a result of variations both in the poundage and in the valuation the amount of rates payable in respect of the flat between 1939 to 1946 first of all fell and then rose substantially beyond the figure at which it stood in 1939, so that when the transfer was made the amount of the rates payable was approximately £61. The notice to the tenant of the proposed transfer is contained in a letter of Sept. 2, 1946, which reads :

> " Dear Sir, As from Oct. 1 we shall be pleased if you will kindly pay the following net amount of rent per month instead of as at present. We feel that it will be mutually more convenient for you to pay this way as the rates are likely to fluctuate from year to year. Arrangements will be made whereby the council and the water board will make their own collection ".

In the left-hand bottom corner of the letter appears the following : " Monthly £13 8*s.* 0*d.*", equivalent to a total of £160 16*s.* 0*d.* It is now conceded that on no view was that figure right, but the letter at least made it clear that from Oct. 1, 1946, the tenant would pay the rates as demanded from time to time, and that the amount which the landlords demanded for rent was to be adjusted in some way. The question of principle, and the main question argued in this court, has been : In what way ?

It is the argument of the landlords that under s. 2 (3) of the Act of 1920 one deducts from the rent then payable the amount of the rates as they stood when the standard rent was fixed. The result in the present case would be to leave a net rent payable to the landlords of £149 per annum. Counsel for the tenant has argued primarily that the amount of the " corresponding reduction ", to use the formula in the sub-section, is the actual amount of the rates payable in respect of the flat at the date when the transfer of the obligation is effected, *i.e.*, here, £61, which would leave, not £149, but only £129, payable to the landlords by way of rent. On either view the tenant would suffer thereafter if the rates were increased, for the landlords would no longer be concerned with them. If the rates fell the tenant would get the benefit, but the rent would remain at the figure either of £149 or of £129, and would not be liable to further variation in accordance with any variation of the amount of the rates. There was, however, a third view which counsel for the tenant took, I gather somewhat lightly, in the court below, and has taken even more lightly in this court. It commended itself, however, to the learned county court judge. That was that s. 2 (3) does not contemplate a single " corresponding reduction " of the rent which is then fixed for all time, but contemplates a sort of sliding scale. According to this view one has to look each year at the amount of the rates in fact leviable and then make an adjustment so that the net adjusted rent plus the actual rates for that year always comes to the standard rent. The effect of that view, which would be administratively highly inconvenient, would be of all the ways put forward most disadvantageous for the landlords, for, whatever happened to the rates, the tenant would pay £190 all told for rent and rates. If the rates went up the tenant would not be further out of pocket, but the landlords would suffer the loss. If the rates went down, it is true, the landlords would get rather more rent, but in what are the more probable circumstances today, namely, that rates should increase, the landlord would have no means of serving any notice of increase or otherwise recouping themselves.

The point is not by any means free from difficulty and I hope I am not in any way being disrespectful to the learned county court judge when I say that I cannot accept his view of the operation of this proviso. For reasons which I have already indicated it would be inconvenient, and I think unjust. Nor does A it seem to me that the language of the sub-section requires or justifies such a conclusion. Section 2 (3) provides :

> " Any transfer to a tenant of any burden or liability previously borne by the landlord shall, for the purposes of this Act, be treated as an alteration of rent, and where, as the result of such a transfer, the terms on which a dwelling-house is held are on the whole less favourable to the tenant than B the previous terms, the rent shall be deemed to be increased . . . Provided that, for the purposes of this section, the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent ".

Counsel for the landlords contended that when regard is had to the proposed adjustment of rent in this case, it cannot be said that the terms on which the C dwelling-house has been held after the transfer was made were on the whole less favourable to the tenant than the previous terms, and that, therefore, we need not concern ourselves with the proviso. I cannot accept that. The transfer to the tenant of the burden of rates, which might well go up, allowing for whatever adjustment was suggested by the landlords in regard to the rent and assuming in their favour that the " terms " should include the amount of the rent, still D left the terms on the whole less favourable. It becomes necessary, therefore, in order to save the landlords from the illegality which might otherwise ensue, to have regard to the proviso, and to find a reduction made in the rent corresponding to the liability for rates which is transferred from the landlords to the tenant, for that, I think, is the meaning of the proviso. Counsel for the landlords has suggested that " corresponding reduction " ought to carry one back to the original E fixing of the standard rent, and that what is contemplated is that the so-called equilibrium which was established when the standard rent was originally agreed between the parties should be preserved or restored. Expressing it a little more precisely in reference to this case, the figure of £190 must be taken to be the sum arrived at between two parties under their contract after bringing into account various considerations, all the benefits and advantages of one kind and F another, and allowing for the circumstance that the landlords were under an obligation to pay out for rates the sum then standing at £41. Counsel for the landlords says that the preservation of that equilibrium will only be achieved if such an adjustment in the rent is now made that the landlords will be left, after disembarrassing themselves of the obligation to pay rates, with the same amount in pocket as they originally had, representing the consideration for the G other and remaining advantages that the tenant will continue to enjoy. He says that if what was intended by this paragraph was a reduction equal to or equivalent to the amount of the rates at the time of the transfer, Parliament would have said that and would have used the words " equivalent to " and not the word " corresponding ".

In my judgment, that argument, attractive though it is, is not justified. It H requires an over-elaboration of what I regard as a perfectly simple piece of English. I think this proviso means simply that where one transfers at a particular point of time a burden hitherto borne by a landlord to the tenant, namely, the liability to rates, then one does not get into the difficulties of the sub-section provided one reduces the rent by a sum equivalent to the then existing liability for rates which is being transferred. I, therefore, read this proviso as meaning that when a transfer of rates is made, an unlawful increase of rent is avoided by reducing the rent by a sum equivalent to the liability for rates as it then stands. It thereafter becomes a matter for the tenant to bear any increase in rates and enjoy any reduction. The landlord is left with a net rent which is entirely unaffected by rates and is arrived at by deducting from the rent then payable the then amount of the rates. Put arithmetically for the purposes of this case, the result is £190 minus £61.

The result appears at first sight to involve a possible hardship on the landlords for this reason. From now on, as they are not paying the rates, it is plain that they cannot serve a notice of increase of rent because of an increase in the rates. If the result was that they were left with a maximum net rent—apart from any other considerations which would entitle them under the other sub-sections to increase—of £129, it would appear that they were in the unhappy position of suffering a serious and perpetual loss as a result of their failing to give in proper form the notices of increase which they had attempted to give. Counsel for the tenant has conceded, however, that, although it is no longer open to the landlords to serve a notice in standard form increasing the standard rent by reference to increases in rates, it is still, under the general terms and intention of the Act, open to them, provided they do it in the proper way, to bring up the rent receivable by them to the standard rent if it has fallen below the standard rent. In the course of the argument examples were given. One was a case where a landlord allowed a tenant for compassionate reasons to have a flat at a very much smaller rent than the standard rent. In that sort of case, if there was a transfer of the burden of rates it would be absurd if the result was that the landlord could never bring up the rent to the standard rent. It would, of course, have to be adjusted in that case, as in this, by reason of the fact that the landlord's original liability to pay rates (a liability comprehended in this case in the standard rent figure of £190) had been transferred to the tenant. The result, therefore, is that the landlord can say: "I am entitled, without giving any statutory form of notice, as in other similar cases, to increase the rent and ask you to pay an amount equivalent to the standard rent". The £190 must now be reduced for this purpose by that part of it which represented, when the standard rent was arrived at, the obligation to pay rates. Again, putting it in figures, the £190 standard rent becomes now, for this purpose, a net standard rent of £190 minus £41, namely, £149. So that, though the operation of transfer, in order to satisfy s. 2 (3), must reduce the rent to £129, it is open to the landlords, on proper steps being taken, to bring it up to £149.

That leaves the question whether a demand to raise the rent to £149 has already been made. In my judgment there is nothing in the correspondence which contains such a demand. The demand obviously must, though not following any statutory or precise form, make it plain what it is the landlords are demanding. Where, as here, there has been a transfer of the burden of paying rates it is obviously right that the tenant, who may not in the ordinary way have any knowledge of what the rates were when the standard rent was fixed, should be fully informed. He must, therefore, be given a proper opportunity (by being given the necessary explanation of what the landlords intend) to verify, and, if he so desires, to challenge the figures. Over and above all that, it is essential in such a demand as that which the landlords want to make, that they should make it clear that they are proposing to increase the rent. That is where these early letters fall down. It is true that by certain calculations it is possible to arrive at a figure which would equal or exceed the sum which the landlords can demand, but, if I am right in the view which I have taken of s. 2 (3) and of the landlords' present rights against the tenant, they can increase the rent up to the standard, the rent having in the circumstances fallen below the standard. Anything which does not make it reasonably clear that that is what the landlords are intending to do is not such a demand as fairly constitutes the sort of notice which I have indicated.

For these reasons I take a different view from that which appealed to the county court judge on the construction of this paragraph, but at the same time I reject the argument of the landlords. I think the main argument which counsel for the tenant has put forward here and below is right, and it is for that construction that I myself decide.

DENNING, L.J. : When this flat was let to the tenant, the landlords, by arrangement with the local authority, were paying the rates. In 1945 and 1946 the landlords purported to serve notices of increases of rent on account of increases of rates. Those notices, as it was eventually conceded, were invalid and so were inoperative to increase the rent, but, at a time when the landlords thought they were valid, they made an arrangement with the local authorities whereby the landlords no longer paid the rates and threw the liability on to the tenant. The tenant acquiesced, so that the liability for rates was transferred from the landlords to the tenant. If the landlords had validly increased the rent to the full permitted amount, there is no doubt that the new rent payable after the transfer would be found by deducting the amount of the current rates from the amount of the current rent. It has been found, however, that the landlords never validly increased the rent, so that only the standard rent of £190 was payable. In those circumstances it seems to me that the new rent payable immediately after the transfer must be found by deducting the amount of the current rates from the amount of the rent lawfully payable at the time of the transfer, namely, the standard rent. Any other view would enable a landlord to escape from all the requirements relating to notices of increase.

This does not mean that the landlord is confined for ever to the lower rent. Just as, before the transfer, he could have increased the rent by giving valid notices of increase, so also, after the transfer, he can raise it to the amount permitted by the Act, that is, the 1939 rent less the 1939 rates, but he must make a demand which shows that he is raising it to the permitted amount. Although this demand does not require to be in the form of a statutory notice of increase, it must afford substantially the same information. An error or omission due to a *bona fide* mistake may not defeat the validity of the demand, but that there must be some demand I have no doubt. In cases where there is no question of transfer and a landlord wishes to raise a low rent payable by a statutory tenant up to the standard rent, he must clearly make a demand before he has any right to the standard rent, and the demand must show on what ground it is made. So here, after the transfer, there must be a demand for the increase showing on what ground it is being made.

HODSON, J. : I agree with the construction placed by the Master of the Rolls on s. 2 (3) of the Act of 1920. The construction contended for by the landlords is, in my opinion, a strained construction which it would be wrong to adopt. That is really decisive of the question which has been raised and argued on this appeal. It follows that the judgment of the learned county court judge must be varied in that the construction which he puts on the proviso to the sub-section is rejected by this court. I agree also with the remarks which have fallen from my Lord as to what may happen in the future. The only question which is left for consideration here is the form of the order and also the question of costs.

Declaration of the county court varied by substituting a declaration that the reduction of rent proper to be made pursuant to the proviso to s. 2 (3) *of the Act of* 1920 *ought to correspond with the actual amount of the general and water rates payable in respect of the period current at the date of the transfer of the liability to the tenant, viz., Oct.* 1, 1946. *Appeal allowed. No order as to costs.*

Solicitors: *G. & G. Keith* (for the landlords); *Edwin Coe & Calder Woods* (for the tenant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CARTER *v.* MACE.

[King's Bench Division (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 21, 1949.]

Carriage—Carriage of goods—Carriage for hire—Failure to comply with conditions of B licence—Aiding and abetting—Liability of hirer—Road and Rail Traffic Act, 1933 (*c.* 53), *s.* 9 (1).

The appellant carried on the business of a transport clearing house, which consisted of obtaining orders for the transport of goods and employing lorry owners to carry the goods. On Jan. 27, 1949, he hired a lorry for the transport of some copper cathodes. The lorry owner held a B licence in respect of the vehicle, but the carriage of copper cathodes for hire or reward was not permitted by the conditions subject to which the licence was held, and the appellant failed to inquire of the lorry owner whether he was legally entitled to carry the goods. The appellant was summoned for aiding and abetting the commission of an offence by the lorry owner against the Road and Rail Traffic Act, 1933, s. 9 (1).

Held: it was the appellant's duty to see that the persons whose vehicles he hired could lawfully carry out the contracts which he had made, and, in hiring a lorry from an owner whose licence did not entitle him to carry the goods in question, the appellant was guilty of aiding and abetting that lorry owner in the commission of an offence against s. 9 (1) of the Act of 1933.

[For the Road and Rail Traffic Act, 1933, s. 9 (1), see HALSBURY'S STATUTES, Vol. 26, p. 881.]

Case Stated by Bootle justices.

The appellant, who carried on the business of a transport clearing house, on Jan. 27, 1949, hired a lorry to carry some copper cathodes which he had contracted to transport. The lorry owner held a B (limited carrier's) licence in respect of the vehicle under pt. I of the Road and Rail Traffic Act, 1933, and the carriage of copper cathodes for hire or reward was not authorised by the conditions subject to which the licence was held. The appellant knew that all B licences had conditions attached to them in regard to the carriage of goods for hire or reward and his usual practice was to ask any person offering him transport what goods he could carry, but on this occasion he failed to do so. At a court of summary jurisdiction at Bootle an information was preferred by the respondent, on behalf of the Licensing Authority for Goods Vehicles for the North-Western Traffic Area, charging the appellant with aiding and abetting the lorry owner in the commission of an offence against s. 9 (1) of the Act of 1933 (which provides that any person who fails to comply with any condition of a licence held by him is guilty of an offence under pt. I of the Act). The information was heard on May 2, 1949. The appellant contended that there was no duty on him to ensure that a person offering to carry goods in a goods vehicle for hire or reward was legally entitled under his licence to carry the goods offered to him, and that he was entitled to assume that the licence holder would observe the conditions of his licence. The justices found the appellant Guilty of the offence charged, and his appeal from their decision was now dismissed by the Divisional Court.

J. E. Jones for the appellant.

H. L. Parker for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county borough of Bootle before whom the appellant was summoned for aiding and abetting the commission of an offence against the Road and Rail Traffic Act, 1933, s. 9 (1), by one James Bennett Alderson. Alderson had a licence (granted to him under pt. I of the Act) which entitled him to operate a goods vehicle, but which was subject to certain conditions in regard to the distance within which he could operate and the materials which he could carry for hire or reward. His licence (a B, or limited carrier's, licence) entitled him to carry building plant and building material for a certain distance, market produce within a certain distance, and solid fuel within seven miles of base. The appellant carries on a business which is described as a clearing house for transport. That means that he executes orders from people who want goods transported. He does not transport A the goods himself, but he gets other people to do so. He engages the lorry owners to do the work and pays them rather less than he receives.

If the appellant undertakes this class of business, he must see that contracts are carried out in a legal manner, and that the people whom he employs can lawfully carry out the contracts which he has made. In the present case, he employed Alderson to carry copper cathodes which he, the appellant, had under- B taken to transport for someone else, but Alderson's licence did not entitle him to carry copper cathodes. In these circumstances, it seems to me perfectly clear that the appellant was aiding and abetting the commission of the offence by Alderson. The appellant carries on his business in the ordinary way in a perfectly satisfactory manner, but in this case he made a slip. The justices have not treated it as a serious case. They only fined him £3 and £2 2*s*. costs. They C were right in so doing, and this appeal must be dismissed with costs.

CROOM-JOHNSON, J.: I agree.

LYNSKEY, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Holt, Beever & Kinsey*, agents for *E. A. Whitehead*, Liverpool (for the appellant); *Treasury Solicitor* (for the respondent).

D

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

E

SMITH *v.* MORRIS MOTORS, LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 19, 1949.]

Factory—Dangerous machinery—Fencing—Maintenance of fencing—Safety guard F *not kept in position by workman—Accident—Section under which summons to be issued—Factories Act*, 1937 (*c.* 67), *s.* 14 (1), *s.* 16.

Justices—Case stated—Joining of third party—Liability for costs—Factories Act, 1937 (*c.* 67), *s.* 137 (1).

The appellant, a factory inspector, laid an information against the first respondents alleging that a dangerous machine in their factory was not G properly fenced and that, accordingly, they had contravened the provisions of the Factories Act, 1937, s. 14 (1). It was proved that the machine, a power press, was fitted with a guard which rendered it safe so long as the guard was in what was called the "down" position, but, if the guard was in the "up" position, the machine became dangerous. The second respondent, H., was operating the press with the guard in the "up" position H when an accident occurred and he was injured. The first respondents contended that H. was the actual offender and they laid an information against him under s. 137 (1). At the hearing it was submitted by the first respondents that no offence had been committed under s. 14 (1) because they had complied with that sub-section by providing an adequate guard, and, therefore, the proceedings should have been brought under s. 16, which required that all fencing and other safeguards fitted to dangerous machinery must be maintained and kept constantly in position, except when any part of the machine was necessarily exposed for examination. The justices upheld the submission and dismissed both informations.

Held : (i) that the summons had been rightly issued under s. 14 (1) which imposed a duty on owners and occupiers of factories containing dangerous machinery to see that it was securely fenced at the material time, *viz.*, the time when the accident occurred, whereas s. 16 did not create any new offence but merely defined the extent of the obligation, and introduced exceptions from the provisions, of s. 14 available as a defence to those within such exceptions.

(ii) where a person was brought in as a third party, as the second respondent had been in the present case, he must be joined as a party to the appeal proceedings in the Divisional Court, but he need not appear there unless he wished to take part in the argument. If he did so, he might become liable to pay costs.

[As to Fencing of Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131; and for Cases, see DIGEST, 2nd Supplement, pp. 29-32, Nos. *68f-81c*.]

Cases referred to :

(1) *Massey* v. *Lingwood* (*S. & P.*), *Ltd.*, (1945), 89 Sol. Jo. 316; 2nd Digest Supp.

(2) *Davis* v. *Reeves & Sons, Ltd.*, (1942), unrep.

(3) *Nash* v. *High Duty Alloys, Ltd.*, [1947] 1 All E.R. 363 ; [1947] K.B. 377 ; 2nd Digest Supp.

Case Stated by Oxford City Justices.

On Mar. 17, 1949, the justices dismissed an information laid by the appellant, Barbara Tuke Smith, an inspector of factories, alleging that the first respondents, Morris Motors, Ltd., had contravened the Factories Act, 1937, s. 14 (1), in failing to fence securely a piece of dangerous machinery, namely, a power press, in their factory. The justices also dismissed an information laid by the first respondents against the second respondent, Kenneth Charles Harris, under s. 137 (1) of the Act, alleging that he was the actual offender because he operated the machine with the safeguard in a dangerous position. The Divisional Court now allowed the appeal and remitted the case to the justices for hearing with an intimation that the submissions made to them on behalf of the first respondents were erroneous in law The facts and the relevant sections of the Factories Act, 1937, appear in the judgment of Lord Goddard, C.J.

MacKenna for the appellant.
Winn for the first respondents.
E. V. Falk for the second respondent.

LORD GODDARD, C.J. : This is a Case stated by Oxford city justices before whom the first respondents, Morris Motors, Ltd., were prosecuted for a breach of the Factories Act, 1937, s. 14 (1). It is unnecessary to say more about the breach than that the allegation was that a certain machine had not been securely fenced whereby personal injury was caused to the second respondent, a workman named Harris, who was brought into the proceedings before the justices under the Factories Act, 1937, s. 137 (1), it being alleged by the first respondents that he was actually responsible for the accident. At the hearing it was proved that the machine was fitted with a movable fence. If the fence had been in the " down " position in which it ought to have been when the second respondent was carrying out the operation which led to the accident, the machine was perfectly safe. If, however, the guard was in what was called the " up " or " raised " position, the machine was capable of causing injury. Therefore, it was a dangerous machine.

Counsel for the first respondents took the point that, if the justices were satisfied that an adequate fence was provided, he was in a position to say that the proceedings ought to have been taken under the Factories Act, 1937, s. 16, and not under s. 14. He invited the appellant to amend the summons and put forward an information under s. 16. The appellant, however, elected to stand on the information which was before the court under s. 14. The justices found in favour of the first respondents, holding that the machine was securely fenced, and, apparently, taking the view that the proceedings might have been begun under s. 16.

Section 14 provides:

> " Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced . . . "

That is the obligation. Section 16 provides :

> " All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act shall be of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use, except when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary, and all such conditions as may be specified in regulations made by the Secretary of State are complied with."

This point has really been decided, so far as this court is concerned, by the decision in *Massey* v. *Lingwood* (*S. & P.*), *Ltd.* (1) heard by HUMPHREYS, J., and CROOM-JOHNSON, J., on June 21, 1945. The effect of that decision was that the material time at which to ascertain whether the machine was securely fenced was when the accident took place. If there was no fencing on the machinery at that time, an offence was committed. HUMPHREYS, J., said in his judgment that s. 16 gives a sort of definition, an explanation, of what is meant by " securely fenced ", and he treated the section as indicating that the fencing must be substantial, that it must be properly maintained, and that it must be kept in position, and he said unless those things were done the machine could not be said to be securely fenced. Section 16 also excepts from the provisions of s. 14 the case where

> " . . . such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary, and all such conditions as may be specified in regulations made by the Secretary of State are complied with."

So s. 16 does two things. While it does not create a new offence, it indicates the circumstances relating to the fencing which will make it secure fencing, and at the same time provides an exception which will afford a defence to an employer if he can bring himself within the words. Much the same decision had been given by this court on Apr. 21, 1942, three years previously, in the unreported case of *Davis* v. *Reeves & Sons, Ltd.* (2).

Those cases are binding on this court and show that an employer cannot say : " Your real case against me is that I did not maintain or keep in position, and so you ought to have proceeded under s. 16." The court decided that, if the machine was not fenced at the time of the accident, an offence was committed under s. 14.

Counsel for the first respondents invited us to say that the Court of Appeal had taken a different view in *Nash* v. *High Duty Alloys, Ltd.* (3). On looking at that case, we do not think that the Court of Appeal did take a different view or that that case is in any way in conflict with the two decisions to which I have referred. What the Court of Appeal were considering there was whether or not the employers were entitled to rely on the exception created in s. 16, and they held on the facts of the case that the employers were not entitled to rely on that section. That case in no way conflicts with the decisions in *Massey* v. *Lingwood (S. & P.), Ltd.* (1) and *Davis* v. *Reeves & Sons, Ltd.* (2). We are bound by those decisions, and no argument has convinced me that there would be any reason to differ from them, even if we could do so.

The decision of the justices was:

> "We were of opinion that the contentions of the respondents, Morris Motors, Ltd., were correct, and we, accordingly, dismissed the summons against them, and the summons brought by the respondents, Morris Motors, Ltd., against the respondent, Harris, was withdrawn by our leave."

The result of the view which I have formed is that the case will have to go back to the justices for them to hear the defence of the first respondents and the proceedings between the first respondents and the second respondent under s. 137 with an intimation that the contentions of the first respondents were not correct.

CROOM-JOHNSON, J. : I am of the same opinion. The argument on behalf of the first respondents is that s. 16 creates an obligation on the occupiers of factories, separate, distinct, and beyond those provided in ss. 12, 13, and 14. Against that it is said that s. 16 is directed to an explanation of the statutory obligations which are imposed on the occupiers of factories by those three sections. I have, I hope, applied my mind with sufficient independence again today to the arguments which have been addressed to us, I will not say untrammelled by, but having regard to, the judgment of Humphreys, J., in *Massey* v. *Lingwood (S. & P.), Ltd.* (1) in which I concurred. I have come to the conclusion that I was right in concurring in that judgment, and that the judgment of Humphreys, J., was right, and, accordingly, that the argument which was taken before the justices on the hearing of the complaint in this case was not one which they ought to have accepted. I agree with the judgment which is proposed by my Lord.

LYNSKEY, J. : I agree. It seems to me that s. 14 of the Factories Act, 1937, is the section which imposes the duty of having fencing. It provides :

> "Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced . . ."

If that section stood alone, it would mean that there was an obligation on the employer at all times and in all circumstances to have his machinery properly fenced. Section 16, however, applies not only to s. 14 but also as to fencing called for under ss. 12 and 13. The effect of s. 16 is to indicate how and when the duty imposed under ss. 12, 13 and 14 is to be carried out. That duty is to be carried out, so far as the provision of fencing is concerned, by providing fencing of substantial construction, by constantly maintaining the fencing, which means keeping it in good and efficient working order and repair and also keeping the fencing in position while the parts required to be fenced or guarded are in motion or use, with certain exceptions. The effect really is that s. 14 imposes the duty and s. 16 defines its extent and introduces exceptions as to when it need not be carried out. In these circumstances it seems to me that the decision of this court in *Massey* v. *Lingwood (S. & P.), Ltd.* (1) was right, and that where a summons is issued for breach of fencing regulations it is properly issued under s. 14, because it is s. 14 which imposes the duty. It is not necessary, or, indeed, possible, to lay an information under s. 16. For those reasons, in my view, the appeal should be allowed.

After the court had refused an application by counsel for the appellant that the respondents should pay the costs of the appeal, counsel for the second respondent asked the court to consider the question of the second respondent's costs.

LORD GODDARD, C.J.: We have not ordered the second respondent to pay any costs, and I do not suppose we should have ordered him to pay the costs of the appellant, but I am afraid we cannot give him any costs. The second respondent need not have come to this court. It should be understood in these third party proceedings, that, if the third party—I use that expression for convenience—feels that he does not want to argue the point because at the moment no order has been made against him, he need not appear. The reason why he must be joined as a party to the proceedings is that, if the case is sent back, as this case is being sent back, and the third party has not been brought here, the proceedings between the first respondent and the third party would be at an end, and that would be unfair to the first respondent. That is why we said the third party must be made a party to the case and served, but there is no reason why he should incur expense in coming here unless he wants to take part in the argument. If he does, he may become liable for costs.

Appeal allowed. Case remitted. No order as to costs.

Solicitors: *The Solicitor, Ministry of Labour and National Service* (for the appellant); *Preston, Lane-Claypon & Co.*, agents for *Herbert & Gowers & Co.*, Oxford (for the first respondents); *W. H. Thompson* (for the second respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

MITCHELL *v.* BARNES AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning, L.J., and Hodson, J.), October 19, 20, 1949.]

Rent Restriction—Standard rent—Apportionment—Period of decontrol—Conversion of premises—House let for dwelling-house purposes from 1929 *to* 1935, *but for business purposes from* 1935 *to* 1946*—Subsequent conversion into residential flats—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (*c.* 17), *s.* 12 (1) (*a*) (*as amended by the Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 71), *s.* 3 (1), *sched. I*), *s.* 12 (3).

From 1929 to 1935 a house was let as a whole as a dwelling-house at a rent of £80 a year, but from 1935 to 1946 it was let for business purposes. On regaining possession in 1946 the landlord converted the house into two residential flats by putting in some wooden partitions to divide the two top floors from the bottom floor and by installing some new baths and sinks, but the county court judge found that there was no change of identity. In 1947 the two flats were let, one at a rent of £156 a year and the other at £130 a year. The tenants contended that, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*a*), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, the standard rent of the whole house was £80 a year, and that, to determine the rents of the two flats, the standard rent of the whole house should be apportioned under s. 12 (3) of the Act of 1920.

HELD: (i) the standard rent of the whole house, within the meaning of s. 12 (1) (*a*) of the Act of 1920, as amended by the Act of 1939, was £80 a year, the rent at which the house was last let as a dwelling-house before Sept. 1, 1939, *i.e.*, from 1929 to 1935; the intervening period of decontrol did not have the effect of taking the house out of the scope of the Rent Restriction so as to enable the landlord to charge what he liked on a new letting; and the fact that on Sept. 1, 1939, the house was let for business purposes was as irrelevant as if it was empty or was let furnished at that time.

Davies v. *Warwick* ([1943] 1 All E.R. 309), *applied.*

Cole v. *Harris* ([1945] 2 All E.R. 146), *distinguished.*

(ii) whether the original dwelling-house had lost its identity as a result of substantial structural alterations was a question of fact for the county court judge, and, as he had found that there was no change of identity, the tenants were entitled to an apportionment of the standard rent, under s. 12 (3) of the Act of 1920.

Dictum of ATKIN, L.J., in *Sinclair* v. *Powell* ([1922] 1 K.B. 407), *followed.*

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-314, para. 369, and 1948 Supp. ; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. *7117-7132*, and Supplements.]

Cases referred to :

(1) *Cole* v. *Harris*, [1945] 2 All E.R. 146 ; [1945] K.B. 474 ; 114 L.J.K.B. 481 ; 173 L.T. 50 ; 2nd Digest Supp.

(2) *Upsons, Ltd.* v. *Herne*, [1946] 2 All E.R. 309 ; [1946] K.B. 591 ; 115 L.J.K.B. 433 ; 175 L.T. 350 ; 2nd Digest Supp.

(3) *Lindop* v. *Quaife*, [1949] 1 All E.R. 456.

(4) *Macmillan & Co., Ltd.* v. *Rees*, [1946] 1 All E.R. 675 ; 175 L.T. 86 ; 2nd Digest Supp.

(5) *Davies* v. *Warwick*, [1943] 1 All E.R. 309 ; [1943] K.B. 329 ; 112 L.J.K.B. 245 ; 169 L.T. 130 ; 2nd Digest Supp.

(6) *Sinclair* v. *Powell*, [1922] 1 K.B. 393 ; 91 L.J.K.B. 220 ; 126 L.T. 210 ; 31 Digest 565, *7129.*

(7) *Haskins* v. *Lewis*, [1931] 2 K.B. 1 ; 100 L.J.K.B. 180 ; 144 L.T. 378 ; 95 J.P. 57 ; Digest Supp.

(8) *Phillips* v. *Barnett*, [1922] 1 K.B. 222 ; 91 L.J.K.B. 198 ; 126 L.T. 173 ; 31 Digest 566, *7132.*

APPEAL by the landlord from an order of His Honour JUDGE PRATT, at Torquay County Court, dated June 7, 1949, apportioning the standard rent of a dwelling-house which had been converted into two flats.

The house, which had been let as a dwelling-house from 1929 to 1935 at a rent of £80 a year, was let for business purposes from 1935 to 1946. The two flats were first let in 1947. The tenants contended that the standard rent of the whole house was £80 a year and that this figure should be apportioned as between the two flats. The landlord contended (*a*) that the user of the premises for business purposes disentitled the tenants from seeking to found the standard rent on the rent payable before that user, and (*b*) that, as a result of the conversion of the premises, the original dwelling-house had lost its identity and the standard rent of the flats was the rent at which they were let in 1947. The county court judge found that there was no change of identity, and held that the standard rent of the house was £80 a year, and he apportioned that rent between the two flats. The landlord's appeal from the order of the county court judge was now dismissed by the Court of Appeal. The facts appear in the judgment of DENNING, L.J.

Alan Campbell for the landlord (the plaintiff).

Raymond Stock for the tenants (the defendants).

SIR RAYMOND EVERSHED, M.R. : I will ask DENNING, L.J., to give the first judgment.

DENNING, L.J. : The question is what is the standard rents of two flats at 25, Totnes Road, Paignton. That house was let as a whole in 1929 as a dwelling-house at a rent of £80 a year. After being so occupied for six years it was let for business purposes to the local authority. The local authority remained in occupation for business purposes from 1935 until 1946, when they gave up possession. During their occupation they had altered the premises a good deal, cutting new doorways and so forth, but when the landlord got possession he restored the walls and did other work, as a result of which the house was able to be occupied by two separate households in the form of two flats. In 1947 these two flats were let, one at £156 a year and the other at £130 a year. The landlord says that those are the proper figures for the standard rents of the flats, whereas the tenants say that the standard rent of the whole house is £80, being the A figure at which it was let in 1929, and that that figure must be apportioned between the two flats, £44 for one and £36 for the other.

To decide this question, it is simplest in the first place to consider the house as not having had any structural alterations at all, but as being let in two separate parts. What would the position be then ? The first limb of s. 12 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended B by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, defines the standard rent as " the rent at which the dwelling-house was let on Sept. 1, 1939 ", that is, of course, let as a dwelling-house. This house was not so let, so that first limb of the definition does not apply. I pause here to say that *Cole* v. *Harris* (1) was decided on that first limb. The flat there in question was let on Sept. 1, 1939, at 22*s.* a week, and that is ample ground for the decision C in that case, but it does not apply here because this house was not let as a dwelling-house on Sept. 1, 1939. It was then being used for business purposes. The second limb of the definition of " standard rent " in s. 12 (1) (*a*) of the Act of 1920, as amended, is :

> " . . . where the dwelling-house was not let on that date, the rent at D which it was last let before that date . . . "

Were these flats let before Sept. 1, 1939, as a dwelling-house ? The answer is : Yes, they were let from 1929 to 1935 at £80 a year. It is true that the house was then let as one dwelling-house, but that makes no difference because s. 12 (3) of the Act of 1920 provides that where it is necessary to apportion an apportionment should be made, and that means that, when a house previously let as a E whole is subsequently let in two parts, one must apportion. Any other view would mean that a landlord could, after Sept. 1, 1939, divide his house into two parts and charge what he liked for each. The Act clearly forbids any such thing. Apart from the question of conversion into two flats, therefore, the standard rent of this whole dwelling-house as at Sept. 1, 1939, was £80 a year, and to obtain the standard rent of the two separate parts that rent would have to be apportioned. F All the cases, such as *Upsons, Ltd.* v. *Herne* (2) and *Lindop* v. *Quaife* (3) proceed on this principle.

It was suggested that as the premises had been used in the intervening time for business purposes we could not look back to the 1929-35 letting. Reference was made to *Macmillan & Co., Ltd.* v. *Rees* (4), where the point was left open. It seems to me, however, that the fact that on Sept. 1, 1939, the house was let G for business purposes is just as irrelevant as if it was empty or was let furnished at that time. An intervening period of decontrol does not enable a landlord to charge what he likes on a new letting. He is confined to the rent payable previously for dwelling purposes : see *Davis* v. *Warwick* (5).

This brings me, therefore, to the question of the conversion of the house into flats. If there was a substantial structural alteration so that the old dwelling-H house changed its identity and two new dwelling-houses were in fact created, then, when the old dwelling-house ceased to exist, its standard rent would have fallen with it. On this point the county court judge went to see the premises himself. He found that all the dilapidations which had happened during the local authority's time had been made good, and then, to convert the house into two flats, some wooden partitions had been erected so as to divide the top two floors from the bottom floor and some new baths and sinks had been put in. He found that there was no change of identity. The question of change of identity is primarily an inference to be drawn by the county court judge. If he has directed himself properly—as in this case he did—we can only interfere if it is quite plain that he has come to the wrong conclusion. It would be clearly unjust if a landlord, by making one or two comparatively small alterations—putting in a window, or a door, or a sink—could thereby get rid of the standard rent altogether. On the other hand, if he does a great deal of structural work he ought to be able to charge a new rent. It is a question of degree, and one primarily for the county court judge. It seems to me that in this case we cannot say he was so clearly wrong that we can interfere. A

It is to be noticed that for any improvement or structural alteration the landlord is entitled, under s. 2 (1) (*a*) of the Act of 1920, as amended by s. 7 (1) of the Act of 1933 and s. 3 (1) and sched. I of the Act of 1939, to an increase in the rent, and that is the real remedy in a case when the house retains its identity. B It has been pointed out to us that the Landlord and Tenant (Rent Control) Act, 1949, s. 1, enables a rent tribunal to fix a reasonable rent in respect of post-1939 new lettings. This means that, even where there is a change of identity, the landlord cannot charge what he likes, with the result that the court need not shrink so much from a finding of change of identity as they have done in the past, but that does not afford ground on which we can interfere in this case. C In cases, as here, when it is found that there has been no change of identity, there is a standard rent properly applicable to the flats by way of apportionment, and the Act of 1949 does not apply. In my view, therefore, the appeal should fail.

HODSON, J. : It has been argued that the county court judge was wrong in coming to the conclusion that the dwelling-house concerned in this D case had not been substantially changed in identity by virtue of the reconstruction which admittedly took place. It has been said that in a number of cases this court has treated that question, which has often arisen, as a question of law. I think it is clear from the authorities to which our attention has been drawn that that is not so, and that the Court of Appeal has consistently treated the question whether reconstruction has changed the identity of a house as a question E of fact. It is only where the court has come to the conclusion that there was no evidence on which the county court judge could come to the conclusion at which he arrived, or that he had misdirected himself, that this court has interfered. In the present case, the county court judge paid attention to the details of the work which had been done—in particular, that part of the work which might be termed constructional work as opposed to decorative work, and he F himself went to look at the premises and then arrived at the conclusion that the amount expended on the work and the work itself were not such as to make it a case in which it could be said that the identity of the premises had been substantially changed. In directing himself on that matter he referred to the decision of the Court of Appeal in *Sinclair* v. *Powell* (6), particularly to the well-known passage from the judgment of ATKIN, L.J., which has been followed G in a number of cases of this class. ATKIN, L.J., said ([1922] 1 K.B. 407) :

> " If the part of a house was not let as a separate dwelling in August, 1914, you may show that substantially in the form in which it now is it existed and was let as part of a whole house or a larger tenement in August, 1914, and can get the rent apportioned. But if the part has been substantially altered so that you cannot fairly predicate of it that in its present form H it was, as part of a whole, let in 1914, I do not think that apportionment is possible ".

The learned judge having applied that language as he did, it seems to me impossible to say that this court can interfere by reason of misdirection, any more than it can on the ground that there was no evidence on which the learned county court judge could come to the conclusion at which he arrived. That seems to be the question of fact on which this case was fought.

On the question of law, it has been argued that, the house having been used for business purposes, it was taken out of the Rent Restrictions Acts and the flats must be held to be outside their scope when it comes to assessing their standard rents under the Acts again in 1947. That matter has been considered by the Court of Appeal in *Macmillan & Co., Ltd.* v. *Rees* (4), in which EVERSHED, J., read the judgment, and left that question open. As it was A left open, an opportunity was given to counsel in this case to argue that the effect of the user of the premises as business premises was to take the premises out of the Acts altogether for the purpose of determining the standard rent, but I think I am right in saying that counsel was unable to put forward either any authority for the proposition, or any substantial argument which ought to be accepted, to drive the court away from the ordinary construction of s. 12 (1) (*a*) B of the Act of 1920 (as amended by s. 3 (1) and sched. I of the Act of 1939), which directs how the standard rent is to be arrived at. In this case the house had been let as a dwelling-house in 1929, and it seems to me to be the plain meaning of the section that it was necessary to go back to that letting to ascertain the standard rent in 1947 and that it matters not whether the house has come out of the Act since 1929, whether by reason of letting for business purposes, C or of being empty or occupied by the owner, or for any other reason.

A third point which was urged has been, I think, taken in this court before in reliance on *Cole* v. *Harris* (1). I have nothing to add to what has been said about *Cole* v. *Harris* (1) except that in that case there was in fact a letting of the flat on Sept. 1, 1939, and that excluded apportionment. In the present case there was no letting on Sept. 1, 1939, the critical date, and it is, therefore, D necessary under s. 12 (3) of the Act of 1920 to go back to find out what the earlier rent was at which the house was let as a dwelling-house. For these reasons, in my opinion, the appeal should be dismissed.

SIR RAYMOND EVERSHED, M.R. : I agree that this appeal fails, and I will only add a few observations on the point made that user of the premises for business purposes disables the tenant from seeking to found the standard E rent on the rent payable on the occasion of the letting as a dwelling-house prior to that user and prior also to Sept. 1, 1939. Reference has been made by DENNING, L.J., and HODSON, J., to *Macmillan and Co., Ltd.* v. *Rees* (4), and it appears from the judgment of this court in that case that the point was then advanced and was regarded as a point of substance, for I see that, in delivering F the judgment of the court, I used this language ([1946] 1 All E.R. 676) :

> " Thirdly, it was argued that if there was a user, and therefore a letting, of the premises as a dwelling-house for the first four months of the term of the 1938 lease, the premises were, during the remainder of that term, indubitably used exclusively for business purposes : with the result that the premises wholly ceased to exist as a dwelling-house and that the land- G lord accordingly cannot now identify the premises which were let as a dwelling-house to the appellant in 1940 with the subject-matter of any letting as a dwelling-house prior to their user for business premises, and cannot therefore have recourse to any such earlier letting for the purposes of fixing the standard rent ".

It is to be observed that the last sentence introduces precisely the standard rent H point. At the end of the judgment I say (*ibid.*, 678) :

> " The question was stated by GREER, L.J. ([1931] 2 K.B. 16), in *Haskins* v. *Lewis* (7) to be undecided : and it remains undecided today ".

If, then, there was this gap in the judicial interpretation of these Acts, it must now be taken to be filled.

In *Phillips* v. *Barnett* (8) three dwelling-houses were converted into something structurally quite different, namely, one factory. I do not think anything in the judgments in that case throws any light on this point. The observation of Greer, L.J., in *Haskins* v. *Lewis* (7) is merely a statement that the point is undecided. I am satisfied from the argument that there is no justification for imposing merely as a result of user for business premises such an exclusion of prior letting of the same premises as a dwelling-house. Section 12 (1) (*a*) of the Act of 1920 (as amended) seems to me, as a matter of English, to negative any such view. I have failed to find any ground for saying that user for business purposes alone, indeed any of the events which may for the time being remove a building from the ambit of the Acts, have the effect suggested. For these reasons and the reasons which have been stated by my brethren, both on this point and on *Cole* v. *Harris* (1) and the other points argued, I think that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Church, Rendell,* agents for *Eastley & Co.*, Paignton (for the plaintiff); *Le Brasseur & Oakley,* agents for *Almy & Thomas,* Torquay (for the defendants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

MINISTRY OF AGRICULTURE AND FISHERIES *v.* MATTHEWS.

[King's Bench Division (Cassels, J.), October 13, 14, 1949.]

Emergency Legislation—Requisition—Land—Agreement purporting to grant tenancy—Lease or licence—Powers of competent authority—Defence (General) Regulations, 1939 (*S.R. & O.*, 1939, *No.* 927) (*as amended*), *reg.* 51 (1), (2).

Estoppel—Agreement by Minister of Agriculture purporting to grant tenancy of requisitioned land—Granting of lease ultra vires the grantor—Defence (General) Regulations, 1939 (*S.R. & O.*, 1939, *No.* 927) (*as amended*), *reg.* 51 (1), (2).

By the Defence (General) Regulations, 1939, reg. 51 (1), a competent authority "may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land."

By reg. 51 (2): "While any land is in the possession of a competent authority by virtue of this regulation . . . the land may . . . be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient . . . and the competent authority so far as appears to it to be necessary or expedient in connection with the taking of possession . . . (*a*) may do, or authorise persons using the land as aforesaid to do, in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest".

On Dec. 1, 1942, the Minister of Agriculture and Fisheries took possession of agricultural land under reg. 51. On Oct. 11, 1944, the defendant went into possession of the land and an agreement in writing with the Minister with reference thereto was concluded on Oct. 24, 1945, applying certain provisions of the Agricultural Holdings Act, 1923, including s. 25 (relating to notice to quit), but excluding *inter alia* s. 23 (relating to the extension of tenancies under leases for a term of years). The agreement recited that possession of the land had been taken by the Minister under the Defence Regulations and proceeded: "The Minister agrees to let and the tenant agrees to take the land" for the duration of the war period (as defined by statute) and thereafter for three years. The words "rent", "additional rent", "during his tenancy", "good tenantable repair", "shall not assign or under-let" and "non-payment of rent" were also used in the agreement.

Held: (i) the Minister of Agriculture and Fisheries, having, under the Defence (General) Regulations, 1939, no interest in the land apart from possession, could grant only the right of occupation of the land, and, therefore, the agreement was not a lease but an agreement for leave and licence to use the land for the termination of which no notice, or a reasonable notice, was required.

Dictum of Denning, L.J., in *Lewisham Borough Council* v. *Roberts* ([1949] 1 All E.R. 824) and *Southgate Borough Council* v. *Watson* ([1944] 1 All E.R. 603), *applied.*

(ii) the Ministry were not estopped from denying that the agreement created a tenancy since to hold otherwise would enable the Minister by estoppel to do an act which was *ultra vires.*

(iii) since the creation of a tenancy, as an act *ultra vires* the Minister, was no act in law, the occupier could not claim damages from the Ministry for a breach of contract in conferring on the occupier only a licence instead of the tenancy which the agreement purported to grant.

[**EDITORIAL NOTE.** The Minister of Agriculture and Fisheries was first appointed by virtue of the Ministry of Agriculture and Fisheries Act, 1919 (c. 91), s. 1, and by that section he was constituted a corporation sole, succeeding on appointment to the benefit of all deeds, contracts, things in action, etc., formerly vested in the Board of Agriculture. It was, therefore, the Minister, and not the Ministry, who was constituted a "competent authority" by reg. 49 of the Regulations of 1939, and it was he who took action in the present case under reg. 51. By the Crown Proceedings Act, 1947 (c. 44), s. 17, however, it was provided that proceedings by or against the Crown should be instituted by or against the appropriate government department selected from a list published by the Treasury in the London Gazette on Dec. 5, 1947, which included the Ministry of Agriculture and Fisheries. By s. 39 of and sched. II to the Act of 1947, the Board of Agriculture Act, 1889 (c. 30), s. 6 (1), was amended so as to revoke the power of suing and being sued formerly vested in the Board of Agriculture. The present action was, therefore, brought by the Ministry, although the Minister had made the agreement with the defendant.

As to Leases and Licences for the use of Real Property, see HALSBURY, Hailsham Edn., Vol. 20, pp. 8-12, paras. 5 and 6; and for Cases, see DIGEST, Vol. 30, pp. 500-503, Nos. *1584-1619.*

For the Defence (General) Regulations, 1939, reg. 51, see Butterworth's Emergency Legislation Service, Title 13, pp. 215-217.]

Cases referred to:

(1) *Lewisham Borough Council* v. *Roberts*, [1949] 1 All E.R. 815; *sub. nom. Roberts* v. *Lewisham Borough Council*, [1949] L.J.R. 1318.

(2) *Southgate Borough Council* v. *Watson*, [1944] 1 All E.R. 603; [1944] K.B. 541; 113 L.J.K.B. 337; 171 L.T. 26; 108 J.P. 207; 2nd Digest Supp.

(3) *Erith Corpn.* v. *Holder*, [1949] 1 All E.R. 389; [1949] 2 K.B. 46; 113 J.P. 154.

(4) *Lewisham Borough Council* v. *Maloney*, [1947] 2 All E.R. 36; [1948] 1 K.B. 50; [1947] L.J.R. 991; 177 L.T. 175; 111 J.P. 454; 2nd Digest Supp.

(5) *Ministry of Agriculture and Fisheries* v. *Hunkin*, (1948) (unrep.).

Action by the plaintiffs, the Ministry of Agriculture and Fisheries, for (*a*) possession of land for the occupation of which by the defendant the parties had contracted; and (*b*) the payment of £496 11*s.* 7*d.* claimed to be owed by the defendant under the agreement and for damages for trespass. COUNTERCLAIM for damages for breach of contract.

The Minister of Agriculture and Fisheries by his agent had requisitioned agricultural land of nearly 300 acres in extent under the Defence (General) Regulations, 1939, reg. 51, and had entered into an agreement with the defendant under which the defendant entered into occupation of the land for a term, which, under the agreement and statutory enactments applied thereby, came to an end on Oct. 11, 1948. The defendant contended that the agreement was a lease, and, alternatively, that the plaintiffs were estopped from denying that it was a lease, and that in either case he (the defendant) was entitled to one year's notice to determine the tenancy under the Agricultural Holdings Act, 1923, s. 25, read in conjunction with the Validation of War-Time Leases Act, 1944, s. 1. Alternatively, he counter-claimed for damages for breach of contract on the ground that the Minister had failed to convey the tenancy which the agreement purported to grant. CASSELS, J., gave judgment for the plaintiffs on the action and counterclaim.

Upjohn, K.C., and *Wingate-Saul* for the plaintiffs.
L. A. Blundell for the defendant.

CASSELS, J.: This is an action by the Ministry of Agriculture and Fisheries to recover possession of land occupied by the defendant, Mr. William West Matthews, in the parish of Oxborough in the county of Norfolk, and a claim is made for certain moneys in connection therewith. There have been no witnesses on either side and no correspondence has been put before the court. The facts are not in dispute. The conclusion depends on the view that the court may take of the arguments of counsel. The agricultural land involved in this action extends to just on 300 acres. In 1942 it had not been cultivated according to the principles of good husbandry, and on Dec. 1, with the consent of the Minister of Agriculture, the Norfolk Agricultural Committee took possession. They retained it until Oct. 11, 1944, when, under the Defence (General) Regulations, 1939, reg. 51, the Minister let the defendant into possession. Regulation 51 provides :

> "(1) A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land. (2) While any land is in the possession of a competent authority by virtue of this regulation . . . the land may, notwithstanding any restriction imposed on the use thereof (whether by any Act or other instrument or otherwise), be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community ; and the competent authority, so far as appears to it to be necessary or expedient in connection with the taking of possession . . . (*a*) may do, or authorise persons using the land as aforesaid to do, in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest . . . (5) A competent authority may, to such extent and subject to such restrictions as it thinks proper, delegate all or any of its functions under paras. (1) to (3) of this regulation to any specified persons or class of persons."

The agreement under which the defendant took possession on Oct. 11, 1944, was dated more than a year later, *viz.*, Oct. 24, 1945, and was made between the

Minister of Agriculture and Fisheries and the defendant. Various provisions of that agreement, such as the payment of £400 a year, cultivation, and some restrictions, do not arise for consideration. The provisions of the Agricultural Holdings Act, 1923, are expressed to be applicable, except certain sections, including s. 23. Section 25 was not excluded. The agreement was :

> " An agreement made this 24th day of October, 1945, between the Minister A of Agriculture and Fisheries (hereinafter referred to as ' the Minister ') acting by Henry Edward Sparke Upcher the chairman of the Norfolk War Agricultural Executive Committee by which committee possession of the lands described in the first schedule hereto has been taken on behalf of the Minister under the powers conferred by the Defence Regulations, 1939, of the one part and William West Matthews [the defendant] of Lakesend B Welney, in the county of Norfolk (hereinafter referred to as ' the tenant ') of the other part ".

Clause (1) provides :

> " The Minister agrees to let and the tenant agrees to take the land particularly described in the first schedule hereto and coloured pink on the C plan annexed hereto and being part of Hall Farm and part of White House Farm both situate in the parish of Oxborough in the county of Norfolk, but subject to the rights of the persons entitled thereto to exercise the sporting rights over the said lands. The tenancy shall be from the 11th day of October, 1944, for the duration of the war period as defined in the Agriculture (Miscellaneous War Provisions) Act, 1940, and thereafter to the D expiration of three years from the end of the said war period or if the said three years shall not expire on the 11th day of October then to the 11th day of October next before the expiration of the said three years, and subject to the other agreements and conditions herein contained ".

The duration of the war period, as defined by s. 30 (1) (*c*) of the Agriculture (Miscellaneous War Provisions) Act, 1940, is :

E

> " the expression ' war period ' means the period for which the Emergency Powers (Defence) Act, 1939, is in force ".

Under the Emergency Powers (Defence) Act, 1945, s. 1 (which substituted a new sub-s. (1) in s. 11 of the Act of 1939) the Act of 1939, which brought the regulations into existence, expired on Feb. 24, 1946. The expiration of three F years from that date would be Feb. 24, 1949, and that would be the end of the period during which the plaintiff or any one through him could have possession of this land. The " 11th day of October next before the expiration of the said three years " in cl. 1 of the agreement would be Oct. 11, 1948, and that is the date when the plaintiff expected that the defendant would vacate the holding, but he did not do so.

G The first issue to be decided is : What is the nature of this agreement ? Is it a tenancy agreement or is it an agreement merely giving to the defendant leave and licence to be in occupation of this land ? At first reading, the words and phrases in use, and, I think, unfortunately in use, in this document might easily lead one to regard it as a tenancy agreement. I find such words and phrases as : " The Minister agrees to let ", " agrees to take " " the tenancy ", " the rent", H " additional rent ", " during his tenancy ", " good tenantable repair ", " shall not assign or under-let " and " non-payment of rent ". It almost seems as if the draftsman has left nothing out which could make it look more like a tenancy agreement. The Minister, of course, has only such powers as the regulation confers on him. He is not the owner of the land; he has no interest in the land ; and, therefore, he cannot grant a lease. He merely has possession through the agricultural committee, under the regulation. He can only pass on what he has himself, namely, the use of the land.

In *Lewisham Borough Council* v. *Roberts* (1), DENNING, L.J., discussing this very point, said ([1949] 1 All E.R. 824):

> " . . . it is necessary to consider the nature of the power to requisition land. It is only a power to take possession of land. It is not a power to acquire any estate or interest in any land : see s. 1 (2) (*b*) (i) of the Emergency Powers (Defence) Act, 1939, and ss. 1 and 2 of the Compensation (Defence) Act, 1939. Once possession is taken the Crown can exercise all the powers incident to possession, such as to license other people to use the premises : see *Southgate Borough Council* v. *Watson* (2), but it cannot grant a lease or create any legal interest in the land in favour of any other person because it has itself no estate in the land out of which to carve any interest. Once possession is taken, the Crown, of course, has all the rights incident to possession, and may, by itself or its agents or sub-agents, exercise all the possessory remedies. A government department, or a town clerk, or a local authority, who is in possession on behalf of the Crown may, therefore, like a bailiff, bring an action of trespass against anyone who disturbs that possession : see *Erith Corporation* v. *Holder* (3), and the fact of being in possession is good as against purchasers without being registered on the Land Charges Register : see *Lewisham Borough Council* v. *Maloney* (4). None of this, however, confers a legal estate or even an equitable interest on the Crown. The basis of it all is possession ".

Those observations were made in the course of a dissenting judgment, but the other members of the court did not deal with this particular matter.

Southgate Borough Council v. *Watson* (2), to which the learned lord justice referred, was an appeal from the Edmonton County Court. The headnote is ([1944] 1 K.B. 541) :

> " A competent authority who has requisitioned a house under reg. 51 of the Defence (General) Regulations, 1939, under powers delegated by the Minister of Health, has no power to create a tenancy with regard to that house, and the person who has been let into possession of the requisitioned house because he has been rendered homeless by enemy action and has been required to pay rent for that accommodation is not thereby made a tenant thereof so as to enable him to claim the protection of the Rent Restrictions Acts ".

SCOTT, L.J., in giving judgment said (*ibid.*, 544) :

> " The question in this case is whether the competent authority who requisitioned the house had power under the Defence Regulations to create a tenancy, turning himself into a landlord and turning into a tenant the person who was put into possession of the house because he had lost possession of his own house by enemy action. The county court judge gave a simple, short and entirely sound judgment in which he held that no tenancy had been created. I think that right ".

For the defendant here it is contended that he has a tenancy determinable by notice which has not been given, and that the Minister had power to create a tenancy. The defendant says, not that he has a tenancy as against the true owner of the land, but that he has a tenancy only as against the Minister, until the regulations cease to have effect and a title paramount prevails. I have to bear in mind that the powers of the Minister were brought into existence by the regulation. His powers are statutory. The power to take possession is not a power to acquire ownership. Apart from possession, the Minister had no interest in the land which he could convey, and no lease the whole or part of which he could assign. He could only part with possession. He had statutory possession, and his only power was to make a contract for the statutory occupation or use of the land. The argument of the plaintiffs is that if, by the agreement of Oct. 24, 1945, the Minister was granting a tenancy, then he was acting *ultra vires*. He could only act within his powers and part with what he had, and what he had was possession and nothing more.

It is further contended on behalf of the defendant that the Minister " by the solemn Act of his entry into the said agreement is estopped from denying that he has vested in the defendant such a tenancy as aforesaid ". It may well be that, if it were a private individual who had entered into this contract, he would have been estopped from denying that it was a tenancy agreement, or, at any rate, would have been liable to an action for damages, but the Minister is a statutory and not an actual person and he can only perform the acts which he is empowered to perform. An *ultra vires* act is not the act of the Minister at all. In *Ministry of Agriculture and Fisheries* v. *Hunkin* (5) the present plaintiffs were suing one Hunkin for possession of a cottage and garden. The county court judge took the view that under the relevant Defence Regulations it was competent for the county agricultural committee, acting under the authorisation of the Minister and as a delegate of the Minister's own powers, to create the relationship of landlord and tenant between the Minister and the defendant. I think he said that the Rent Restrictions Acts protected Mr. Hunkin. The Court of Appeal allowed the appeal against that decision, and in his judgment Lord Greene, M.R., made certain observations which are certainly of value in the present case. Counsel for the defendant, the person in possession of the land possession of which was sought by the Ministry of Agriculture and Fisheries, disclaimed any intention of attempting to support the county court judge's judgment that the Minister had power under the regulations to create a tenancy and had in fact created it by the document in that case, but he took the point that the Minister was estopped from denying that the document did create a tenancy. On that the Master of the Rolls said (referring to counsel for the defendant) :

> " He suggested, first of all, that even assuming, as he conceded, that the regulations gave no power to the Minister to create a tenancy, nevertheless the Minister was estopped from denying that the document in question did create a tenancy and, accordingly, the relationship must be regarded as one of landlord and tenant. There is, I think, a very short answer to that. Accepting the view which Mr. *Baillieu* [counsel] accepts, that the Minister had no power under the regulations to grant a tenancy, it is perfectly manifest to my mind that he could not by estoppel give himself such power. The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of *ultra vires* if it was possible for the donee of a statutory power to extend his power by effecting an estoppel. That point, I think, can be shortly disposed of."

I have, therefore, come to the conclusion that this was an agreement for leave and licence, for the determination of which no notice is required, or, at most, only a reasonable notice according to the circumstances. Some comment has been made that this agreement discloses a considerable uncertainty. I do not know whether it does. The agreement by which the defendant was let into possession was specific as to the date for determination being Oct. 11 next before the expiration of three years from the end of the war period as defined in the Agriculture (Miscellaneous War Provisions) Act, 1940, to which I have referred. I think that the plaintiff is entitled to judgment for possession.

There is a counter-claim for damages, namely, that inasmuch as the Minister purported to grant a tenancy to the defendant and as the document reads much more like a tenancy agreement than anything else, there has been a breach of contract on the part of the Minister and the defendant ought to be entitled to recover the difference between the value to him of the tenancy that he would have had if the contract had been what it purported to be and the value to him of the licence which he has got. There is no doubt that, if he had been a tenant in the ordinary way, he might well have enjoyed one of the two or three favourable positions which have been put before the court under various Acts of Parliament. I gather that he might have been entitled to a month's notice or a year's notice, and a tenancy likely to last for ten years, and of none of those does he get the advantage. I think the answer again must prevail that an *ultra vires* act is no act at all if done by a statutory body whose powers are limited by the statute or statutes which brought them into existence and subsequently regulate their actions. Therefore, the counterclaim must fail.

Judgment for the plaintiff for possession and on the counterclaim. Case to stand over as to the amount due from the defendant to the plaintiff and as to costs, with liberty to both sides to apply.

Solicitors: *Sir Denys Stocks,* Solicitor of the Ministry of Agriculture and Fisheries (for the plaintiffs); *Ellis & Fairbairn* (for the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

JOWETT-SHOOTER *v.* FRANKLIN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Stable, JJ.), July 21, 1949.]

Street Traffic—In charge of motor vehicle while under influence of drink—Disqualification for holding licence—Special reasons for not disqualifying—No attempt to drive and no intention to drive—Road Traffic Act, 1930 (c. 43), *s.* 15 (2).

Returning to his motor car, a driver realised that he was under the influence of drink and decided not to drive again that night but to rest and sleep in the car. He sat in the passenger's seat, keeping the ignition key in his pocket intending ultimately to be driven home (as he, in fact, was) by one of his employees at the dance, or, alternatively, to take a taxi-cab. He was convicted of being in charge of a motor vehicle while under the influence of drink to such an extent as to be incapable of having proper control of it in contravention of s. 15 (1) of the Road Traffic Act, 1930.

HELD: these facts were special to the offence and not to the offender and constituted "special reasons" within s. 15 (2) of the Act why the court should order that the driver be not disqualified for holding a driving licence.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 15, see HALSBURY'S STATUTES, Vol. 23, p. 622; and FOR CASES, see DIGEST, 2nd Supp., Vol. 42, p. 31, Nos. *188f* and *188g*.]

Case referred to:

(1) *Whittall* v. *Kirby,* [1946] 2 All E.R. 552; [1947] K.B. 194; [1947] L.J.R. 234; 175 L.T. 449; 111 J.P. 1.

CASE STATED by the recorder of Birmingham. The facts appear in the judgment of LORD GODDARD, C.J.

Vernon Gattie for the appellant.
A. H. Ormerod for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the recorder of Birmingham on an appeal by the present respondent against his conviction by justices of being in charge of a motor vehicle while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle and to remove the disqualification which had been imposed by the court of summary jurisdiction.

This court has laid it down authoritatively in *Whittall* v. *Kirby* (1) that to find special reasons for not disqualifying a convicted person for holding a driving licence the facts said to constitute special reasons must be special to the offence and not to the offender. In other words, the mere fact that it would cause great hardship to the offender—financial hardship or business hardship, whatever it might be—or the fact that he has never been convicted before, or that he has just begun to drive, or some matter of that sort, is not a ground which can be regarded as affording "special reasons". If, however, the court of trial finds facts which are special to the particular offence and go strongly in mitigation of the offence, it is not for this court to say whether or not they themselves would have imposed disqualification. That is for the court of trial. If there are proper facts found which can amount to "special reasons," this court does not interfere.

In the present case the recorder found that the respondent, who was undoubtedly the owner of the car and to that extent in charge of it, had taken his car to a dance hall with two of his employees and the employees had gone into the dance. He himself left the hall because he did not dance, and he then consumed too much drink. Realising that he was under the influence of drink, he entered his motor car. He did not sit at the driving seat. He sat in the passenger's seat and did not put the ignition key into the lock. He simply went to rest in the car. The recorder finds that he had no intention himself of driving or moving the car from the place where it was parked. The Case states :

> "When spoken to he [the respondent] said that he was resting and was awaiting the arrival of his employees, and that he had gone to the motor car in order to sleep, and that he had no intention of driving. He also said that, if his employees (one of whom could, and did, in fact, drive the car away) did not come, he intended to take a taxi-cab in order to get home".

The recorder then states the reasons which he finds to be special reasons :

> "That the [respondent] had entered the motor car in order to rest ; that he was in a position of rest in the motor car ; that he had not made any attempt or effort to drive or to get into a position to drive ; that the ignition key was in his pocket ; that he had left his hat and gloves in the dance hall ; and that he did not intend to drive the motor car again that night".

Those were the "special reasons" which, the recorder held, justified him in holding that the respondent should not be disqualified. In the opinion of the court, the recorder addressed his mind to right considerations, and he has found here circumstances which can fairly be said to be special to the offence and not merely to the offender. In those circumstances, this appeal fails.

OLIVER, J. : I agree.

STABLE, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *M. P. Pugh*, Birmingham (for the appellant) ; *Rising & Ravenscroft*, agents for *H. E. Wynschenk & Needham*, Birmingham (for the respondent).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* A. W. GAMAGE, LTD.

[King's Bench Division (Cassels, J.), October 17, 18, 1949.]

Purchase Tax—Wholesale value—Appropriation by manufacturer of chargeable goods for sale in retail department—Opinion of commissioners—Power of court to review—Finance (No. 2) Act, 1940 (*c.* 48), *s.* 21 (1).

By s. 18 (1) of the Finance (No. 2) Act, 1940 (as amended by the Finance Act, 1944, s. 10 (1)), purchase tax is chargeable on the wholesale value of certain goods. " Wholesale value " is defined by s. 21 (1) as being " the price which in the opinion of the commissioners the goods would fetch, on a sale . . . by a person selling by wholesale in the open market . . . to a retail trader . . . "

The defendants were both manufacturers and retailers of water softeners, articles subject to purchase tax, which passed direct from the defendants' manufacturing department to their retail department without going through the hands of a wholesaler. The defendants contended that the wholesale value should be calculated on the cost of production, but the Commissioners of Customs and Excise, after obtaining information from the trade, expressed the opinion that the wholesale value was that cost with an increase (commonly called " uplift ") of fifteen per cent., that total representing the price which could have been obtained in the open market by a wholesaler.

Held : under s. 21 (1) of the Act the opinion of the commissioners as to wholesale value was final and conclusive ; there was no evidence that they had not expressed an opinion, or that, in arriving at their opinion, they had applied any wrong principle ; and, therefore, the court had no power to review their decision.

[For the Finance (No. 2) Act, 1940, s. 21, see HALSBURY'S STATUTES, Vol. 33, p. 412.]

Case referred to :

(1) *Carltona, Ltd.* v. *Works Comrs.*, [1943] 2 All E.R. 560 ; 2nd Digest Supp.

Action by the Attorney-General, on behalf of the Commissioners of Customs and Excise, claiming payment of £67 16*s.* 10*d.*, being the balance remaining unpaid of purchase tax on certain water softeners manufactured and sold by retail by the defendants. The defendants did not, within the period of fourteen days, as prescribed by the Purchase Tax Regulations, 1945 (S.R. & O., 1945, No. 517), reg. 17, or within such further period as the commissioners might allow, serve a notice on the commissioners requiring reference of a dispute to a referee under s. 21 (2) of the Finance (No. 2) Act, 1940, and, therefore, the matter came before the court. Cassels, J., refused to interfere with the decision of the commissioners and gave judgment for the amount claimed.

H. L. Parker for the Attorney-General.
G. R. F. Morris for the defendants.

CASSELS, J. : The Attorney-General, on behalf of His Majesty's Commissioners of Customs and Excise, sues the defendants, A. W. Gamage, Ltd., for the payment of £67 16*s.* 10*d.*, being the balance remaining unpaid of purchase tax on certain water softeners which were manufactured and sold by the defendants in their store. If the contentions of the defendants are right, the commissioners have claimed an amount from the defendants which is founded on a wrong method of calculation, and so are not entitled to succeed.

By s. 18 (1) of the Finance (No. 2) Act, 1940 (as amended by the Finance Act, 1944, s. 10 (1)) :

> " A tax, to be called purchase tax, shall be charged, subject to and in accordance with the provisions of this Part of this Act, on the wholesale value of all chargeable goods bought under chargeable purchases."

The case raises an important question from the point of view of manufacturers and traders, because the defendants are not only retailers, but are also, in respect of the goods in this case, manufacturers. Water softeners are goods which attract purchase tax and the question is in what way the tax should be calculated. The defendants manufacture these water softeners and sell them retail in their shop. This presented to the commissioners a somewhat different type of case A from the normal, namely, where a wholesaler sells the article to a retailer who sells it to the public. The defendants took the view that purchase tax ought to be calculated on the cost of production, including the cost of the raw materials and labour, and they invited the commissioners to calculate a wholesale value on that cost. That did not appeal to the commissioners. It, therefore, becomes necessary to decide what is the meaning of the words in the Finance (No. 2) B Act, 1940, which imposes this tax.

Section 21 (1), which deals with the meaning of " wholesale value ", provides :

> " The wholesale value of any goods in respect of which tax is chargeable shall be taken to be the price which in the opinion of the commissioners the goods would fetch, on a sale made at the time when the tax in respect of the goods becomes due by a person selling by wholesale in the open C market in the United Kingdom to a retail trader carrying on business in the United Kingdom only, if no tax were chargeable in respect of the sale and it were made in the circumstances specified in sched. VIII to this Act."

Section 21 (2) provides :

> " If, in ascertaining the amount of tax for which any person is accountable, D any dispute arises as to the wholesale value of any goods, the question shall be referred to the arbitration of a referee appointed by the Lord Chancellor, who shall not be an official of any government department, and the decision of the referee with respect to the matter in dispute shall be final and conclusive: Provided that this sub-section shall not have effect, and tax shall be chargeable on the wholesale value of the goods as fixed by the Com- E missioners, unless, within the prescribed period from the time when the commissioners' opinion as to the wholesale value of the goods has been communicated to the person accountable, or within such further period as they may allow, notice requiring a reference thereunder has been served on the commissioners, and that person has deposited with them the amount of the tax appearing on the basis of their opinion to have become due."

F By sub-s. (3):

> " If the amount of the tax chargeable on the basis of the wholesale value of any goods as determined on a reference under the last preceding sub-section is less than the amount deposited with the commissioners thereunder the excess shall be repaid ".

G In sched. VIII, para. 2, provision is made as to the things which are to be assumed in computing the price which goods to be valued would fetch on such a sale as is mentioned in s. 21 (1), namely, that the seller is paying the commission, costs, charges and other expenses; that the price includes the cost of delivery to the buyer ; that the price is the sole consideration for the sale ; that neither the seller nor any person associated with him in business has any interest in the H subsequent disposal of the goods ; and that there is no commercial relationship between the buyer and the seller otherwise than that created by the sale.

It has been contended here that because there was no factual open market in water softeners, therefore there was no factual basis on which the commissioners could form an opinion. I am unable to subscribe to that submission. When the commissioners have a case such as this I think they must arrive at their opinion as the result of information which they have available. In the present case on Feb. 18, 1946, an officer of the Customs and Excise told the defendants that the value for purchase tax would be equivalent to the cost of the completely assembled water softeners, increased by twenty-five per cent. On Sept. 7, 1946, when there was further information available, another officer of the Customs and Excise wrote stating that the tax would be calculated at 33 1/3 per cent. on a wholesale value represented by the total cost to the defendants of the completed water softeners increased by fifteen per cent. A great deal of criticism has been levelled against the commissioners because of these two letters and counsel for the defendants says : " In one part of the year you say twenty-five per cent. and in another you say fifteen per cent. Why come down ? What is the information that you had ? " The answer which is made is : " We had other information which enabled us to arrive at a proper method of calculating the wholesale value on articles which are subject to purchase tax and do not pass through the usual channels."

The manufacturer who sells his own products in his retail shop is dealt with in s. 25 of the Finance (No. 2) Act, 1940, which provides :

> " (1) Where a wholesale merchant or manufacturer who is required by this Act to be registered appropriates or applies any chargeable goods . . . or, in the case of a manufacturer, any chargeable goods which have been made by him or which are the result of a process applied by him, either (*a*) to the purposes of any business carried on by him of selling chargeable goods by retail (otherwise than to registered manufacturers as materials), or (*b*) to the purposes of any business carried on by him of letting out chargeable goods on hire, or (*c*) to any other purpose not being a sale of the goods under a purchase which is a chargeable purchase or a sale of the goods to a registered wholesale merchant as stock for his business or to a registered manufacturer as materials, the appropriation or application shall be treated for the purposes of this Part of this Act as if it were a chargeable purchase, he shall be accountable for the tax chargeable in respect of the goods, and the tax shall become due at the time of the appropriation or application."

The defendants are registered under the Act and they must comply with all the requirements of the Act concerning their business, including the making and selling of water softeners. Section 25 (2) provides :

> " A registered wholesale merchant or manufacturer who carries on any business of selling chargeable goods by retail, or of letting out chargeable goods on hire, shall keep such records as the commissioners may require him to keep and in such form as they may require, and if he fails so to do he shall be guilty of an offence against this Part of this Act."

If, therefore, the defendants had not kept proper records, they would have been guilty of an offence.

The commissioners, after having ascertained the various bases of information with regard to water softeners, said that the tax should be based on the cost of production plus fifteen per cent. The defendants maintained that it should be based on the cost only. Have the commissioners approached this matter from a wrong point of view by ascertaining from the trade such information as they could and arriving at a conclusion by means of a percentage addition to the cost to the defendants of manufacturing these water softeners in order to ascertain what would be the wholesale value if they had passed through the wholesale market ? I do not think that they have. I think that they have done their best and that they have conformed with the Act of Parliament. It is said that this Act is so ambiguous that one cannot apply it, and that where there is an ambiguity it must be resolved in the favour of the taxpayer. I agree with that. There is authority which has been expressed in the highest courts that an Act of Parliament which imposes a tax must do so in words which are easily understood. I find no ambiguity in this Act. " Wholesale value " means that, if there is no " open market " (a phrase which is used in s. 21) the commissioners must do the best they can to arrive at an opinion. They did arrive at an opinion as is indicated by the letter of Sept. 7, which says :

> " I am directed by the Commissioners of Customs and Excise to confirm that they are not prepared to accept as satisfying the statutory definition of wholesale value a tax value represented by the actual cost to you of the water softeners in question ".

So there is evidence before me that the commissioners have, in some form or other, considered this matter and have arrived at an opinion.

Next, there is the point whether this is the only way in which this matter could be dealt with. In most of these cases the commissioners are in communication with the trade associations. No question is raised about that. Subject to anything which might be shown to the contrary, it would seem to be a good way in which this matter could be dealt with, for the wholesale value for the purposes of purchase tax to be agreed between the commissioners, on the one hand, and the trade association, on the other. It may be that there is no representative body of manufacturers of water softeners. At any rate they have not emerged in the course of this case.

I come now to the final point, namely, whether there is a dispute here as to the wholesale value of any goods ? I think there is because the commissioners have said : " The wholesale value of these goods is cost plus fifteen per cent." and the defendants say : " No, the wholesale value is cost ", and nothing will bring the parties together on that. Such a question can be referred " to the arbitration of a referee appointed by the Lord Chancellor, who shall not be an official of any government department, and the decision of the referee with respect to the matter in dispute shall be final and conclusive." The defendants, however, said : " We contend that s. 21 (2) of the Finance Act (No. 2), 1940, does not apply to a dispute like this. This is a dispute about principle ". They said that the commissioners had never applied themselves properly to this matter, that there was not any open market, that there never had been an open market, that they were not entitled to arrive at the conclusion at which they did, and that s. 21 (1) required that the commissioners should have facts to go on before they arrived at a conclusion and were not entitled to make guesses. I cannot uphold that contention. In connection with this matter there are some observations which were made by LORD GREENE, M.R., in *Carltona, Ltd.* v. *Works Comrs.* (1), in which he said ([1943] 2 All E.R. 563) :

> " The last point that was taken was to this effect, that the circumstances were such that, if the requisitioning authorities had brought their minds to bear on the matter, they could not possibly have come to the conclusion to which they did come. That argument is one which, in the absence of an allegation of bad faith—and I may say that there is no such allegation here—is not open in this court. It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if *bona fide* exercised no court can interfere. All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."

This was a decision of the commissioners, acting under Act of Parliament. It was right that an opportunity should be given to the defendants to ventilate, without undue limitation, the grievance they feel in having manufactured these water softeners and provided them for the public at a smaller price than the public would have to pay for a water softener which had passed through the usual channels and had been, first, manufactured, then in the hands of a wholesaler and, possibly, in the hands of a second wholesaler, and then in the hands of a retailer before it got to the purchaser. The defendants have taken the view that they ought to bring this matter before the court, but the commissioners are entitled to succeed and I give judgment for the amount which is claimed.

Judgment for the commissioners for £67 16s. 10d. with costs on High Court scale.

Solicitors: *Sir Henry Nazeby Harrington, Solicitor for the Customs and Excise* (for the commissioners); *Mawby, Barrie & Letts* (for the defendants).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Re WELSH ANTHRACITE COLLIERIES, LTD. INDUSTRIAL AND GENERAL TRUST, LTD. *v.* WELSH ANTHRACITE COLLIERIES, LTD., AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), July 19, October 19, 20, 1949.]

Company—Receiver—Receiver appointed before July 1, 1948—*Duty to deliver abstract of receipts and payments—Companies Act,* 1948 (c. 38), *s.* 372.

The Companies Act, 1948, s. 372 (2) (which imposes on the receiver of the property of a company who is appointed on behalf of debenture holders the duty to send to various bodies and persons an abstract of his receipts and payments within a certain time of the expiration of each year) does not operate so as to affect the position or increase the duties of a receiver appointed before the Act came into operation on July 1, 1948.

[AS TO INFORMATION WHERE RECEIVER OR MANAGER APPOINTED, see HALSBURY, 1949 edn., Vol. 5, pp. 576-578, para. 914.]

Cases referred to:

(1) *Ex parte Todd, Re Ashcroft,* (1887), 19 Q.B.D. 186; 56 L.J.Q.B. 431; 57 L.T. 835; 42 Digest 696, *1115.*

(2) *Lauri* v. *Renad,* [1892] 3 Ch. 402; 61 L.J.Ch. 580; 67 L.T. 275; 42 Digest 696, *1116.*

(3) *Re Pulborough Parish School Board Election, Bourke* v. *Nutt,* [1894] 1 Q.B. 725; 63 L.J.Q.B. 497; 70 L.T. 639; 58 J.P. 572; 42 Digest 704, *1208.*

PROCEDURE SUMMONS whereby it was asked that it might be determined whether Sir William Henry Peat, the receiver appointed in a debenture holder's action on Mar. 2, 1937, was bound to send to the Registrar of Companies and others any abstract of his receipts and payments pursuant to the Companies Act, 1948, s. 372 (2), and, if so, whether the first such abstract should be for the period of twelve months ended on Mar. 1, 1949, or for some other and what period.

Welsh Anthracite Collieries, Ltd., was unable to pay the interest on debenture stock which would fall due for payment on Mar. 31, 1937, and the present action was commenced on behalf of all holders of the stock for the enforcement of their security and for the appointment of a receiver and manager. On Mar. 2, 1937, judgment in the usual form was given, and Sir William Peat was appointed receiver and manager on behalf of the debenture stock holders. The receiver was directed by the court to pass his accounts half-yearly made up to Sept. 1 and Mar. 2 in each year. The accounts up to and including the twenty-first account were duly rendered. Owing to a delay in receiving certain information, the twenty-second account covered the period of one year ending on Sept. 1, 1948, and was certified on Mar. 25, 1949.

The present summons as originally drafted asked that the time for filing and circulating the receiver's abstract of receipts and payments pursuant to the Companies Act, 1948, s. 372, for the period ending Mar. 1, 1949, should be extended until July 31, 1949, but by leave of VAISEY, J., it was amended by substituting the question set out above. VAISEY, J., held that s. 372 (2) did not apply to receivers appointed before the Act of 1948 came into operation.

J. G. Strangman for the plaintiffs.

M. M. Wheeler for the second defendants, the Trustees Corporation, Ltd.

D. B. Buckley for the Board of Trade.

The first defendants, Welsh Anthracite Collieries, Ltd., was not represented.

VAISEY, J.: This is a summons in a debenture holder's action which was commenced in 1937. The plaintiffs are the Industrial and General Trust, Ltd., suing on behalf of themselves and all other holders of the series of first mortgage debenture stock of Welsh Anthracite Collieries, Ltd., to which I will refer as " the company ". The defendants are, first, the company, and, secondly, the Trustees Corporation, Ltd., the latter being the trustees of the trust deed securing the said debenture stock, which was dated Nov. 16, 1927. On Mar. 2, 1937, judgment in the form usual in such an action was given, and Sir William Henry Peat was appointed receiver and manager on behalf of the debenture stockholders. A direction was given to him to pass his accounts half-yearly, made up to Sept. 1 and Mar. 2 in each year. This direction has been duly carried out by him and the twenty-second of such accounts, covering a period of one year ending on Sept. 1, 1948, was duly certified on Mar. 25, 1949, the delay in connection with that account being sufficiently explained in the receiver's affidavit filed in support of this summons. Practically the whole of the assets of the company have been realised, only a few small items being left in the receiver's hands or under his control. The judgment has, in fact, been almost fully worked out, and the action itself is now practically at an end.

The Companies Act, 1948, came into operation on July 1, 1948. The question which I have now to decide arises under s. 372 which, for the first time, imposed certain duties on receivers and managers. The short question is whether, and, if so, to what extent, those duties fall to be discharged by receivers and managers appointed before the Act came into operation as well as by those appointed thereafter. The section is divided into seven sub-sections. The marginal heading, which, of course, has no effect on its construction, is in these words : " Provisions as to information where receiver or manager appointed." Sub-section (1) provides :

> " Where, in the case of a company registered in England, a receiver or manager of the whole or substantially the whole of the property of the company (hereafter in this section and in the next following section referred to as ' the receiver') is appointed on behalf of the holders of any debentures of the company secured by a floating charge, then subject to the provisions of this . . . section . . . "

certain obligations arise. The definition section in the Act, s. 455, provides that " debenture " includes debenture stock, and there is no doubt that Sir William Peat is receiver of the whole, or substantially the whole, of the property of this company. Pausing there, it should be noted that the words " is appointed " differ in form from the words " has been appointed " in s. 370 of the Act, and in the Act there are other variations of expression in reference to the appointment of receivers to which I need not, I think, particularly refer.

The obligations which I have mentioned are shortly as follows : (*a*) the receiver is forthwith to notify the company of his appointment ; (*b*) the company is within fourteen days after the receipt of the notification to deliver a particular form of statement to the receiver ; and (*c*) the receiver is within two months after receiving the statement to send documents to various authorities and persons. A

So far as sub-section (1) is concerned, it seems to me that it can only apply to the case of a receiver and manager appointed after the coming into operation of the Act because the sequence of obligations begins with and depends on an act to be done forthwith, *i.e.*, at the inception of and as a first step in the receivership. B

The difficulty arises under sub-s. (2) which provides :

> " The receiver shall within two months, or such longer period as the court may allow after the expiration of the period of twelve months from the date of his appointment and of every subsequent period of twelve months, and within two months or such longer period as the court may allow after he ceases to act as receiver or manager of the property of the company, send to the Registrar of Companies, to any trustees for the debenture holders of the company on whose behalf he was appointed, to the company and (so far as he is aware of their addresses) to all such debenture holders an abstract in the prescribed form showing his receipts and payments during that period of twelve months or, where he ceases to act as aforesaid, during the period from the end of the period to which the last preceding abstract related up to the date of his so ceasing, and the aggregate amounts of his receipts and of his payments during all preceding periods since his appointment." C D

Sub-section (3) provides :

> " Where the receiver is appointed under the powers contained in any instrument, this section shall have effect—(*a*) with the omission of the references to the court in sub-s. (1) ; and (*b*) with the substitution for the references to the court in sub-s. (2) of references to the Board of Trade ; and in any other case references to the court shall be taken as referring to the court by which the receiver was appointed." E

Sub-section (4) has no immediate bearing on the question which I have to decide, but there is a concluding sentence which I think I ought to read : F

> " Nothing in this sub-section shall be taken as limiting the meaning of the expression ' the receiver ' where used in, or in relation to, sub-s. (2) of this section."

Finally, sub-s. (7) provides that, if the receiver makes default in complying with the requirements of s. 372, he shall be liable to a fine not exceeding £5 for every day during which default continues. G

Counsel for the plaintiffs asks me to say that sub-s. (2) applies only to post-Act receiverships, *i.e.*, receiverships which begin on or after July 1, 1948. He puts his argument in several ways. First, he says that, as the application of sub-s. (1) of the section is admittedly so restricted, it is only reasonable to construe sub-s. (2) as similarly restricted. Secondly, he says that the expression " is appointed " in sub-s. 1 differs in significance and not merely in words from " has been appointed ", and that the expression " the receiver " at the beginning of sub-s. (2) is markedly controlled by its context when it appears in sub-s. (1), and means a receiver in the sense attributed to it on a proper construction of sub-s. (1), *i.e.*, a post-Act receiver. Thirdly, he says that the sub-section would, on the alternative view, have a retrospective effect because it would involve, in H the case of the first so-called abstracts, a reference to transactions effected before the Act came into operation. Fourthly, he points out that the sub-section is a penal provision and ought to be construed so as to impose no greater obligations than are indicated by its unmistakable terms.

In support of his argument counsel cited certain cases which I need not, I think, do more than mention in passing. The first of these cases is *Ex parte*
A *Todd* (1). The next is *Lauri* v. *Renad* (2) in which LINDLEY, L.J., in the course of his judgment, said ([1892] 3 Ch. 420) :

> "It certainly requires very clear and unmistakable language in a subsequent Act of Parliament to revive or re-create an expired right. It is a fundamental rule of English law that no statute shall be construed so as to have a
> B retrospective operation unless its language is such as plainly to require such a construction ; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

In *Re Pulborough Parish School Board Election* (3) there are some possibly relevant observations in the judgments of LOPES and DAVEY, L.JJ., to the effect that
C where a statute imposes a new duty it must be presumed to be intended not to have a retrospective effect ([1894] 1 Q.B. 737, 741). The case is a curious one in some ways because the majority in the Court of Appeal, consisting of LOPES and DAVEY, L.JJ., overruled the decision of the Queen's Bench Division by LAWRENCE and WRIGHT, JJ., LORD ESHER, M.R., dissenting, so that three judges were of one opinion and two judges, whose view prevailed, were of the
D other opinion. I have mentioned these cases as my attention was drawn to them, but I am very doubtful whether they are really relevant, because I do not think that on any view of this matter the section in the Act in question can be said to have any real retrospective operation.

Counsel for the trustees was content to support the argument of the plaintiffs, taking the view that in this particular case compliance with sub-s. (2) would
E serve no useful purpose and would merely be a waste of money, time, and paper. With that view I am much inclined to sympathise. Indeed, I was half tempted to say that I would, on a certain view of this matter, be prepared to extend the two months period to such a time, say, ten years, as would have the effect of excusing the receiver in this particular case from any obligation to do anything.

Counsel for the Board of Trade, realising, as I realise, that my decision must
F affect a very large number of cases, greatly assisted me by his argument to the contrary. He asks me to say that sub-s. (2) does apply generally to pre-Act receiverships, but only to oblige the receiver to carry out such of its directions as fall to be carried out by him at dates subsequent to the commencement of the Act. Thus, in the present case, where the receiver was appointed on Mar. 2, 1937, he should, according to this argument, compile
G his abstract for the year commencing on Mar. 2, 1948, and send it to the appropriate quarter within two months from the end of that year, *i.e.*, on or before May 2, 1949. When I put to counsel the possible case of the two months expiring immediately, or, say, two days after the Act came into operation, leaving the receiver no time to do anything, counsel could only suggest that the receiver must, to avoid the risk of the penalty of £5 a day, apply to the court for an
H extension of time, even if he had no funds out of which to pay the costs of the application. I do not think that that exceptional case has very much bearing on the point or ought to be taken into more than passing consideration by me. However, counsel admits that sub-s. (1) cannot apply to pre-Act receiverships, and that a pre-Act receiver is not obliged to do anything under sub-s. (2) unless the obligation to do it arises under the terms of the sub-section at a date subsequent to the coming into operation of the Act. He contends, and I am inclined to agree with him, that so to construe the sub-section would in no sense make it

retrospective in its operation. He further says that the expression "is appointed" has in its context no other meaning than "shall be" or "shall have been" appointed, and that the limited effect of sub-s. (1) is attributable, not so much to the form of that expression as to the nature of the obligations thereby imposed being such that their performance by a pre-Act receiver is, on the face of it, impossible.

It may be that the arguments are somewhat evenly balanced, but on the whole I prefer the view advanced by the plaintiffs. It seems to me that the whole of s. 372 is a code for the guidance and the direction of post-Act receivers. It is noticeable that in the previous section, s. 371, it is provided :

> "(4) This section shall apply whether the receiver or manager was appointed before or after the commencement of this Act, and to periods before, as well as to periods after, the commencement of this Act."

It is significant that there is no corresponding statement applicable to s. 372 (2). That omission appears to me to be significant. I think that the context of "the receiver" in sub-s. (1) and the use of that expression at the beginning of sub-s. (2) point to the fact that the section does not apply to receivers generally, but only applies to receivers who come within the operation of sub-s. (1). The definition in sub-s. 1 is curiously placed and curiously expressed. Sub-section (2) does not say "a receiver shall within two months" and so forth. It says "the receiver", and I think that, although one has in this case rather to grasp at straws in a somewhat choppy sea, that is an indication that the receiver on whom the obligations of sub-s. (2) are laid is necessarily the same kind of receiver as he who is subject to the obligations of sub-s. (1).

In answer to the question in the summons, I will declare that Sir William Peat is not bound to carry out the procedure laid down in sub-s. (2) of the section. If the Board of Trade consider that the consequences of this decision are contrary to the public interest, they will, I hope, carry the matter to a higher court. If any leave is required for such an appeal, I will certainly grant it. My conclusion is, put quite briefly, that there is nothing in s. 372 which affects the position or increases the duties of a receiver who was appointed before July 1, 1948, and I think I am to some extent fortified in that conclusion by sub-s. (6) of s. 372, which provides :

> "Nothing in sub-s. (2) of this section shall be taken to prejudice the duty of the receiver to render proper accounts of his receipts and payments to the persons to whom, and at the times at which, he may be required to do so apart from that sub-section."

Order accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the assets in the hands of the receiver.

Solicitors: *Slaughter & May* (for the plaintiff); *Ashurst, Morris, Crisp & Co.* (for the second defendant) ; *Solicitor to the Board of Trade.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

PAYNE *v.* SCHMIDT AND ANOTHER.

[COURT OF APPEAL (Somervell, Singleton and Jenkins, L.JJ.), October 21, 1949.]

Costs—Counsel's fees—Fee of circuit counsel briefed as junior to counsel appearing on circuit to which he does not belong—R.S.C., Ord. 65, *r.* 27 (29).

A By R.S.C., Ord. 65, r. 27 (29): "On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased . . . by payment of special fees to counsel . . ."

B In an action between a plaintiff and two defendants, the plaintiff was successful and the first defendant was ordered to pay the second defendant's costs. The second defendant's solicitors had briefed junior counsel who was not on the circuit where the action was tried, and, in consequence of the circuit rules, that counsel was paid a special fee and a second junior counsel, who was on the circuit, was briefed to appear with him. The C second defendant did not seek to recover on taxation the special fee, but he did claim a proportionate fee for the second counsel.

HELD: where, as here, it appeared that the expense of employing a junior counsel was incurred, not because of the difficulty of the case, but merely by reason of a circuit rule, the master, in the exercise of his discretion, was entitled to refuse to allow the fee of such a second counsel.

D INTERLOCUTORY APPEAL from a decision of BIRKETT, J., sitting in chambers, reversing the order of the taxing master whereby the fee payable to a second junior counsel had been disallowed on taxation.

The second counsel had been briefed in compliance with the circuit rules as the first counsel briefed was not on the circuit. The master took the view on the evidence before him that, apart from the circuit rule, the solicitors who had E briefed the two counsel did not regard the case as justifying the employment of two counsel. The master, accordingly, disallowed the fee to the second counsel, but indicated that, had he thought the matter one that was fit for a noting brief, he would have allowed a fee to the second counsel of £5 10*s.* 0*d.* The judge in chambers reversed the decision of the master and allowed the brief fee to the second counsel, but the Court of Appeal now reversed the judge's order and F restored the order of the master.

Wingate-Saul for the first defendant.
P. M. O'Connor for the second defendant.

SOMERVELL, L.J.: This is an appeal from an order made by BIRKETT, J., in chambers on an application to review the taxation by MASTER HOOD of the G second defendant's costs in certain proceedings. The learned judge's order was that a brief fee of 25 guineas to Mr. *Armstrong-Jones* should stand, and that a fee amounting to two thirds of that fee be allowed to Mr. *McDermott.* The first defendant, who was ordered to pay the costs, appeals against that order.

The nature of the proceedings do not matter to any appreciable extent. The plaintiff sued for personal injuries. Originally she proceeded against the Ministry H of Agriculture, who dropped out, and then against a Mr. Schmidt. Finally, a Mr. Slator was added. There was a dispute between the two defendants, Mr. Schmidt and Mr. Slator. An order had been made directing the cause to be tried at Lincoln on the Midland Circuit. The solicitors to Mr. Slator, when he was added, instructed Mr. *Armstrong-Jones*, who is not on the Midland Circuit, to draft the defence. Under the circuit rule, if, as was desired, Mr. *Armstrong-Jones* conducted the case at Lincoln, there had to be a special fee paid to him, and he also had to have a junior from the circuit. It was not sought to recover the special fee on taxation. It was recognised that it did not fall within the relevant rules of R.S.C., Ord. 65, which lay down what sums are to be allowed on taxation and the principles on which masters are to exercise their discretion, but the dispute arose as to the junior's fee, and we have before us the reasons put in by the solicitors and the answers by the master. Broadly speaking, the reasons put in by the solicitors were that this was a substantial case, and that if, in the ordinary way and apart from any circuit rule, two counsel had been employed, the junior's fee would have been allowed. The master in his answers, after reciting that Mr. *Armstrong-Jones* was unable to appear at the trial except with a counsel attached to the circuit, goes on :

> " A brief was, therefore, delivered to Mr. *Niall McDermott* of that circuit (called November, 1946, and in the same chambers as Mr. *Armstrong-Jones*) to enable Mr. *Armstrong-Jones* to conduct the case . . . On taxation of the costs the second defendant's solicitors stated that they did not wish or intend to instruct leading counsel as they did not think the case justified it, but that they wanted specially to have Mr. *Armstrong-Jones* to conduct the case in court as he was well known to them and often instructed by them in this class of work, and, furthermore, that they knew of no equally strong junior on this circuit. In point of fact, there are a number of eminent juniors attached to this circuit well experienced in this class of work ".

On that the learned master came to the conclusion that the brief delivered to Mr. *McDermott* was only necessitated by the briefing of counsel who was not a member of the Midland Circuit, and that it was, therefore, not an item properly to be allowed on the party and party taxation. He continues :

> " In any event, if I had thought it a case which merited the employment of two juniors, I do not consider that junior counsel in the particular circumstances of this case is entitled to more than a noting brief of £5 10*s*. 0*d*."

The latter part of that paragraph may not be quite happily worded, but I think it is clear from the opening words of it that he did not think it a case which merited two counsel in the ordinary sense. I think he meant to say : " If, although it did not merit two counsel, I had been asked to allow some small fee for taking notes, I daresay I should have thought it quite reasonable ".

Counsel for the second defendant submits that the answer indicates a wholly wrong approach to the problem, and shows that the learned master was actuated by irrelevant circumstances. He says that the learned master should not inquire as to how the junior came to be employed, but he should have asked : " Is this a case which is fit for two counsel ? ", and, if it appeared to be so, he should have allowed two counsel. Counsel says that, on the broad facts of the case the master should have come to the conclusion that two counsel would have been allowed if employed in the ordinary way, and that he would have come to this conclusion but for the irrelevant matters which he considered. I cannot agree with counsel on this point, because where the learned master says " in any event " he is meaning that on no view did he regard it as a case fit for two counsel. I also disagree with counsel in his submission that the circumstances as set out are irrelevant and such as a master is not entitled to take into consideration. I have no wish to say anything which might fetter the discretion of masters, but, if in a case where it is plain on the facts as they are brought before the master that the expense of employing a junior counsel has been incurred solely because of a circuit rule, in my view, he would be entitled, it may be that he would be bound, to say that that fell outside the principles laid down in the rules as to what items are to be included. In the present case, he was told, according to his answer, by the defendant's solicitors themselves " that they did not wish or intend to instruct leading counsel as they did not think the case justified it ". That, in my view, was a circumstance which he was entitled to take into consideration, and he was entitled to come to the conclusion, as he did, on all the facts that the expense of junior counsel fell outside the rules. Therefore, even if one does not take the paragraph to which I have referred as defeating the second defendant *in limine*, I do not accept his submission that the matters to which the learned master referred, and on which he relied, were irrelevant to the problem he had to consider. For these reasons, I think the learned judge's order was wrong, and that this appeal should be allowed.

A **SINGLETON, L.J.** : I agree, and I only wish to emphasise that no question of principle is raised on this appeal. From the reasons and answers which are before us it is clear that the solicitors for the second defendant did not intend or wish to brief leading counsel because they did not think the case justified it, and, furthermore, it is clear that the only reason for the briefing of the second counsel was to enable Mr. *Armstrong-Jones* to appear on the Midland Circuit.
B The master in the paragraph to which my Lord has referred indicates that he did not regard this case as a case fit for a second counsel. The concluding paragraph of the answer is :

> " In all the circumstances and in exercise of my discretion I have disallowed the costs of second counsel, but have allowed one brief fee of 25 guineas which I consider adequate ".

C That was a matter for the taxing master, and on such a matter I do not think that it is open to a judge to review that taxation. It was entirely within the master's discretion. I agree that the appeal must be allowed.

JENKINS, L.J. : I also agree.

Appeal allowed with costs here and below.

D Solicitors : *Treasury Solicitor* (for the first defendant) ; *Hewitt, Woollacott & Chown* (for the second defendant).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Reversed. C.A. [1950] 1 All E.R. 436.

E *Re* GREENWOOD'S AGREEMENT, PARKUS *v.* GREENWOOD.

[CHANCERY DIVISION (Harman, J.), October 21, 1949.]

Lease—Renewal—Perpetual right of renewal—Lease for three years with option to renew for further period of three years on same terms " including the present covenant for renewal "—Law of Property Act, 1922 (*c.* 16), *s.* 145,
F *sched.* XV, *para.* 5.

An agreement, dated Jan. 29, 1946, whereby certain premises were let for a term of three years from Jan. 30, 1946, contained an option to renew in the following terms : " The landlord will on the written request of the tenants made three calendar months before the expiration of the term hereby granted and if there shall not be at the time of such request any existing
G breach or non-observance of any of the agreements on the part of the tenants herein contained . . . grant to them a tenancy of the . . . premises for the further term of three years from the expiration of the said term at the same rent and containing the like agreements and provisions as are herein contained (including the present covenant for renewal) . . . " The agreement contained the usual covenants by the tenants and also a positive covenant
H in regard to the user of the premises. It was contended by the assignee of the lease that the agreement contained a covenant for perpetual renewal, and, therefore, under the Law of Property Act, 1922, s. 145, and sched. XV, para. 5, there was vested in him a term of 2,000 years in the property.

HELD : on the face of it, the covenant for renewal contained in the agreement was not a covenant for perpetual renewal, but merely a covenant to renew once; sched. XV, para. 5, to the Act of 1922 operated to convey a term of 2,000 years only where the lease contained an express covenant or obligation for perpetual renewal; and, therefore, the agreement did not operate as a demise for a term of 2,000 years.

Wynn v. *Conway Corpn.* ([1914] 2 Ch. 705), and *Northchurch Estates, Ltd.* v. *Daniels* ([1946] 2 All E.R. 524), *distinguished.*

[As to Covenants for Perpetual Renewal of Lease, see HALSBURY, Hailsham Edn., Vol. 20, pp. 154-157, paras. 167, 168; and for Cases, see DIGEST, Vol. 31, pp. 79-81, Nos. *2240-2261*.] A

Cases referred to:

(1) *Wynn* v. *Conway Corpn.*, [1914] 2 Ch. 705; 84 L.J.Ch. 203; 111 L.T. 1016; 78 J.P. 380; 31 Digest 81, *2261*.

(2) *Northchurch Estates, Ltd.* v. *Daniels*, [1946] 2 All E.R. 524; [1947] Ch. 117; [1947] L.J.R. 6; 176 L.T. 4; 2nd Digest Supp.

(3) *Hare* v. *Burges*, (1857), 4 K. & J. 45; 27 L.J.Ch. 86; 30 L.T.O.S. 255; B 22 J.P. 84; 31 Digest 80, *2248*.

(4) *Green* v. *Palmer*, [1944] 1 All E.R. 670; [1944] Ch. 328; 113 L.J.Ch. 223; 171 L.T. 49; 2nd Digest Supp.

Adjourned Summons by the assignee of a lease dated Jan. 29, 1946, asking (*inter alia*) for a declaration that he was entitled to a term of 2,000 years in the C demised property on the ground that, on the true construction of the lease, there was a grant of a term with a covenant for perpetual renewal, within the meaning of the Law of Property Act, 1922, sched. XV, para. 5. Harman, J., held that, on the face of it, the covenant for renewal was not a covenant for perpetual renewal, and, therefore, sched. XV, para. 5, of the Act of 1922, did not apply, and the lease did not operate as a demise of a term of 2,000 years. The facts D and the relevant clauses of the lease appear in the judgment.

Michael Albery for the assignee.
Hesketh for the lessor.

HARMAN, J.: By this summons Daniel Parkus, the plaintiff, claims a declaration that on the true construction of the agreement of Jan 29, 1946, E mentioned in the heading of the summons, there is now vested in him a term of 2,000 years in the property which is the subject-matter of this agreement. The defendant, David Greenwood, is the freeholder of the property and the lessor under the agreement in question. The agreement is one of Jan. 29, 1946, and is expressed to be made between the defendant, hereinafter called the lessor, of the one part, and Mark Lee and Jack Barnett, hereinafter called the tenants, of F the other part. Various things are agreed—first, that the landlord will let and the tenants will take the demised premises, which are 96, Brick Lane, Stepney, with a workshop at the rear, for a term of three years from Jan. 30, 1946, subject to a then existing tenancy of part. By the second clause the tenants agree with the landlord (i) to pay monthly the reserved rent of £383 10*s*. a year; (ii) to pay the rates and taxes; (iii) to keep the interior in tenantable repair G and condition, structural repairs excepted; (iv) to allow the landlord to enter and inspect; (v) not to make alterations; (vi) not to imperil the insurances; (vii) (which is a positive covenant) to use the premises "as and for the tenants' business of tailors or such other mode or business as may be approved by the landlord and the upper portion for residential purposes"; (viii) not to commit or permit a nuisance; (ix) not to part with the possession of the premises H or any part of it without the written consent of the landlord; (x) to deliver up the premises. Clause 11 sets out the covenants by the landlord. Clause 11 (*a*) is for quiet enjoyment and cl. 11 (*b*) is in these terms:

> "That the landlord will on the written request of the tenants made three calendar months before the expiration of the term hereby granted and if there shall not be at the time of such request any existing breach or non-observance of any of the agreements on the part of the tenants herein con-

> tained at the expense of the tenants grant to them a tenancy of the said premises for the further term of three years from the expiration of the said term at the same rent and containing the like agreements and provisions as are herein contained (including the present covenant for renewal) the tenants on the signature of such renewed agreement to sign a counterpart thereof and to pay the proper costs of such agreement and counterpart."

Clause 12 is the usual proviso for re-entry on breach.

The tenants, Mark Lee and Jack Barnett, by an assignment of June 6, 1946, assigned to one Ettie Fordham the premises comprised in the agreement to hold the same unto her for the residue of the term then vested in the assignors :

> " . . . subject to the payment of the rent and performance of the agreement and conditions respectively reserved by and contained in the agreement."

There was no assignment there expressed of the benefit of the covenant for renewal. On Mar. 7, 1947, the assignee, Ettie Fordham, assigned to the plaintiff, Parkus, the premises comprised in and demised by the recited agreement :

> " . . . together with the benefit of the tenant's right of renewal of the term as contained in the recited agreement."

Thus, in so far as she got the benefit of the renewal, she purported to assign it.

It is said that Parkus, as assignee under these two documents of the term of three years, has got, not a three years term, but a 2,000 years term in the property. If that be the result in law, it is one not contemplated by the parties when they made the original agreement, for it is clear that, if people wish to create a term of 2,000 years, they are very unlikely to do it by creating a term of three years with a right to renew. However that may be, the Law of Property Act, 1922, sched. XV, para. 5 (which has effect under s. 145 of the Act), provides :

> " A grant, after the commencement of this Act, of a term, sub-term, or other leasehold interest with a covenant or obligation for perpetual renewal, which would have been valid if this Part of this Act had not been passed, shall (subject to the express provisions of this Act) take effect as a demise for a term of 2,000 years . . . free from any obligation for renewal or for payment of any fines, fees, costs, or other money in respect of renewal."

It is said that this was a grant after 1925 of a term with a covenant for perpetual renewal within the meaning of sched. XV, para. 5, and the first question I have to determine is whether that is so.

The argument of counsel for the plaintiff is as follows. He says that the words in the covenant are the very words in which, under the old conveyancing terms and under the law as it stood until 1925, perpetually renewable leaseholds were, in fact, created. Therefore, in the words of sched. XV, para. 5, to the Act of 1922, he says, this is such a covenant as would before the Act have created a perpetually renewable leasehold, and sched. XV, para. 5, operates accordingly. On the face of it this is certainly not a covenant for perpetual renewal. One can have such a covenant in a lease, and, indeed, it was not uncommon to find it in a lease. An example which has been pointed out to me is contained in *Wynn* v. *Conway Corporation* (1), where there was a right to renew a 21 years' term at the conclusion of the first eleven years and it was expressly provided that :

> ". . . so often as every eleven years of the said term shall expire the lessors will grant . . . unto the lessee such new lease of the . . . premises upon surrender of the old lease as aforesaid and paying such fine of £7 10*s*. on the day or time hereinbefore limited or appointed."

There on the face of it there was a right to renew at the end of every eleven years and that was on the face of it a perpetually renewable lease.

Since the Act of 1922, such a document has come before the court in *Northchurch Estates, Ltd.* v. *Daniels* (2), where the memorandum of agreement was in these terms :

> " The term shall be for a period of one year certain . . . the tenant having the option to renew the tenancy from year to year on identical terms and conditions . . . "

by notice in writing to be given at or before Christmas in each year. EVERSHED, J., found that he had no option but to say that that was a contract for the grant of a perpetually renewable lease and, therefore, a term of 2,000 years was created in the property, whether that was the result contemplated by the parties or not. Is the position the same in the present case ? Counsel for the plaintiff says that it is, because, where one finds a covenant to renew for a further term, and the grant of such further term is to be :

> " . . . at the same rent and containing the like agreements and provisions as are herein contained (including the present covenant for renewal) . . . "

—which are the words here used—that is the same thing as creating a perpetually renewable lease. He cites *Hare* v. *Burges* (3) to support that proposition. That was a case of a demise for a year. The headnote is :

> " Lease for lives, with a covenant on the death of either of the *cestuis que vie* to execute a renewed lease at the same rent and subject to the same covenants ' including this present covenant' : *Held*, a covenant for perpetual renewal . . . "

on the footing that the lessee was

> " . . . entitled to have inserted in the renewed lease a covenant for renewal *totidem verbis* with that contained in the original lease . . . "

In support of that view, counsel for the assignee tells me that in DAVIDSON'S PRECEDENTS AND FORMS IN CONVEYANCING, 3rd ed., vol. V, pt. I, p. 142, the words " including this present covenant " are used to create a perpetual right to renew, and that a careful conveyancer, if he wished to have no trouble and not to have it said that there might be such a perpetual right, would use the opposite words, namely, " other than this present covenant ". All that I accept, but, none the less, in my judgment, sched. XV, para. 5, to the Law of Property Act, 1922, operates to create a term of 2,000 years only where the lease is on the face of it perpetually renewable. In my opinion, one has to find in the lease or agreement an express covenant or obligation for perpetual renewal. I do not find any such covenant here. All I find is a covenant for renewal once. True that has in it, as counsel for the assignee has said, the seeds of its reproduction. Nevertheless, it is not on the face of it a covenant for perpetual renewal. Consequently, I hold that there is no term of 2,000 years created between these parties.

In *Green* v. *Palmer* (4) UTHWATT, J., held, without regard to this present point, that words in something of the same sort of form as these created a right to renew twice and no more. That was an instance of a furnished tenancy for six months, and the improbability that the parties had thought of creating a 2,000 years' term was very high. The learned judge mentioned in his judgment that he was entitled to take into consideration all the surrounding circumstances. How he came to the conclusion to which he did, I find difficult to follow, but I say nothing about it because it does not seem to me to touch the point which I decide here.

Declaration accordingly.

Solicitors : *Evan Davies & Co.* (for the assignee) ; *Neve, Beck & Co.* (for the lessor).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

PULTON *v.* LEADER.

[King's Bench Division (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 21, 1949.]

Street Traffic—Offence under Road Traffic Act, 1930*—Obligation to give information—Road Traffic Act,* 1930 (*c.* 43), *s.* 113 (3) (*b*).

By s. 113 (3) of the Road Traffic Act, 1930 : " Where the driver of a vehicle is alleged to be guilty of an offence under this Act—(*a*) the owner of the vehicle shall give such information as he may be required by or on behalf of a chief officer of police to give as to the identity of the driver, and, if he fails to do so, shall be guilty of an offence, unless he shows to the satisfaction of the court that he did not know and could not with reasonable diligence have ascertained who the driver was ; and (*b*) any other person shall, if required as aforesaid, give any information which it is in his power to give and which may lead to the identification of the driver, and, if he fails to do so, he shall be guilty of an offence."

A police officer, alleging that the driver of the appellant's motor car had committed an offence under the Road Traffic Act, 1930, on a certain date, requested the appellant to furnish the name and address of the driver on that occasion. The appellant inquired of the police what was the nature of the offence and claimed the right, before complying with the requirements of the Act, to decide for himself whether or not an offence had been committed. On being informed, he refused to give the information asked for. The appellant was charged under s. 113 (3) (*b*) of the Road Traffic Act, 1930, and convicted. On appeal,

Held : (i) s. 113 (3) came into operation as soon as the driver of a motor vehicle was alleged to be guilty of an offence under the Act ; the police were not bound to specify the nature of the offence ; and, therefore, the appellant was under an obligation to supply the information when he was first requested to do so.

(ii) although the appellant was the owner of the car, it was not necessary that he should be charged under s. 113 (3) (*a*) instead of s. 113 (3) (*b*).

[For the Road Traffic Act, 1930, s. 113 (3), see HALSBURY'S STATUTES, Vol. 23, p. 684.]

Case Stated by a metropolitan magistrate.

The appellant was convicted at Bow Street magistrate's court on an information preferred by the respondent, a sergeant of police, under s. 113 (3) (*b*) of the Road Traffic Act, 1930, for " that he [the appellant] between Feb. 2, 1949, and March 16, 1949, did fail when required by or on behalf of the Commissioner of Police of the Metropolis to give information which it was in his power to give and which might lead to the identification of the driver of a vehicle who was alleged to be guilty of an offence under the Road Traffic Act, 1930." The appellant, the owner of the vehicle, on being requested by notice to furnish information as to the name and address of the driver on a certain date, returned the notice endorsed : " I should be glad to know the nature of the alleged offence before giving the name and address as requested." The police gave the appellant some information as to the offence alleged to have been committed and the appellant refused to give the information for which they had asked. The Divisional Court held that the appellant was guilty of an offence when he first failed to give the information and dismissed the appeal.

Scott Henderson, K.C. and *Baerlein* for the appellant.

Vernon Gattie for the respondent.

LORD GODDARD, C.J. : This is a Case stated by a metropolitan magistrate sitting at Bow Street magistrate's court before whom the appellant was summoned under s. 113 (3) (*b*) of the Road Traffic Act, 1930, for

> "that he [the appellant] between Feb. 2, 1949, and Mar. 16, 1949, did fail when required by or on behalf of the Commissioner of Police of the Metropolis to give information which it was in his power to give and which might lead to the identification of the driver of a vehicle who was alleged to be guilty of an offence under the Road Traffic Act, 1930".

On Feb. 2, 1949, the following notice was given to the appellant :

> "Road Traffic Act, 1930. Application for name and address of driver. The driver of motor vehicle bearing index mark and identification number CYK 737 which was used at Caxton Street . . . on Jan. 18, 1949, is alleged to have committed an offence under the above-mentioned Act. In compliance with the requirements of s. 113 (3) you are hereby requested to furnish at an early date on this form the name and address of the driver of the vehicle on the above occasion".

That notice was sent back by the appellant, who stated : "I should be glad to know the nature of the alleged offence before giving the name and address as requested".

The appellant had no right to say that. The statute puts on him the obligation to give the information. The police did not summon him there and then for refusing to give the information, but they gave him some information about the offence which they alleged was committed. Before the magistrate the appellant claimed the right before complying with the requirements of the Act to decide for himself whether or not an offence had been committed. That, however, is not provided for by the statute which only requires the police to allege that an offence under the Road Traffic Act has been committed by a driver. Once they allege that, they are entitled to ask anybody who they think can give them information to tell them who the driver was.

Another point is now raised by counsel for the appellant who says that, the magistrate having found that the appellant was the owner of the car, the appellant ought to have been summoned, not under s. 113 (3) (*b*), but under s. 113 (3) (*a*). In my opinion, there is nothing in that point. It may well be that the police do not know who the owner of the car is. They, therefore, serve the notice under s. 113 (3) on the appellant as the owner or any other person. The owner is required to give certain specific information; any other person is required to give such information as he can give. The appellant was summoned for an offence under s. 113 (3) (*b*), which states :

> "any other person shall, if required as aforesaid, give any information which it is in his power to give and which may lead to the identification of the driver . . ."

If there was to be any question raised on this point, it ought to have been taken at the time, and the matter could have been amended, but this case seems undoubtedly within s. 1 of the Summary Jurisdiction Act, 1848, which provides that no objection to a summons for an alleged defect, either in substance or in form, is to prevail if it does not do the defendant any prejudice. If it does the defendant any prejudice, the justices can adjourn the case so as to give him an opportunity of setting up some answer which he might not otherwise have. None of those considerations applies here. The points raised have no substance, and the magistrate was quite justified in convicting the appellant.

CROOM-JOHNSON, J. : I agree for the same reasons.

LYNSKEY, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Amery-Parkes & Co.* (for the appellant); *The Solicitor, Metropolitan Police* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

KESTELL AND ANOTHER *v.* LANGMAID.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell, L.J., and Hodson, J.), October 25, 26, 1949.]

Agriculture—Agricultural holding—Compensation for disturbance—Notice to quit—Purchase by landlords of land after Sept. 3, 1939—*Prior consent to notice of Minister not obtained—Validity of notice—Agricultural Holdings Act,* 1923 (*c.* 9), *s.* 12 (1)—*Defence* (*General*) *Regulations,* 1939, *reg.* 62, *para.* 4A (*as amended*).

By the Defence (General) Regulations, 1939, reg. 62, para. 4A : " Where the whole or any part of an agricultural holding is subject to a contract of sale made since Sept. 3, 1939, or has been sold in pursuance of a contract of sale made since that date, any notice to quit that holding or any part thereof given to the tenant so as to expire at any time after the end of the year 1941 shall be null and void : Provided that this paragraph shall not apply to any notice if (whether before or after the giving thereof) the Minister of Agriculture and Fisheries consents in writing thereto."

The landlords, who had purchased an agricultural holding after Sept. 3, 1939, served a notice to quit on the tenant in September, 1945, expiring on September 29, 1946, without obtaining the written consent of the Minister as required by reg. 62, para. 4A. On the expiry of the notice the tenant vacated the holding and claimed that he was entitled to compensation for disturbance under the provisions of the Agricultural Holdings Act, 1943, s. 12 (1).

HELD : the notice having been accepted as a good notice by the tenant, who had quitted the holding in consequence of it, the requirements of s. 12 (1) were satisfied although the notice was bad under reg. 62, para. 4A, and the tenant was entitled to claim compensation for disturbance.

Westlake v. *Page* ([1926] 1 K.B. 299), *applied.*

[AS TO COMPENSATION FOR DISTURBANCE, see HALSBURY, Hailsham Edn., Vol. 1, pp. 361-368, paras. 594-601 ; and FOR CASES, see DIGEST Supp.

Cases referred to :

(1) *Westlake* v. *Page,* [1926] 1 K.B. 299; 95 L.J.K.B. 456; 134 L.T. 612; Digest Supp.

(2) *Fox* v. *Neal,* (1924), 13 L.J.C.C.R. 11.

(3) *Streat* v. *Cottey,* (1947), 14 L.J.C.C.R. 156.

APPEAL by the landlords from a judgment of His Honour JUDGE SCOBELL ARMSTRONG, sitting at Bodmin County Court, and dated June 17, 1949.

In a Special Case stated under the Agricultural Holdings Act, 1923, sched. II, para. 10, the arbitrator submitted to the county court as a question of law whether a notice to quit an agricultural holding was a valid notice despite the fact that the landlords, who were landlords within the meaning of the Defence (General) Regulations, 1939, reg. 62, para. 4A, had not first obtained the written consent of the Minister of Agriculture and Fisheries, so that the tenant, who had accepted the notice as legal and vacated the holding, was entitled to compensation for disturbance under s. 12 (1) of the Act on the ground that his tenancy had terminated by reason of a valid notice to quit. The county court judge held that for the purpose of s. 12 (1) the notice to quit was valid and his decision was now affirmed by the Court of Appeal who dismissed the landlords' appeal with costs.

Wiggins for the landlords.
H. E. Park for the tenant.

SIR RAYMOND EVERSHED, M.R. : This is an appeal from a judgment of JUDGE SCOBELL ARMSTRONG on a Special Case submitted to him by an arbitrator under the Agricultural Holdings Act, 1923. The material facts are set out in the Special Case, and I do not propose to canvass the whole of them in this judgment. The point is raised sufficiently clearly by the question of law submitted by the arbitrator, which is this :

> " The question of law upon which I now ask the opinion of this honourable court pursuant to sched. II, para. 10, to the Agricultural Holdings Act, 1923, is : 'Where reg. 62, para. 4A, of the Defence (General) Regulations, A 1939, is applicable to a notice to quit and the landlords fail to apply for the approval of such notice by the Minister and such notice is, therefore, according to the regulation, " null and void ", but the tenant nevertheless quits on the date named in such notice in consequence of such notice, is such notice effective for the purpose of giving to the tenant who has quitted a right to claim compensation for disturbance pursuant to s. 12 of the B Agricultural Holdings Act, 1923, assuming that the tenant on his part has observed all proper legal formalities in connection with his claim for compensation ? ' "

Section 12 of the Agricultural Holdings Act, 1923, under which the claim for compensation arises, is a very long section, but it is only necessary to read a C short extract from sub-s. 1 as follows :

> " Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then . . . "

in the absence of certain matters referred to, the tenant is entitled to obtain D compensation for disturbance.

Counsel for the landlords has pointed out in a clear and forceful argument that there are two conditions stated in the section the satisfaction of both of which is required to give rise to the claim for compensation. The first is that the tenancy terminates by reason of a notice to quit given by the landlord, and the second is that the tenant, in consequence of such notice, quits the holding. E It will be observed from the form of the Case which I have read that, so far as we are concerned, we must assume that the second condition is fulfilled, for the arbitrator has found as a fact, and his finding is part of the question submitted, that the tenant did quit in consequence of the notice, but that still leaves the question to be determined : Was the tenancy terminated by reason of the notice to quit ? F

Before I turn to the language of the Defence Regulation which gives rise to the question I should say that the landlords acquired the reversion to this tenant's tenancy at a date after Sept. 1, 1939 ; that at various dates thereafter they attempted to get possession by serving notice to quit, but in each case they failed to obtain the written consent of the Minister of Agriculture required by the Defence Regulation; and that, finally, in September, 1945, they served G another notice expiring on Sept. 29, 1946, in which they stated that the reason for giving the notice was their own requirement of possession of the farm. I assume that they thought that, if they required the farm for their own occupation, the necessity of obtaining ministerial consent was removed. However that may be, they never did obtain it, but, on the expiry of the notice, namely, on Sept. 29, 1946, the tenant quitted the holding. H

In the court below the tenant placed his case on two grounds. First, that on the true interpretation of the Act the first condition, like the second, was satisfied. In other words, not only had he (the tenant) quitted the premises in consequence of the notice, but also his tenancy had been terminated by reason of the notice. Secondly, he alleged that, in any event, the landlords were estopped, or were otherwise disabled, from alleging or asserting the invalidity of their notice. The county court judge decided, I think rightly, in the tenant's favour on the first point, and, therefore, he did not go on to consider the estoppel question. We, taking the same view as the judge, have also thought it unnecessary to pursue the estoppel matter. We have, therefore, heard no argument upon it, and I propose to say no more about it.

I pass now to the terms of the Defence (General) Regulations, 1939, reg. 62, para. 4A, of which is as follows :

A
> " Where the whole or any part of an agricultural holding is subject to a contract of sale made since Sept. 3, 1939, or has been sold in pursuance of a contract of sale made since that date any notice to quit that holding or any part thereof given to the tenant so as to expire at any time after the end of the year 1941 shall be null and void. Provided that this paragraph shall not apply to any notice if (whether before or after the giving thereof) the Minister of Agriculture and Fisheries consents in writing thereto."

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Counsel for the landlords argued that the words " null and void " leave no room for any doubt that the legislature is saying : " A notice which is embraced within this Defence Regulation is for all purposes to be regarded as without any force, validity or effect." If that be right, it was argued, though the tenant may be found to have quitted the holding because he had received a particular piece of paper, nevertheless it cannot be said that his interest in the land came to an end by reason of something which is, so to speak, wholly proscribed by the law as without any effect. There is considerable force in that argument, but, in considering it, this court is not without substantial guidance, and so I turn at once to a previous decision of the Court of Appeal in *Westlake* v. *Page* (1).

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It is true, as counsel for the landlords has said, that the particular point in that case which seems to me to be of the highest significance in the present case is not mentioned in the headnote, and, in a sense, is dealt with incidentally in the judgment, but, as I follow the case, the decision on this relevant point was necessary to the result at which the court arrived. The landlord in that case had sought to obtain possession from his tenant by serving a notice to quit, but in the notice to quit he had added certain words to the effect that, if the tenant agreed to proposals which he (the landlord) had made as regards the rent, the landlord would not seek to take advantage of the notice. When the time came the tenant did, pursuant to the notice, quit the holding, and he then claimed that a right to compensation under the Agricultural Holdings Act, 1923, s. 12, had arisen. The landlord thereupon said : " No. This notice to quit was conditional, and, therefore, it was a bad notice." The relevant part of the judgment of BANKES, L.J., is as follows ([1926] 1 K.B. 304) :

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> " The first point taken by the landlord in this case is a technical one, that the notice to quit given was in law a bad notice, because it was conditional, and that under those circumstances the case does not come within [s. 12 of the Act of 1923] at all, for that section when speaking of a holding being terminated by a notice to quit must presumably refer to a termination by a valid notice. I cannot accept that contention. It seems to me that if a notice to quit is given, whether it be a good or a bad one, and it is accepted as a good notice by the tenant, who quits the holding in consequence of it, the case comes within the language of the section. That technical point, therefore, fails."

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WARRINGTON, L.J., dealt somewhat differently with this point, but he did not indicate any dissent from the general proposition stated by BANKES, L.J. SCRUTTON, L.J., said (*ibid.* 310) merely that on this point he " agreed with what his brothers had already said ". It seems to follow that in *Westlake* v. *Page* (1) this court, or, at the least, a majority of this court, must be taken to have held that for the tenant to be entitled to compensation under s. 12 it was not necessary to prove that the notice to quit which operated to put an end to the tenancy and in consequence of which the tenant had gone out was a valid notice in the sense that it complied with the requirements of the contractual position between landlord and tenant.

The question which counsel for the landlords has argued here is whether that opinion ought to apply, not to an invalidity *vis-a-vis* the contractual rights, but to something which is by Parliament declared to be null and void. That there is a distinction between the two, at any rate for some purposes, I will not deny, but it seems to me that, in construing a section such as this and considering the purpose which the section has in mind, it would be *pessimi exempli* to draw fine distinctions of that character unless we were compelled to do so, and it does not seem to me that there is anything in the use of the words "null and void" in the Defence (General) Regulations, 1939, reg. 62, para. 4A, which compels the court to say that the principle applicable to a notice which is "bad" in the sense that it fails to comply with the contractual obligations of the landlord does not apply to a notice which is bad because it fails to comply with a provision of the regulation. I agree that the words "null and void" are of the strongest import and it would be difficult to conceive of any formula to express the quality of badness which was stronger than they are. At the same time, when one considers para. 4A, it appears to be necessary to read those words with some reservation. That the notice should ever take effect, it must, of course, in a case of the type we are dealing with, be a year's notice expiring at the end of the year. The regulation itself contemplates on the face of it that the consent which is required to give effectiveness to the notice and to make the earlier part of the regulation inapplicable, may be given at any time, both before or after the giving of the notice. It is, therefore, contemplated, whatever the practice of the Minister may be, that a notice given in September, 1945, to expire at Michaelmas, 1946, might not get the necessary *imprimatur* till the summer, or even the beginning of the autumn, of 1946. During the period from the time the notice was served until the consent was given, what would be its position ? If "null and void" was to be given the widest and most comprehensive significance, it would be difficult, I think, to imagine that it was null and void for nine or ten months and then was suddenly given life and vigour by a consent *ex post facto* obtained from the Ministry of Agriculture.

I do not wish to pursue that further. I mention it merely to support the view that, in my judgment, the use of the phrase "null and void" here is not sufficient to justify or require the court to say that the principle applicable in *Westlake* v. *Page* (1) ought not to be applied in this case. The language of BANKES, L.J., in that case is perfectly general. It seems to me that, if a notice to quit is given, whether it be a good or a bad one, and it is accepted as a good notice by the tenant, the case comes within the language of the section. I decline to say that there are such degrees of badness as would justify the sort of distinction which we are invited to introduce into this case. I would further add that the language of the section is : "Where the tenancy of a holding terminates by reason of a notice to quit . . ." It does not say : "Where the tenancy terminates or is terminated *by* a notice to quit". The difference in language is not one on which I would wish to place any very great emphasis, but there it is, and, if the question be asked as a matter of ordinary English: "By reason of what did this tenancy terminate ?", it seems to me that on the facts of this case the only possible answer is : "By reason of this document, good, bad or indifferent, namely, the notice to quit served by the landlord."

Finally, I think that the two conditions in s. 12 (1) of the Act, namely, (i), the requirement that the tenancy should be terminated by reason of the notice to quit, and (ii) that the tenant should quit in consequence of the notice, are understandable if the purpose of the section is borne in mind. For it is necessary, if the tenant is to get compensation, that not only should his right as a tenant go, but that he should also leave the premises. Unless both conditions are satisfied, a tenant holding over or having no contractual right might nevertheless prefer a claim to compensation while he still remained in possession.

The result, therefore, is that, in my judgment, the view taken by the county court judge was correct. He referred to another decision by a county court judge, *Fox* v. *Neal* (2), in which the view of the county court judge who was then concerned differed from that of himself (JUDGE SCOBELL ARMSTRONG). We have looked at that case, and also at another case, *Streat* v. *Cottey* (3), in which the point was raised before a third county court judge. In the last named case the learned judge came to a conclusion contrary to that of *Fox* v. *Neal* (2) and in line with that which commended itself to JUDGE SCOBELL ARMSTRONG in the present matter. In my opinion, the view taken by JUDGE SCOBELL ARMSTRONG and by the judge in *Streat* v. *Cottey* (3) is to be preferred to the view taken in *Fox* v. *Neal* (2), and I think, as I have already indicated, that the decision of the court below was correct and that this appeal accordingly fails.

SOMERVELL, L.J. : I agree that this appeal fails and that, for the reasons that have been given, this case is covered by the reasoning in *Westlake* v. *Page* (1). We are bound by that authority, but, if I may say so, I wholly agree with the conclusion that was come to in that case.

HODSON, J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Hyde, Mahon & Pascall,* agents for *John Pethybridge & Son,* Bodmin (for the appellants) ; *Barlow, Lyde & Gilbert,* agents for *Stephens & Scown,* St. Austell (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

LUFF *v.* LUFF.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), October 26, 1949.]

Divorce—Costs—Security for wife's costs—Payment by wife of deposit to solicitors for prosecution of suit—Subsequent application for security for costs—Amount ordered against husband—Deduction of amount of deposit from amount of security.

A wife, cross-petitioner in a divorce suit, applied to the registrar for an order that the husband should find security for her costs. She had already deposited with her solicitors £35 in respect of costs for the prosecution of her suit. The registrar estimated the amount of the costs at £75, and, although aware of the sum deposited by the wife, ordered the husband to give security for that amount.

HELD : the amount to be secured by the husband should be reduced by that of the wife's deposit, namely, to £40.

[AS TO SECURITY FOR WIFE'S COSTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 724-727 ; paras. 1107-1115 ; and FOR CASES, see DIGEST, Vol. 27, pp. 421-424, Nos. *4277-4307.*]

Cases referred to :

(1) *Allen* v. *Allen, Allen* v. *Allen and Bell,* [1894] P. 134 ; 63 L.J.P. 78 ; 70 L.T. 326 ; 27 Digest 421, *4278.*

(2) *Williams* v. *Williams,* [1929] P. 114 ; 98 L.J.P. 40 ; 140 L.T. 383 ; Digest Supp.

APPEAL by the husband from an order of the registrar directing the husband to give security for the wife's costs of a cross-petition for divorce filed by her to the extent of £75 which the registrar estimated as the wife's costs up to setting down and for the hearing of the suit.

Barnard, J., allowing the appeal, held that a sum of £35 which had been deposited by the wife with her solicitors towards her costs should be deducted from the amount of the security ordered by the registrar.

Merrylees for the husband.
Stranger-Jones for the wife. A

BARNARD, J.: This is an appeal by a husband from an order of the registrar directing the husband to find security for the wife's costs to the extent of £75. The matter first came before Hodson, J., who directed that the summons should be adjourned into open court. The wife had deposited £35 with her solicitors for the prosecution of her cross-petition, and the husband contends that the B registrar, having estimated the costs up to setting down and for the hearing at £75, should have taken into account the £35 which was in the hands of the wife's solicitors. The wife, on the other hand, says that I ought to consider this £35 merely as the wife's separate income. Her contention was before the registrar who, none the less, directed the husband to find security to the full extent.

Counsel for the wife has referred me to *Allen* v. *Allen* (1), but I do not think C that that case helps me. There the husband was ordered to find security and appealed to the Court of Appeal. The wife had a separate income of her own of £280 a year, but, none the less, the court had ordered the husband to pay £500 a year alimony pending suit. That makes it clear that the court considered that her own income was not sufficient for her to live on in the station in life to which she was accustomed, and, therefore, they ordered the husband to pay alimony. D The Court of Appeal said that, if they interfered with the order for security and so forced the wife to pay some of the costs of the hearing, they would, in effect, be flouting the order which the court had made that £280 a year plus the £500 were what she needed to live on in her ordinary station in life.

In the present case, if I had not the statement before me that the £35 had been actually paid by the wife to her solicitors towards the expenses of this suit—if E I had merely been told that she had £35 or £50 or some other sum—I should have been very loth to interfere with the registrar's order, because he would be quite entitled to take that figure into account and none the less direct the husband to find the security to the full extent. I do not think, however, that the registrar has acted in accordance with the well-known principles which are to be applied in these matters. Hill, J., makes the position clear in *Williams* v. F *Williams* (2), when he says ([1929] P. 118):

> "The main object of security, in recent years at any rate, is that justice may be done by the wife being enabled to procure the assistance of solicitor and counsel and come to court".

So far as the £35 goes, the solicitor is in pocket to that extent towards pre- G senting the wife's case. Therefore, I think it proper, the registrar having estimated that the total costs would be £75, to vary the order made by the registrar by directing the husband to find security to the extent of £40.

Appeal allowed.

Solicitors: *Rhys Roberts & Co.* (for the husband); *C. M. A. Baker*, Harrow (for the wife). H

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

COMMONWEALTH OF AUSTRALIA AND OTHERS *v.* BANK OF NEW SOUTH WALES AND OTHERS.

[PRIVY COUNCIL (Lord Porter, Lord Simonds, Lord Normand, Lord Morton of Henryton and Lord MacDermott), April 26-29, May 2-5, 9, 10, 23-27, 30, 31, June 1, July 26, October 26, 1949.]

A *Privy Council—Australia—Appeal—Right to appeal without certificate of High Court of Australia—Determination of question "as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States"—No reference to inter se question in orders appealed from—Determination of inter se question necessary to give relief to appellants—Commonwealth of Australia Constitution Act,* 1900 (*c.* 12), *Constitution, s.* 74.

B *Australia—Banking—Freedom of inter-State "trade, commerce, and intercourse"—Prohibition of private banking—Invalidity of enactment—Commonwealth of Australia Constitution Act,* 1900 (*c.* 12), *Constitution, s.* 92—*Australian Banking Act,* 1947 (*No.* 57 *of* 1947), *s.* 46.

By s. 92 of the Constitution of the Australian Commonwealth (contained in the Commonwealth of Australia Constitution Act, 1900): "On the C imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

By s. 74: "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and D those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

With the object of expanding the Commonwealth Bank, which was publicly-owned, and suppressing private banks, the legislature of the E Commonwealth of Australia enacted the Banking Act, 1947. Part VII of the Act, which is headed "Prohibition of the carrying on of banking business by private banks," consist of s. 46 which provided for the extinction of all private banks, immediately or step by step, at the will of the Treasurer. On the passing of the Act, the respondents (who included eight private banks incorporated in Australia, three private banks incorporated in F England, and the States of Victoria, South Australia and Western Australia) brought actions in the High Court of Australia claiming that the Act was invalid. The appellants (the Commonwealth of Australia, the Treasurer of the Commonwealth, the Commonwealth Bank of Australia and the governor of the Bank) were the defendants in the actions. The respondent banks, who were authorised to carry on the business of banking in Australia G under the Banking Act, 1945, carried on a substantial amount of inter-State business and some of them acted as bankers for certain States. In each of the actions the High Court made an order declaring (*inter alia*) that s. 46 of the Act of 1947 contravened s. 92 of the Constitution, and, therefore, was invalid. On an appeal by the appellants to the Judicial Committee of the Privy Council in respect of this part of the orders, the respond- H ents raised the preliminary plea that the relief sought on the appeal could not be granted without the determination of a question "as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States" within the meaning of s. 74 of the Constitution, and, therefore, no appeal lay without the certificate of the High Court, which had not been sought. The formal orders of the High Court bore on their face no reference to any *inter se* question, and on the face of them the necessity for a certificate was not apparent, but from the judgments of the judges of the High Court it was clear that *inter se* questions were raised in the actions, and, although the question whether any of the provisions of the Act of 1947 contravened s. 92 of the Constitution was not itself, apparently, an *inter se* question, the determination of the *inter se* questions was a necessary condition of a successful defence of the Act of 1947 in the High Court and of obtaining the relief sought on the appeal. The appellants contended that a certificate was not necessary unless there had been a specific decision adverse to an appellant on an *inter se* question, and that it was erroneous to contend that a certificate was required merely because an *inter se* question had been raised in the proceedings before the High Court and might have to be decided on the appeal.

Held : section 74 of the Constitution was not limited to cases where there had been a specific decision adverse to an appellant on an *inter se* question, but, as the relief sought by the appellants could not be granted without the determination of an *inter se* question, the section applied and, therefore, no appeal would lie without the certificate of the High Court.

Per curiam : In every case in which the relief sought on an appeal cannot be granted without the determination of an *inter se* question and the certificate of the High Court has been given no further leave from His Majesty in Council is necessary.

The Board would not express an opinion on any *inter se* question which, as a certificate had not been given, it was the function of the High Court finally to determine. In the circumstances of the case, however, they thought it right to state their views on the question whether s. 46 of the Banking Act, 1947, offended against s. 92 of the Constitution.

Held : the business of banking was included among the activities described in s. 92 of the Constitution as " trade, commerce, and intercourse " and protected by that section ; as s. 46 of the Act of 1947 authorised the total prohibition of private banking, it directly restricted the inter-State business of banking ; and, therefore, its object was to restrain, and not merely to regulate, inter-State " trade, commerce, and intercourse," and it was contrary to s. 92 of the Constitution.

James v. *Cowan* ([1932] A.C. 542) and *James* v. *Commonwealth of Australia* ([1936] 2 All E.R. 1449), *applied.*

[As to Appeals from the High Court of Australia, see HALSBURY, Hailsham Edn., Vol. 11, pp. 235, 236, paras. 450, 451 ; and for Cases, see DIGEST, Vol. 17, p. 496, Nos. *608-610.*]

Cases referred to :

(1) *Baxter* v. *Taxation Comrs.*, (1907), 4 C.L.R. 1087 ; 17 Digest 496, *p.*

(2) *Rajah Tasadduq Rasul Khan* v. *Manik Chand*, (1902), L.R. 30 Ind. App. 35 ; 17 Digest 501, *644.*

(3) *James* v. *Cowan*, [1932] A.C. 542 ; 101 L.J.P.C. 149 ; 147 L.T. 321 ; *revsg.*, (1930), 43 C.L.R. 386 ; Digest Supp.

(4) *James* v. *Commonwealth of Australia* (No. 2), [1936] 2 All E.R. 1449 ; [1936] A.C. 578 ; 105 L.J.P.C. 115 ; 155 L.T. 393 ; Digest Supp.

(5) *James* v. *State of South Australia*, (1927), 40 C.L.R. 1 ; Digest Supp.

(6) *Salomon* v. *Salomon & Co.*, *Salomon & Co.* v. *Salomon*, [1897] A.C. 22 ; 66 L.J.Ch. 35 ; 75 L.T. 426 ; 16 Digest 246, *441.*

(7) *R.* v. *Vizzard, Ex parte Hill*, (1934), 50 C.L.R. 30 ; 40 Argus L.R. 16 ; 7 A.L.J. 362 ; Digest Supp.

(8) *Duncan* v. *Queensland State*, (1916), 22 C.L.R. 556 ; 17 Digest 450, *b.*

(9) *Australian National Airways Proprietary, Ltd.* v. *The Commonwealth*, [1946] A.L.R. 1 ; 71 C.L.R. 29 ; 19 A.L.J. 304 ; 2nd Digest Supp.

(10) *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty., Ltd.*, (1939), 62 C.L.R. 116.

(11) *State of Tasmania* v. *State of Victoria*, (1935), 52 C.L.R. 157.

Consolidated Appeals, by special leave, from orders, dated Aug. 11, 1948, of the Full High Court of Australia (exercising its original jurisdiction), in so far as such orders gave effect to the judgments of the majority of the judges (Rich, Starke, Dixon and Williams, JJ., Latham, C.J., and McTiernan, J., *dissenting*), that s. 46 of the Banking Act, 1947, offended against s. 92 of the Australian Constitution.

The appellants in each of the five appeals were the Commonwealth of Australia, the Treasurer of the Commonwealth (the Rt. Hon. Joseph Benedict Chifley), the Commonwealth Bank of Australia and the governor of the Commonwealth Bank (Hugh Traill Armitage), and the respondents, who brought the actions against the appellants to test the validity of the Act of 1947, included eight private banks incorporated in Australia, three private banks incorporated in England, and the States of Victoria, South Australia and Western Australia. The States of New South Wales and Queensland were interveners in support of the appellants. On the hearing of the appeals, the respondents raised as a preliminary point the plea that the appeals did not lie without a certificate of the High Court of Australia, as the relief sought by the appellants could not be granted without the determination of a question "as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States," within the meaning of s. 74 of the Australian Constitution. The Judicial Committee now gave judgment for the respondents on the preliminary point, and dismissed the appeals, but, in view of the fact that a certificate from the High Court might still be obtained, they thought it right to express their opinion on the question, which had been fully argued before them, whether s. 46 of the Banking Act, 1947, offended against s. 92 of the Constitution. Their Lordships held that it did. The facts appear in the judgment of the Board delivered by Lord Porter.

H. V. Evatt, K.C. (*Attorney-General for Australia*), *K. H. Bailey, K.C.* (*Solicitor-General for Australia*), *Pritt, K.C.*, *P. D. Phillips, K.C.* (of the Australian Bar), *Gahan*, *H. L. Parker* and *C. I. Menhennitt* (of the Australian Bar) for the appellants.

Sir Walter Monckton, K.C., *Sir Cyril Radcliffe, K.C.*, *G. E. Barwick, K.C.* (of the Australian Bar), *F. W. Kitto, K.C.* (of the Australian Bar), *E. G. Coppel, K.C.* (of the Australian Bar), *Sir Valentine Holmes, K.C.*, *Diplock, K.C.*, *MacKenna*, *Sir David Maxwell Fyfe, K.C.*, *Douglas I. Menzies* (of the Australian Bar), *A. J. Hannan, K.C.* (of the Australian Bar), and *J. Harcourt Barrington* for the respondents.

Pritt, K.C., and *Gahan* for the interveners, States of New South Wales and Queensland.

Oct. 26, 1949. The following judgment of the Board was delivered by

LORD PORTER: These consolidated appeals from orders of the High Court of Australia raise important and difficult questions in regard to the legislative power of the Commonwealth government under the Australian Constitution and in regard to the limitations expressly or by implication imposed on it by that Constitution. The Act of which the validity is challenged is the Banking Act, 1947, hereafter called "the Act." Its provisions will be referred to later in detail, but its objects as stated in s. 3 may be at once set out. They are as follows:

> "(*a*) the expansion of the banking business of the Commonwealth Bank as a publicly-owned bank conducted in the interests of the people of Australia and not for private profit; (*b*) the taking over by the Commonwealth Bank of the banking business in Australia of private banks and the acquisition on just terms of property used in that business; (*c*) the prohibition of the carrying on of banking business in Australia by private banks."

The legislative power of the Commonwealth is defined in s. 51 of the Constitution [contained in the Commonwealth of Australia Constitution Act, 1900]. By s. 51 :

> " The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to : (i) Trade and commerce with other countries, and among the States . . . (xiii) Banking, other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money . . . (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." A

Purporting to exercise the power thus vested in it the Commonwealth enacted B the Act. It does not touch State banking even within the limits authorised by *placitum* (xiii). The expansion of the Commonwealth Bank and the suppression of private banks are its aim. By " private banks " is meant the bodies corporate whose names are set out in sched. I to the Act. They are the banks authorised to carry on the business of banking in Australia under the provisions of the Banking Act, 1945, s. 8 and sched. I. They are fourteen in number, eight of them C incorporated in Australia, three of them in England and three elsewhere.

Forthwith on the passing of the Act numerous actions were commenced in the High Court in which the plaintiffs claimed that the Act was invalid. It is unnecessary to state the parties to the several actions beyond saying that the plaintiffs included the eight private banks incorporated in Australia, the three private banks incorporated in England together with, in some cases, a director D and representative shareholder, and, in addition, the States of Victoria, South Australia and Western Australia, while the defendants were the Commonwealth of Australia, the Right Hon. Joseph Benedict Chifley (the Treasurer of the Commonwealth), the Commonwealth Bank of Australia and Hugh Traill Armitage (the governor of that Bank). The defendants are the appellants in the present consolidated appeals, while the plaintiffs in the several actions are E the respondents. In addition, the States of New South Wales and Queensland have, by leave of their Lordships, intervened in the appeal in support of the appellants.

Their Lordships are directly concerned in these appeals with one section only of the Act, s. 46, the terms of which will be presently set out. But in the High Court not only s. 46 but numerous other provisions of the Act were successfully F attacked and in respect of their declared invalidity the appellants have brought no appeal. It will be convenient as an introduction to s. 46 to state briefly the provisions of the Act and to explain what remains of them after the judgment of the High Court. Section 3 stating the objects of the Act has already been set out. Other relevant provisions were of the following character. Section 6 : a severability clause in terms at least as wide as, and possibly wider than, those G to be found in s. 15A of the Acts Interpretation Act, 1901-1941. Section 11 (*a*) : a declaration that it shall be the duty of the Commonwealth Bank to provide adequate banking facilities for any State or person requiring them. Section 12 : a power to acquire by agreement all or any of the shares in a private bank. Section 13 : powers of compulsory acquisition of Australian shares in any of the private banks where the Treasurer is satisfied that the majority in number H of the shares in that bank are Australian shares, and a consequent provision (s. 15) for the payment of fair compensation therefor. Section 17 : an enactment that, where Australian shares are so acquired, the existing directors shall cease to hold office, and s. 18 *et seq* : power to the governor of the Commonwealth Bank to appoint other directors in their stead, and certain provisions incidental thereto. Section 22 : power to the Treasurer to invite a private bank to make an agreement with the Commonwealth Bank for the taking over of the business of that private bank. Section 24 : where no such agreement is arrived at by a specified date provision for a compulsory transfer of the business in Australia of that bank to the Commonwealth Bank with the consequent transfer of assets and for the payment of fair compensation (s. 25). Sections 26-36 : the setting up of a Court of Claims to assess compensation and a provision that the computation of its amount should be entrusted to the Court of Claims exclusively and should consequently be withdrawn from the jurisdiction of the High Court. Sections 37-45 : the assessment of compensation.

By orders made by the High Court in each action, it was declared that the following provisions of the Act were invalid, *viz.*, division 2 of pt. IV (which contained ss. 12 to 16 inclusive) except in so far as it related to the voluntary acquisition of shares and without prejudice as therein mentioned, and division 3 of pt. IV (which contained ss. 17 to 21 inclusive) and ss. 24, 25, 37 to 45 inclusive, 46, 59 and 60. As has been already stated, these orders have not been appealed from, except in regard to s. 46. This section is contained in and makes up the whole of pt. VII of the Act. It is entitled " Prohibition of the carrying on of banking business by private banks " and is as follows :

> " (1) Notwithstanding anything contained in any other law, or in any charter or other instrument, a private bank shall not, after the commencement of this Act, carry on banking business in Australia except as required by this section. (2) Each private bank shall, subject to this section, carry on banking business in Australia and shall not, except on grounds which are appropriate in the normal and proper conduct of banking business, cease to provide any facility or service provided by it in the course of its banking business on Aug. 15, 1947. (3) The last preceding sub-section shall not apply to a private bank if its business in Australia has been taken over by another private bank or after that business has been taken over by the Commonwealth Bank. (4) The Treasurer may, by notice published in the *Gazette* and given in writing to a private bank, require that private bank to cease, upon a date specified in the notice, carrying on banking business in Australia. (5) The date specified in a notice under the last preceding sub-section shall be not more than two months after the date upon which the notice is published in the *Gazette*. (6) The Treasurer may, from time to time, by notice published in the *Gazette* and given in writing to the private bank concerned, amend a notice under sub-s. (4) of this section (including such a notice as previously amended under this sub-section) by substituting a later date for the date specified in that notice (or in that notice as so amended). (7) That later date may be a date either before or after the expiration of the period of two months referred to in sub-s. (5) of this section. (8) Upon and after the date specified in a notice under sub-s. (4) of this section (or, if that notice has been amended under sub-s. (6) of this section, upon and after the date specified in that notice as so amended), the private bank to which that notice was given shall not carry on banking business in Australia. Penalty : £10,000 for each day on which the contravention occurs."

It is the validity of this section, divorced from the other sections of the Act which have been declared invalid, that the appellants seek to maintain. In the High Court and before this Board its validity has been challenged on grounds, which, though not all of them will be discussed, it is convenient to set out. It is attacked on the grounds : (i) that its provisions do not constitute a law " for the peace, order, and good government of the Commonwealth with respect to " any of the matters with respect to which the Commonwealth Parliament has, by virtue of s. 51 of the constitution, or otherwise, power to make laws ; (ii) that they contravene s. 92 of the constitution ; (iii) that they are inconsistent with the maintenance of the constitutional integrity of the States ; (iv) that they are inconsistent with s. 105A of the constitution and the Financial Agreement of 1927, made thereunder; (v) that they are inseparable from other provisions of the Act which are themselves invalid. The appellants, contending that on none of these grounds was the decision of the High Court adverse to them except that which was based on the contravention of s. 92 of the Constitution, seek to obtain from the Board a contrary decision on this point, and, as will appear, their Lordships will express their opinion on it. But, before doing so, they must examine and deal with another question of far-reaching importance.

Special leave to appeal against the several orders of the High Court of Australia was granted to the appellants on the footing that at the hearing of the appeals the right should be reserved to the respondents to raise the preliminary plea that such appeals did not lie without the certificate of the High Court. It is this plea, which was duly raised by the respondents, that must now be considered, no such certificate having been sought or given. Chapter III of the Constitution, which is entitled "The Judicature", consists of s. 71 to s. 80 inclusive, of which s. 73 defines the appellate, and s. 75 the original, jurisdiction of the High Court of Australia thereby established. Section 74, which for the present purpose is all important, is in the following terms:

> "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.
>
> The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.
>
> Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal Prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

The question for determination is whether by reason of the provisions of this section the right of His Majesty by virtue of His Royal Prerogative to grant to the appellants special leave to appeal was, in the circumstances to which their Lordships must now refer, abrogated unless the High Court certified in the manner required by the section. It will be convenient to refer to a question of the kind described in s. 74 as an "*inter se* question."

The relevant circumstances appear to be these. (i) The formal orders of the High Court make no reference to any "*inter se*" question. Declarations of invalidity are made and injunctions are granted, but on the face of the orders the necessity for a certificate under s. 74 is not apparent. (ii) The several cases were heard without pleadings on motion. It is, therefore, only from the evidence which was given on affidavit, the statements made at the Bar as to the argument, and the contents of the judgments of the learned judges of the High Court, that it can be ascertained what were the issues raised and debated. (iii) A consideration of these matters places it beyond doubt that the validity of the Act in general and of s. 46 in particular was, as has already been stated, challenged on (*inter alia*) the grounds (*a*) that its provisions were not a law "for the peace, order, and good government of the Commonwealth with respect to" any of the matters with respect to which the Commonwealth Parliament had power by virtue of s. 51 of the Constitution or otherwise to make laws, (*b*) that they were inconsistent with the maintenance of the constitutional integrity of the States,

and (*c*) that they were inconsistent with s. 105A of the Constitution and the Financial Agreement made thereunder. These grounds admittedly raise *inter se* questions. (iv) The determination of each of these *inter se* questions in favour of the appellants was a necessary condition of a successful defence of the impugned Act in the High Court and it remains a necessary condition of obtaining the relief sought on the appeal to His Majesty in Council. If these *inter se* questions
A are so determined, the question whether the Act or any of its provisions contravenes s. 92 of the Constitution must then be decided. But this question appears not to be an *inter se* question. (v) A clear majority of the judges of the High Court were of opinion that s. 46 of the Act contravened s. 92 of the Constitution and was, accordingly, invalid. The present appeal is brought to challenge the correctness of this opinion. On the *inter se* questions (except that of
B inconsistency with the maintenance of the constitutional integrity of the States) there was a considerable diversity of opinion and in regard to this there was some controversy before their Lordships whether, if, indeed, it became necessary to determine whether a "decision" had been given on any *inter se* question, a final opinion could be attributed to some members of the court.

It is to these circumstances that the provisions of s. 74 of the Constitution
C must be applied, and it is convenient to state summarily the rival submissions of the parties. By the respondents, who contend that in the absence of a certificate no appeal lies, it is urged that on its true construction the section means that no appeal to His Majesty is permissible without certificate if the relief sought on the appeal cannot be granted without the determination of an *inter se* question. The appellants, on the other hand, though they agree that it
D may be necessary to look beyond the terms of the formal order, contend that a certificate is not necessary unless there has been a specific decision adverse to an appellant on an *inter se* question, which he and he alone wishes to challenge, and that it is erroneous to contend that a certificate is required merely because an *inter se* question has been raised in the proceedings before the High Court and may have to be decided in the appeal to His Majesty in Council.

E Before considering how far these conflicting views accord with the actual language of s. 74, their Lordships would briefly examine the section in a somewhat wider aspect. It is, in the first place, clear that in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those *inter se* questions which were of such vital importance to Commonwealth and
F States alike. Reference may be made on this aspect of the matter to the judgment of GRIFFITH, C.J., and BARTON and O'CONNOR, JJ., in *Baxter* v. *Taxation Comrs.* (*N.S.W.*) (1). In its broad outlines s. 74 speaks for itself in this respect and the policy which it embodied is emphasised in later Judiciary Acts: see s. 38A of the Judiciary Act, 1903-1934, which reproduces s. 2 of the Judiciary Act, 1907. It would be a paradoxical result if, in the face of s. 74, the determina-
G tion of *inter se* questions, which might be of transcendent importance, was left to this Board by the accident that the respondent, having won before the High Court on some other point, yet wished to rely also on a contention which raised an *inter se* point. To this matter their Lordships will return when they consider the practical aspect of their decision. It is sufficient here to say that this argument appears to weigh heavily against the submission of the appellants. In the
H second place there appears to their Lordships to be no ground for suggesting that any new kind of jurisdiction is created by s. 74. It deals with the Royal Prerogative to grant special leave to appeal and imposes certain limitations on, or, in the language of the section, in some degree "impairs," that right. But the appeal by special leave is what it always has been, an appeal from an order or other judicial act which affects adversely the rights claimed by the appellant party. It is in the light of this consideration that the section must, if possible, be construed. To give effect to the appellants' submission would appear to involve

the admission of an appeal, not from a judicial act, but from the pronouncement of an opinion on a question of law.

The conclusion to which these broad considerations point is, in their Lordships' opinion, assisted by a closer examination of the section, though its language suggests that the difficulty which now arises had not been in the mind of its authors. As its opening words show, the section deals with " appeals " to His Majesty in Council and, as already observed, an appeal is the formal proceeding by which an unsuccessful party seeks to have the formal order of a court set aside or varied in his favour by an appellate court. It is only from such an order that an appeal can be brought. In s. 74 the appeal is described as an appeal " from a decision of the High Court " and so far no difficulty arises. " Decision " is an apt compendious word to cover " judgments, decrees, orders, and sentences," an expression that occurs in s. 73. It was used in the comparable context of the Judicial Committee Acts, 1833-1844, as a generic term to cover " determination, sentence, rule, or order " [s. 3 of the Act of 1833] and " order, sentence, or decree " [s. 21 of the Act of 1833]. Further, though it is not necessarily a word of art, there is high authority for saying that even without such a context

> " . . . the natural, obvious, and *prima facie* meaning of the word ' decision ' is decision of the suit by the court . . . "

see *Rajah Tasadduq Rasul Khan* v. *Manik Chand* (2), where the question was whether in the Indian Civil Procedure Code, s. 596, " decision " meant the formal expression of an adjudication in a suit or the statement given by the judge of the grounds of a decree or order, and Lord Davey, delivering the opinion of this Board (L.R. 30 Ind. App. 39), used the words that have been cited above. It is, however, on the words next following [in s. 74] that the appellants primarily rely. The appeal which is not permitted is an appeal :

> " . . . from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* . . . "

It is said by the appellants that the words " upon any question " are to be read with the immediately preceding word " decision " and that, so read, they qualify the meaning of that word so that it must be interpreted as the expression of an opinion by the court on a particular *inter se* question, with the result (as their Lordships understand the argument) that the only prohibited appeal is one in which the appellants seek to obtain a reversal of that expression of opinion in an appellate court. In support of this contention the appellants rely also on the repetition of the word " question " at the end of the first paragraph, and again in the second paragraph of the section. It appears to their Lordships to be of little significance whether the words " upon any question " are linked (as the appellants contend) with " decision " or (as the respondents contend) with " appeal." The former is the natural grammatical meaning and is to be preferred. Then, so runs the appellants' argument, the respondents' construction requires that the word " upon " should be read as equivalent to " involving " and this, they say, is an illegitimate straining of language. It may be conceded that the word " upon " is not the word most apt to the occasion. But, if the alternative construction involves (as it appears to involve) giving to both the words " appeal" and " decision " some other than their natural and primary meaning, and further involves a grave departure from the policy which clearly inspires this part of the Constitution, it does not appear to their Lordships that the use of the word " upon," where " involving " would more aptly be used, should deter them from adopting the respondents' construction. It is a somewhat elliptical, but by no means an impossible, use of language to speak of a decision upon a certain question when what is meant is a decision in a suit which cannot be decided without the determination of that question, or, more shortly, a decision involving a certain question or involving the determination of a certain question.

Moreover, if the construction for which the respondents contend may be criticised as departing from the strict meaning of the word " upon," the construction put forward by the appellants cannot escape a similar criticism. It was urged that, if the phrase, " No appeal . . . from a decision of the High Court upon any question," is read as a whole without pausing on its several elements, its meaning is clear. But, so read, it has not, or at least has not clearly, the meaning attributed to it by the appellants unless it is amplified so as to read : A " No appeal from an order of the High Court being a decision adverse to the appellant upon a question " (or " in so far as it is a decision adverse to the appellants upon a question "). For this paraphrase, which is not artistic, nor itself free from ambiguity, there seems to be no justification. To their Lordships it appears preferable to adhere strictly to the proper meaning of " appeal " and of " decision " when it is used in relation to an appeal. If any other interpre- B tation is adopted, the word " decision " is required to do double duty, meaning at the same time the order of the court and an expression of opinion by the court. The appellants, as has already been said, rely on the further references in the section to " the question " ; so also do the respondents who contend that the phrase in the second paragraph, " an appeal . . . on the question," not only supports their view that the words " upon any question " are to be linked with C " appeal " rather than with " decision," but also, since " appeal " can have only one meaning, emphasises the contention that the " question " means the suit in which the question is raised. In their Lordships' opinion, however, little assistance is given by the repetition of the word. The meaning of the first paragraph of the section must be determined by its own language.

In the next place their Lordships must consider what is the scope and meaning D of the section if the respondents' submission is not accepted. They have not found it easy to ascertain or to state precisely what is at this stage of the argument the contention of the appellants. It is clear that no difficulty arises unless it is sought to bring an appeal in a suit in which two pleas are involved, the one a plea which challenges the validity of a statute on an *inter se* question, the other a plea which may be a challenge of its validity on some other ground, *e.g.*, that E it offends against s. 92 of the Constitution, or may turn purely on some question of fact. Further, it is clear that no difficulty arises if both pleas are decided against the same party. It could not in that case be contended (subject only to a qualification appearing later) that an appeal would lie without a certificate of the High Court. But the difficulty arises where there are two pleas of the kind described and either the *inter se* plea (as it may briefly be called) is decided one F way and the other plea the other way, or, a decision on the other plea being sufficient to determine the rights of the parties, the High Court think it unnecessary to express any, or any final, opinion on the *inter se* plea. And, as the present appeal well illustrates, the situation is capable of numerous and by no means fanciful variations. Thus, in a case in which two or three or more pleas, amongst them an *inter se* plea, were raised, it might well not be possible to say that there G had been in favour of one party or the other a decision, or even an expression of opinion on the *inter se* plea, by a majority of the judges constituting the court ; yet in such a case it might be clear that the unsuccessful party who sought to appeal could not succeed on his appeal unless the appellate court decided the *inter se* plea in his favour. It appears to their Lordships that, as soon as it is conceded (as both sides concede) that s. 74 cannot be confined to simple cases of H declaratory judgments where the validity or invalidity of the impugned statute and the reason therefor appear on the face of the order, the limitation of its scope, for which the appellants contend, ought not to be accepted. They have already stated that, in their opinion, the definition for which the respondents contend gives a legitimate meaning to its actual language and is consonant with its obvious purpose.

Their Lordships, in coming to this conclusion, perforce disagree with the views expressed by the majority of the court in *Baxter's* case (1) as to the meaning of the word "decision" in s. 74, preferring that expressed by Higgins, J. (4 C.L.R. 1172). They would, however, observe that in that case it was unnecessary for the court to consider a case such as the present appeal, in which different pleas have been decided in favour of different parties, and to pursue to its logical conclusion the construction of the section which they favoured. Nor, valuable and important though their observations were, were they necessary to the decision of the case. The appellants further relied on the opinion expressed in Quick and Garran's Annotated Constitution of the Australian Commonwealth, a work published in 1901 in the early days of the Constitution. It does not appear to their Lordships that, however learned and distinguished its authors, they can give authoritative weight to an opinion which was expressed before the construction of the section had been tested before the court.

Before leaving this question, their Lordships think it right to deal with a point that arises on the second paragraph of the section. It is there provided that, if the High Court grants a certificate :

> ". . . thereupon an appeal shall lie to [His] Majesty in Council on the question without further leave."

If, as their Lordships hold, the certificate of the High Court is necessary whenever the appellant cannot obtain the relief that he claims without the determination of an *inter se* question, does it follow that, when such a certificate has been given, no further leave is required, even though other questions, which are not *inter se* questions, will have to be determined ? In their Lordships' opinion, it does. On this question no settled practice has or could be established until the scope of s. 74 had been finally determined. It may now be stated that in every case in which the relief sought on the appeal cannot be granted without the determination of an *inter se* question (*a*) no appeal will lie without the certificate of the High Court, and (*b*) when that certificate has been given, no further leave from His Majesty in Council will be necessary. It was suggested that the prerogative right to grant leave to appeal might in this way be unduly restricted, for a litigant might raise an *inter se* question on some unsubstantial pretext in the hope that thus the way to an appeal to His Majesty in Council would be barred. But the possibility of abuse is no reason for departure from what appears to be the logical procedure, and it can be assumed that the High Court or this Board will deal with such action summarily. Finally, mention should be made of one class of case which requires special treatment. If, for example, a party to a suit contends (i) that the facts of his case do not bring him within the operation of a statute and (ii) that, even if they do, the statute is invalid on some *inter se* ground, and both pleas are decided against him, there appears to be no reason why he should not accept the decision of the High Court on the *inter se* question but present a petition to His Majesty in Council for special leave to appeal on the other question. In such a case, if leave were granted, the Board would, on the hearing of the appeal, have no concern with any *inter se* question and, in harmony with the formula already stated, the appellant could obtain the relief he claimed without the determination by the Board of any such question. The example given is not exhaustive of this class of case. The plea other than the *inter se* plea might be founded not on fact but on some other ground of invalidity, in which case the same principle would apply.

The view which their Lordships have expressed that no appeal lies to them without a certificate from the High Court of Australia is conclusive of the case and in normal circumstances they would not give any opinion on the many other matters argued before them. Nor do they propose to express any opinion on the "*inter se*" questions which it is the function of the High Court finally to determine unless a certificate is given under s. 74 of the Constitution. But for two reasons they think it right to state their views on the question to which so large a part of the argument of the appellants was directed, *viz.*, whether s. 46 of the

Act of 1947 offends against s. 92 of the Constitution—first, because it might yet be possible to apply for, and if the High Court should think fit to grant it, to obtain a certificate which would enable the appellants to re-argue a case already fully argued, and, secondly, because it appears to them that a large part of the appellants' argument was based on a misapprehension of two cases already decided by this Board which it is their Lordships' duty, so far as they can, to
A correct.

The familiar terms of the first part of s. 92 may be set out :

> " On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

B Forty years of controversy on these words have left one thing at least clear. It is no longer arguable that freedom from customs or other monetary charges alone is secured by the section. On that the contending parties, while differing on almost every other point, are agreed. The questions remaining are : What is included, and, in particular, is the business of banking included, in the expres-
C sion "trade, commerce, and intercourse"? What is the freedom guaranteed by the section, and is it infringed by the Act ? On these questions the parties put forward conflicting contentions. The appellants (who claim support in the dissenting judgments of LATHAM, C.J., and MCTIERNAN, J.) contend that banking, though it may be carried on by means of inter-State transactions, is not " trade, commerce, and intercourse among the States " within s. 92, and, further, that,
D even if it is, the Act of 1947 does not infringe any guaranteed freedom. The contrary on both points is contended by the respondents whose contention was upheld by the other four judges of the High Court (RICH, WILLIAMS, STARKE and DIXON, JJ.). In considering these rival contentions, their Lordships will examine the decisions in *James* v. *Cowan* (3) and *James* v. *Commonwealth of Australia* (No. 2) (4), claimed by both sides to be decisive in their favour, and then
E consider the bearing of those decisions and the reasoning which appears to be implicit in them on the present case. Before this is done, however, it remains to complete the statement of relevant facts and to deal with one matter, not indeed of general importance but peculiar to the present case, *viz.*, the question whether s. 46 [of the Act of 1947] as a whole is severable from the parts of the Act which have been declared invalid and the further question whether, if part
F of s. 46 itself is invalid, yet the rest of it is valid.

As may be surmised from what has already been said, the business of banking in Australia is at the present time carried on by three kinds of organisation (i) the Commonwealth Bank of Australia, (ii) State banks, and (iii) the private banks which have been already described. The private banks carry on a substantial volume of inter-State business amounting to about fifteen per cent.
G of their total business and some of them act as bankers for certain of the States. The Act does not differentiate, or authorise a differentiation, between their inter-State and intra-State business. It has not been suggested that it would be possible to do so. They are already under a large measure of control by the Commonwealth Bank under the Banking Act, 1945, the provisions of which Act have not been challenged in these proceedings. The expansion of the Commonwealth Bank is one of the avowed objects of the Act of 1947 and must
H inevitably follow from the prohibition of private banking. Since the appellants rely on it for one part of their argument, it may be well to repeat that s. 11 of the Act imposes on the Commonwealth Bank the duty

> " . . . (*a*) to provide in accordance with the conditions appropriate in the normal and proper conduct of banking business, adequate banking facilities for any State or person requiring them ; (*b*) to conduct its business without discrimination except on such grounds as are appropriate in the

> normal and proper conduct of banking business ; and (*c*) to observe, except as otherwise required by law, the practices and usages customary among bankers and, in particular, not to divulge any information relating to, or to the affairs of, a customer of the Commonwealth Bank except in circumstances in which it is, in accordance with law or the practices and usages customary among bankers, necessary or proper for the Commonwealth Bank to divulge that information."

These being the relevant facts, their Lordships turn first to what has been called the severability point. It is enacted by s. 6 of the Act as follows :

> "It is hereby declared to be the intention of the Parliament (*a*) that if any provision of this Act is inconsistent with the Constitution, that provision and all the other provisions of this Act shall nevertheless operate to the full extent to which they can operate consistently with the Constitution ; (*b*) that the provisions of the last preceding paragraph shall be in addition to, and not in substitution for, the provisions of s. 15A of the Acts Interpretation Act, 1901-1941 ; and (*c*) that this section and s. 15A of the Acts Interpretation Act, 1901-1941, shall have effect notwithstanding that their operation may result in this Act having an effect different, or apparently different in substance, from the effect of the provisions contained in this Act in the form in which this Act was enacted by the Parliament."

Taking into consideration the wide terms of this section supplementing those of s. 15A of the Interpretation Act, 1901-1941, their Lordships have come with some hesitation to the conclusion that s. 46 is severable from the invalidated provisions of the Act and that its validity must be tested as if it were a separate enactment. It may be observed, however, that, since, as will appear, so regarded it falls by its own offence against s. 92 of the Constitution, it is an academic question whether it should suffer from association with other sections. The further question, whether the validity of any part of s. 46 can be maintained if other parts of it are invalid, is in the same sense academic. It will not help the appellants, if, for example, sub-ss. (1) to (3) inclusive can be considered as one enactment and sub-ss. (4) to (8) as another. But, since the matter has been argued before them, their Lordships state their opinion that on its true construction s. 46 contains one indivisible scheme, no part of which can be severed from the rest. Sub-section (1) contains the primary enactment, the prohibition of private banking : sub-s. (2), which is barely intelligible except by reference to provisions for compulsory acquisition now excised from the Act, is intended to ensure an orderly continuance of banking facilities, until the private banks are dissolved, by compelling each of them to carry on its business "subject to the section." From the date specified by notice given by the Treasurer under sub-s. (4), or a substituted date (sub-ss. (6) and (7)), the bank to which notice has been given must not carry on business in Australia (sub-s. (8)). There is on the true construction of the section a single indivisible scheme by which the extinction of all private banking is to be brought about immediately or step by step at the will of the Treasurer. It is on this footing that the validity of the section will be examined. As was observed by the learned Chief Justice in the course of his judgment :

> "There is no doubt that the provisions mentioned are directed towards putting the plaintiff banks out of business or that, if put into operation, they will achieve that result."

From this way of stating the problem the appellants do not shrink. The question then is whether an Act which, leaving untouched the Commonwealth and State banks, authorises the total prohibition of all private banking, offends against s. 92 of the Constitution.

The problem being thus stated, the first question that must be answered is

whether a prohibition of banking business is, in any view, within the ambit of s. 92. This question can itself be resolved into two questions : (i) Is the business of banking included among those activities described as " trade, commerce, and intercourse " in s. 92 ? (ii) If not, is a prohibition of private banking, involving the denial of a choice of banking facilities to those engaged in trade and commerce among the States, a restriction on the freedom of that trade and
A commerce which is guaranteed by s. 92 ? Concluding, as they do, that the first question must be answered in the affirmative, their Lordships do not think it necessary to discuss the second, which presents many difficulties. It is, in their opinion, clear that such words as " trade, commerce, and intercourse " are not naturally susceptible of such a narrow interpretation as the appellants would put on them. And, if they may say so with all respect to the learned Chief Justice
B who has taken the opposite view, it would be contrary to the trend of judicial decision both in Australia and (so far as that is relevant) in the United States of America to hold otherwise. The view, which at one time appeared to be put forward in argument, that the words in s. 92, " whether by means of internal carriage or ocean navigation," restricted its operation to such things and persons as are carried by land or sea has long since been rejected and cannot be enter-
C tained. The business of banking, consisting of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred activities, is a part of the trade, commerce and intercourse of a modern society and, in so far as it is carried on by means of inter-State transactions, is within the ambit of s. 92. On this part of the case their Lordships respectfully adopt the language and reasoning of DIXON, J., to which they can add nothing.

D The business of banking being an activity of which the freedom is protected by s. 92 of the Constitution, the next question is whether the Act offends that section, and their Lordships turn at once to *James* v. *Cowan* (3) and *James* v. *Commonwealth of Australia* (No. 2) (4). Of these two cases the more important, for what it decided, is *James* v. *Cowan* (3). The facts in *James* v. *Cowan* (3) can only be understood if they are read in conjunction with the earlier case of *James* v.
E *State of South Australia* (5). James carried on business in South Australia as a grower and producer of dried fruits and in the course of it sold his products outside that State. For reasons, which have been many times stated in judgments of this Board and of the High Court and need not be repeated, the Commonwealth and certain of the States, including South Australia, had recourse to legislation to deal with the whole question of marketing dried fruits. In 1924
F the South Australian legislature enacted the Dried Fruits Act, 1924. The material provisions of this Act are set out at large in the judgment of *James* v. *Cowan* (3). It is essential only to notice that the Act contained two sections, s. 20 and s. 28, each of which authorised an interference with the free disposal by the grower of his products, s. 20 by empowering the Dried Fruits Board, which was established under the Act, in its absolute discretion to determine
G where and in what quantities the output of dried fruits produced in any year should be marketed, and s. 28 (which was expressed to be subject to s. 92 of the Constitution) by empowering the minister to purchase by agreement, or acquire compulsorily, any dried fruits in South Australia grown and dried in Australia, subject to certain exceptions which need not be particularised.

In *James* v. *State of South Australia* (5) it was in the first place the validity
H of s. 20 of the Act and of determinations made under it that came in question and it was held by the whole court (ISAACS, A.C.J., GAVAN DUFFY, POWERS, RICH and STARKE, JJ.) that that section, so far as it authorised a determination by the board limiting the quantities of dried fruits which might be marketed within the Commonwealth, was obnoxious to s. 92. From the decision of the High Court no appeal was brought to this Board. But, s. 20 failing him, the Minister of Agriculture in South Australia sought to make use of his powers under s. 28. Once more James invoked s. 92 of the Constitution and in *James*

v. *Cowan* (3) challenged the validity of the executive action taken under s. 28, and it was in this case when it came before the Board that the decision was given, which, as their Lordships think, goes far to determine the present case. For, as part of the *ratio decidendi* of the case and by no means *obiter* or by way of a historical narrative, the Board expressly affirmed the decision of the High Court in *James* v. *State of South Australia* (5). The primary importance of the decision lies in this, that, in regard to s. 20 of the Act of 1924, Lord Atkin, A delivering the opinion of the Board, said ([1932] A.C. 559) :

> " In the result, therefore, one returns to the precise situation created by s. 20 with its determination of where and in what quantities the fruit is to be marketed. Section 20 and the determinations are invalid, and for precisely the same reasons it appears to their Lordships inevitable that the B exercise of the powers of the Minister, crediting him with the precise object and intention found by the High Court, were also invalid."

Before further examining what is involved in this decision, their Lordships think it convenient to note what was actually decided in the other of the two cases which have come before them. In *James* v. *Commonwealth of Australia* (4) it was a similar Act, but in this case an Act of the Commonwealth, that was C under attack, and the substantial issue was whether the Commonwealth, as well as the States, was bound by s. 92. If it was bound, then the further question arose whether the Act in question was obnoxious to s. 92 of the Constitution. The decision of the Board was that the Commonwealth was bound by s. 92 and it is significant that the judgment delivered by Lord Wright, M.R., thus proceeds ([1936] 2 All E.R. 1477) : D

> " For these reasons their Lordships are of opinion that s. 92 binds the Commonwealth. On that footing it seems to follow necessarily that the Dried Fruits Act, 1928-1935, must be held to be invalid. On the interpretation of ' free ' in s. 92, the Acts and the regulations either prohibit entirely, if there is no licence, or if a licence is granted, partially prohibit inter-State E trade. Indeed the contrary was but faintly contended if the Commonwealth were held to be bound by the section."

There does not in fact appear to have been any ground for contending that, if the Act which was challenged in *James* v. *Cowan* (3) was invalid, that challenged in *James* v. *Commonwealth of Australia* (4) could be valid.

It might well appear that these two decisions were a serious obstacle to the F present appellants' case. Section 20 of the South Australian Act was invalid. It was general in its terms. It did not discriminate between inter-State and intra-State trade in dried fruits. But because it authorised a determination at the will of the Dried Fruits Board, the effect of which would be to interfere with the freedom of the grower to dispose of his products to a buyer in another State, it was invalid. And for the same reason the Commonwealth Act fell. The neces- G sary implications of these decisions are important. First may be mentioned an argument, strenuously maintained on this appeal, that s. 92 of the Constitution does not guarantee the freedom of individuals. Yet James was an individual and James vindicated his freedom in hard-won fights. Clearly there is here a misconception. It is true, as has been said more than once in the High Court, that s. 92 does not create any new juristic rights, but it does give the citizen H of State or Commonwealth, as the case may be, the right to ignore, and, if necessary, to call on the judicial power to help him to resist, legislative or executive action which offends against the section. And this is just what James successfully did.

Linked with the contention last discussed was another which their Lordships do not find it easy to formulate. It was urged that, if the same volume of trade flowed from State to State before as after the interference with the individual

trader, and, it might be, the forcible acquisition of his goods, then the freedom
of trade among the States remained unimpaired. In the first place, this view
seems to be in direct conflict with the decisions in the *James* cases (3) and (4),
for there the section was infringed though it was not the passage of dried fruit
in general, but the passage of the dried fruit of James, from State to State that
was impeded. Secondly, the test of total volume is unreal and unpractical, for
A it is unpredictable whether by interference with the individual flow the total
volume will be affected and it is incalculable what might have been the total
volume but for the individual interference. Thirdly, whether or not it might
be possible, if trade and commerce stood alone, to give some meaning to this
concept of freedom, in s. 92 " trade " and " commerce " are joined with " intercourse
" and it has not been suggested what freedom of intercourse among the
B States is protected except the freedom of an individual citizen of one State to
cross its frontier into another State or to have such dealings with citizens of
another State as his lawful occasions may require.

The bearing of those decisions with their implications on the present appeal
is manifest. Let it be admitted, let it, indeed, be emphatically asserted, that the
impact of s. 92 on any legislative or executive action must depend on the facts
C of the case. Yet it would be a strange anomaly if a grower of fruit could successfully
challenge an unqualified power to interfere with his liberty to dispose
of his produce at his will by an inter-State or intra-State transaction, but a
banker could be prohibited altogether from carrying on his business both inter-State
and intra-State and against the prohibition would invoke s. 92 in vain.

In their Lordships' opinion, there is no justification for such an anomaly. On
D the contrary, the considerations which led the Board to the conclusion that s. 20
of the South Australian Dried Fruits Act, 1924, offended against s. 92 of the
Constitution lead them to a similar conclusion in regard to s. 46 of the Banking
Act, 1947. It is no answer that under the compulsion of s. 11 of the Act the
Commonwealth Bank will provide the banking facilities that the community
may require, nor, if anyone dared so to prophesy, that the volume of banking
E would be the same. Nor is it relevant that the prohibition affects the intra-State
transactions of a private bank as well as its inter-State transactions. So also
in the *James* cases (3) and (4), there was no discrimination. His fruit, for whatever
market destined, was liable to be the subject of a " determination."

Yet it is on these very decisions and in particular on that in *James* v. *Commonwealth
of Australia* (4) that the appellants rely. The third of their reasons in their
F formal Case is that

> " . . . the decision of the majority of the High Court in relation to s. 92 is inconsistent with the decisions of the Judicial Committee in *James* v. *Commonwealth of Australia* (4) and *James* v. *Cowan* (3)."

It appears to their Lordships that this contention ignores the actual decisions
G and is based on a misapprehension of certain language used in the judgments
of the Board. In *James* v. *Cowan* (3) LORD ATKIN speaks ([1932] A.C. 555) of
s. 20 and the determinations made under it as " directed at inter-State commerce
as such." Elsewhere (*ibid.*, 559) he speaks of the " objects " of the minister and
the Dried Fruits Board and (*ibid.*, 558) of the " real object " of arming the minister
with a certain power. It is possible that this language is open to misconception.
H But, in whatever sense the word " object " or " intention " may be used in
reference to a minister exercising a statutory power, in relation to an Act of
Parliament it can be ascertained in one way only, which can best be stated in
the words of LORD WATSON ([1897] A.C. 38) in *Salomon* v. *Salomon & Co.* (6) :

> " In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

The same idea is felicitously expressed in an opinion of the English Law officers, Sir Roundell Palmer and Sir Robert Collier, cited by ISAACS, J. (43 C.L.R. 409) in *James* v. *Cowan* (3) :

> " 'It must be presumed that a legislative body intends that which is the necessary effect of its enactments ; the object, the purpose and the intention of the enactment, is the same . . .' "

ISAACS, J., adds (*ibid*) :

> " By the 'necessary effect,' it need scarcely be said, those learned jurists meant the necessary legal effect, not the ulterior effect economically or socially."

It was because s. 20 of the Dried Fruits Act of South Australia operated according to the natural meaning of its words to authorise a direct restriction on the manner in which James could dispose of his product by an inter-State transaction that it offended against s. 92 of the Constitution, not because some other extraneous purpose, object or intention was ascribable to the South Australian legislature.

So also, in *James* v. *Commonwealth of Australia* (4) LORD WRIGHT in delivering the opinion of the Board uses somewhat similar language. He speaks ([1936] 2 All E.R. 1467) of the " real object " of an Act, of " its admitted object " (*ibid.*, 1470), citing words used by LORD ATKIN in *James* v. *Cowan* (3), and, again, of an Act being " directed against " or " aimed at " a particular result. On these expressions the appellants have fastened, contending that an Act cannot offend against s. 92 unless it can be shown that the intention of the legislature was to interfere in some way with inter-State trade, and they go on to say that in the Banking Act, 1947, there is to be found no intention to interfere with inter-State trade. That Act, they say, is not directed or aimed at such trade. To this their Lordships would say that the test is clear : Does the Act, not remotely or incidentally (as to which they will say something later), but directly, restrict the inter-State business of banking ? Beyond doubt it does, since it authorises in terms the total prohibition of private banking. If so, then in the only sense in which those words can be appropriately used in this case, it is an Act which is aimed or directed at, and the purpose, object and intention of which is to restrict, inter-State trade, commerce and intercourse.

It is not, however, only on a misunderstanding of the expressions last mentioned that the appellants base their claim that *James* v. *Commonwealth of Australia* (4) is decisive in their favour. They further find support in such phrases as " freedom as at the frontier or . . . in respect of 'goods passing into or out of the State' " ([1936] 2 All E.R. 1475) and " freedom at what is the crucial point in inter-State trade, that is at the State barrier " (*ibid.*, 1476), which are to be found in the course of the judgment in that case. These words must (as must every word of every judgment) be read *secundum subjectam materiam*. They were appropriate to their context and must be read in their context. They cannot be interpreted as a decision either that it is only the passage of goods which is protected by s. 92 or that it is only at the frontier that the stipulated freedom may be impaired. It is not to be doubted that a restriction, applied not at the border but at a prior or subsequent stage of inter-State trade commerce or intercourse, may offend against s. 92. Nor, as their Lordships hold, in accordance with the view long entertained in Australia, is it in respect of the passage of goods only that such " trade, commerce, and intercourse " is protected.

Lastly, the judgment in *James* v. *Commonwealth of Australia* (4) was invoked by the appellants on the ground that it contained expressions of approval of certain decisions previously given by the High Court of Australia, and (so the argument ran), if those decisions were right, then the judgment of the High Court in the present case could not be maintained. This is a dangerous line of argument. It is true that in the course of a narrative of the leading High Court decisions on s. 92 of the Constitution LORD WRIGHT, M.R., observed ([1936] 2 All E.R. 1470) in regard to a passage in the judgment of EVATT, J., in *R.* v. *Vizzard, Ex parte Hill* (7) :

> " If this reasoning, which in *Vizzard's* case (7) was primarily applied to the States, is, as it seems to be, correct, then in principle it applies *mutatis mutandis* to the Commonwealth's powers under s. 51 (i) . . . "

But it does not appear to their Lordships that the whole of that learned judge's reasoning received the considered approval of the Board. Nor, even if it were otherwise, would it follow that the judgment of the High Court in the present case could not be maintained. As was also said in *James* v. *Commonwealth of Australia* (4) (*ibid.*, 1476) :

> " In every case it must be a question of fact, whether there is an interference with this freedom of passage."

The facts in relation both to subject-matter and to manner of restriction or interference are so widely different in the two cases that it is difficult to apply to one case all that was said in the other. In this connection it may be noted that in *James* v. *Cowan* (3) their Lordships observed ([1932] A.C. 561) that they found themselves :

> " . . . in accord with the convincing judgment delivered by ISAACS, J., in the High Court."

The decisions in *James* v. *Cowan* (3) and in *Vizzard's* case (7) may be reconciled. It would not be easy to reconcile all that was said by EVATT, J., in the one case with all that was said by ISAACS, J., in the other.

Their Lordships have thought it proper to deal at considerable length with the earlier decisions of this Board because so much reliance was placed on them by the appellants. It is, they think, clear that, far from assisting the appellants, these two decisions are, as the respondents have throughout contended, strongly against them. In observing on the *James* cases, (3) and (4), and their bearing on the present case, their Lordships noted that the Act now under consideration operated to restrict the freedom of inter-State " trade, commerce, and intercourse," not remotely or incidentally, but directly. On this and on a cognate matter, the distinction between restrictions which are regulatory and do not offend against s. 92 of the Constitution and those which are something more than regulatory and do so offend, their Lordships think it proper to make certain further observations. It is generally recognised that the expression " free " in s. 92, though emphasised by the accompanying " absolutely," yet must receive some qualification. It was, indeed, common ground in the present case that the conception of freedom of " trade, commerce, and intercourse " in a community regulated by law presupposes some degree of restriction on the individual. As long ago as 1916, in *Duncan* v. *State of Queensland* (8), SIR SAMUEL GRIFFITH, C.J., said (22 C.L.R. 573) :

> " But the word ' free ' does not mean *extra legem*, any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law."

Through all the subsequent cases in which s. 92 has been discussed, the problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted : (i) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (ii) that s. 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States, on the one hand, and citizens and States, on the other, it is only the court that can decide the issue. It is vain to invoke the voice of Parliament. A

Difficult as the application of these general propositions must be in the infinite variety of situations that in peace or in war confront a nation, it appears to their Lordships that this further guidance may be given. In *Australian National Airways Proprietary, Ltd.* v. *The Commonwealth* (9), LATHAM, C.J., used these words (71 C.L.R. 61) : B

> " I venture to repeat what I said in the former case [*viz., Milk Board* (*N.S.W.*) v. *Metropolitan Cream Pty., Ltd.* (10) (62 C.L.R. 127)] : ' One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is " directed against " inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92 '." C

With this statement, which both repeats the general proposition and precisely states that simple prohibition is not regulation, their Lordships agree. And it is, as they think, a test which must have led the Chief Justice to a different conclusion in this case had he decided that the business of banking was within the ambit of s. 92. They do not doubt that it led him to a correct decision in the *Airways* case (9). There he said (71 C.L.R. 61) : D

> " In the present case the Act is directed against all competition with the inter-State services of the Commission. The exclusion of other services is based simply upon the fact that the competing services are themselves inter-State services. . . . The exclusion of competition with the Commission is not a system of regulation and is, in my opinion, a violation of s. 92." E

Mutatis mutandis, these words may be applied to the Act now impugned, for it is an irrelevant factor that the prohibition prohibits inter-State and intra-State activities at the same time. F

Yet about this, as about every other proposition in this field, a reservation must be made, for their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency, or in some other body, be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State " trade, commerce, and intercourse " thus prohibited and thus monopolised remained absolutely free. Nor can one further aspect of prohibition be ignored. It was urged by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants and bankrupts could without restraint embark on inter-State trade and diseased cattle or noxious drugs could freely be taken across State frontiers. Their Lordships must, therefore, add what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or G H things calculated to injure its citizens. Here, again, a question of fact and degree is involved which is nowhere better exemplified than in the Potato Case (*State of Tasmania* v. *State of Victoria* (11)) where the following passage occurs (52 C.L.R. 168) in the judgment of Gavan Duffy, C.J., and Evatt and McTiernan, JJ. :

> " In the present case it is neither necessary nor desirable to mark out the precise degree to which a State may lawfully protect its citizens against the introduction of disease, but, certainly, the relation between the introduction of potatoes from Tasmania into the State of Victoria and the spread of any disease in the latter is, on the face of the Act and the proclamation, far too remote and attenuated to warrant the absolute prohibition imposed."

The same difficulty arises in applying the other discriminatory test, that between a restriction which is direct and one that is too remote. Yet the distinction is a real one and their Lordships have no doubt on which side of the boundary the present case falls. It is the direct and immediate result of the Act to restrict the freedom of trade, commerce and intercourse among the States. Their Lordships will not attempt to define this boundary. An analogous difficulty in one section of constitutional law, *viz.*, in the determination of the question where legislative power resides, has led to the use of such phrases as " pith and substance " in relation to a particular enactment. These phrases have found their way into the discussion of the present problem also and, as so used, are the subject of just criticism by the learned Chief Justice. They, no doubt, raise in convenient form an appropriate question in cases where the real issue is one of subject-matter, as when the point is whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve a useful purpose in the process of deciding whether an enactment which works some interference with trade, commerce and intercourse among the States is, nevertheless, untouched by s. 92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which s. 92 presents. Used as they have been to advance the argument of the appellants, they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit. In the field of constitutional law—and particularly in relation to a federal constitution—this is conspicuously true, and it applies equally to the use of the words " direct " and " remote " as to " pith and substance." But it appears to their Lordships that, if these two tests are applied, *viz.*, (i) whether the effect of the Act is in a particular respect direct or remote, and (ii) whether in its true character it is regulatory, the area of dispute may be considerably narrower. It is beyond hope that it should be eliminated.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed.

Appeals dismissed.

Solicitors : *Coward, Chance & Co.* (for the appellants) ; *Linklaters & Paines*, *Farrer & Co.*, *Bircham & Co.*, *Slaughter & May*, and *Freshfields* (for the respondents) ; *Light & Fulton* (for the interveners).

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

Re KELLNER'S WILL TRUSTS. BLUNDELL *v.* ROYAL CANCER HOSPITAL AND OTHERS.

[Court of Appeal (Sir Raymond Evershed, M.R., Somervell, L.J., and Vaisey, J.), October 24, 25, 1949.]

Charity—Hospital—Teaching hospital—Institution taken over by State between death of testatrix and grant of probate—Gift of share of residue—Disposition of gifts—" Rights to which any governing body were entitled immediately before the appointed day "—" Endowment " of hospital—Application of trust property in making payments to board of governors—National Health Service Act, 1946 (*c.* 81), *s.* 6 (1), *s.* 7 (1), (10), *s.* 60 (1) (*a*).

By pt. II of the National Health Service Act, 1946, which came into force on July 5, 1948, hospitals and their property were taken over by the State. By s. 6 (1) of the Act : " Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister . . . all interests in or attaching to premises forming part of a voluntary hospital . . . and in . . . movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section." By s. 7 (1) : " Where any voluntary hospital to which the last foregoing section applies is, before the appointed day, designated by the Minister under this Part of this Act as a teaching hospital . . . all endowments of the hospital held immediately before the appointed day shall on that day . . . be transferred to and vest in the board of governors constituted under the following provisions of this Part of this Act for the teaching hospital." Section 7 (10) defined " endowment " in relation to a voluntary hospital as " property held by the governing body of the hospital or by trustees solely for the purposes of that hospital, being property of the following descriptions (*a*) interest in or attaching to land . . . (*b*) shares, stocks . . . and other securities, and any other personal property held by way of an investment ; (*c*) money, including any credit in a banking account ; (*d*) rights under any bill of exchange, promissory note or gratuitous covenant for the payment of money: Provided that an equitable interest held for the purposes of a voluntary hospital in trust property in which there are other equitable interests shall not be deemed to be an endowment of that hospital." By s. 79 (1) the word " property " included rights. By. s. 60 (1) : " Where property, other than property transferred to the Minister or to the board of governors of a teaching hospital or to a hospital management committee under s. 6 or s. 7 of this Act, is held on trust immediately before the appointed day, and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose of making payments, whether of capital or income (*a*) in the case of a hospital designated as a teaching hospital . . . to the board of governors of that teaching hospital."

By her will, dated June 18, 1948, the testatrix gave her property to her trustee on the statutory trusts for realisation and directed him to divide her residuary estate into eight equal shares and to pay one such share to the Royal Cancer Hospital (Free), which was a corporation incorporated by Royal Charter, and another to the Cancer Research Institute, which was owned and controlled by the hospital, both the hospital and the institute being charitable institutions. The testatrix died on June 23, 1948, and probate of the will was obtained on July 31, 1948, *i.e.*, after the National Health Service Act, 1946, had come into force. By the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 (S.I., 1948, No. 979), made under s. 11 (8) of the Act, the Royal Cancer Hospital (Free) was designated as a teaching hospital, and from July 5, 1948, the affairs of the hospital and the institute were conducted by a board of governors. It was contended by the board that the shares of the residue given by the will to the hospital and the institute vested in them under s. 7 (1) of the Act, or, alternatively, that the trustee was required to apply the shares in paying the capital and income thereof to them under s. 60 (1). The Minister of Health claimed the shares under s. 6 (1).

HELD : (i) the rights of the hospital and the institute, as residuary legatees, were to have the estate administered, and on completion of the administration to have the balance remaining in the executor's hands distributed in due proportions, and such rights were not covered by s. 6 (1).

(ii) the rights were not " endowments " within s. 7 (10), and, therefore, s. 7 (1) did not operate to vest them in the board of governors.

(iii) there was nothing in s. 78 (1) of the Act of 1946, coupled with the definition of " the governing body " in s. 79 (1), which effected the dissolution or disappearance of the chartered corporation of the hospital, and, therefore, *prima facie*, rights given to the corporation remained in the corporation, but the trust instrument must under s. 60 (1) " be construed as authorising or . . . requiring " the trustee " to apply the trust property . . . for the purpose of making payments . . . to the board of governors."

Decision of HARMAN, J. (*ante* p. 43), *reversed.*

[FOR THE NATIONAL HEALTH SERVICE ACT, 1946, see HALSBURY'S STATUTES, Vol. 39, p. 515.]

APPEAL by the Board of Governors of the Royal Cancer Hospital from an order of HARMAN, J., dated May 11, 1949, and reported *ante* p. 43. The originating summons was issued to determine *inter alia* whether on the true construction of the will of the testatrix and of the National Health Service Act, 1946, (*a*) the right to receive shares of the residuary estate of the testatrix bequeathed by her will to the Royal Cancer Hospital (Free) and the Cancer Research Institute (i) was vested in the Minister of Health under s. 6 of the Act, or (ii) was vested in the board of governors under s. 7 of the Act ; or (*b*) the trustee of the will was required to apply the shares in paying the capital and income thereof to the board of governors under s. 60 of the Act ; or (*c*) the shares (i) were held on some other, and, if so, what, charitable trusts, or (ii) were undisposed of and passed as on the testatrix's intestacy. HARMAN, J., held that neither s. 6 nor s. 7 nor s. 60 applied to the bequests and that they were outside the scope of the Act, but that there had been no lapse and, therefore, the shares should be applied so as to give effect to the testatrix's charitable intent under the Sign Manual. The Court of Appeal now held that s. 60 applied, and that the trustee was, therefore, required to apply the shares in paying the capital and income to the board of governors. The facts and relevant statutory provisions appear in the judgment of SIR RAYMOND EVERSHED, M.R.

Ungoed-Thomas, K.C., and *H. E. Francis* for the Board of Governors of the Royal Cancer Hospital.

J. A. Armstrong for the trustee.

A. F. M. Berkeley for the Ministry of Health.

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *D. B. Buckley* for the Attorney-General.

The persons entitled on intestacy were not represented before the Court of Appeal.

SIR RAYMOND EVERSHED, M.R. : By her will dated June 18, 1948, Mrs. Mabel Alicia Kellner appointed the plaintiff in the present action, Mr. Blundell, her sole executor and trustee. After certain pecuniary legacies she devised and bequeathed all her real and personal estate not otherwise disposed of and of which she was capable of disposing to her trustee on the administration trusts expressed in Form 8 of the Statutory Will Forms, 1925. In cl. 5 she proceeded to direct her trustee to stand possessed of the resulting investments and cash on trust to divide the same equally between eight named charities of which the first were the Cancer Research Institute, Fulham Road, and the Royal Cancer Hospital (Free), Fulham Road. Mrs. Kellner died on June 23, 1948, and her will was duly proved by the executor therein named on July 31, 1948.

The question that has arisen in the action is in regard to the effect on those testamentary dispositions of the National Health Service Act, 1946. That Act was passed on Nov. 6, 1946, some eighteen months or more before Mrs. Kellner made her will, but nothing, as it has turned out, depends on that fact. The appointed day—that is, for present purposes the day on which the Act came into operation—was July 5, 1948, a date, be it observed, after the death of Mrs. Kellner, but before the probate of her will. The parties to the present proceedings, apart from the plaintiff executor-trustee, were, when the matter was before the learned judge, (i) the board of governors of the Royal Cancer Hospital (which is a body corporate, the creation of the National Health Service Act, 1946), (ii) the Ministry of Health, (iii) Mrs. Norah Cox, who was joined as representing the testatrix's next of kin, and (iv) His Majesty's Attorney-General representing the general interests of charity. In this court Mrs. Cox does not appear. Her claim to participate as next of kin was negatived by the learned judge. She has not herself given any notice of appeal and the matter proceeds in her absence.

The real question, put briefly and, I hope, sufficiently accurately, is whether the terms of the Act of 1946 specifically provide for the destination of Mrs. Kellner's bounty to the Royal Cancer Hospital (Free), and, if they do not, how the property given to that charity should now be disposed of. The learned judge took the view that the Act failed to comprehend this particular gift, but came to a conclusion in favour of the argument of the Attorney-General that there was here a charitable intention to which effect could and should be given by directing the administration of the bequest under the Sign Manual. I think it is important at the outset to observe that, in my judgment, the body corporate designated by the testatrix, the Royal Cancer Hospital (Free), has not (or, at least, has not been proved to have) ceased to exist. I mention that matter at once because, unfortunately, the point does not appear to have been debated in the court below, and, the learned judge having concluded that the corporation had ceased to exist, his general conclusion on the terms of the Act was, naturally, affected by that view. But, as I have indicated, I think that the corporation must be taken still to exist. No one in this court has, indeed, suggested the contrary. The exhibits in the case include a copy of the charter which was granted in 1910 and incorporated the charity which had existed ever since 1851. It would, I think, be surprising if, by some chance phrase in an Act like this Act of 1946 a corporation incorporated by royal charter was wholly dissolved. Such a view is, indeed, inconsistent, if I may anticipate the reference I shall make to the Act presently, with the terms of s. 77 of the Act itself.

The charter provides that the president and governors for the time being shall be a corporation with perpetual succession, and the purposes of the charter also indicate that the management of the affairs of the hospital will be in the hands of a committee of management. I think the distinction between the corporation, on the one hand, and its committee of management, on the other hand, may be of importance when I come to deal with the terms of the Act itself, but I emphasise at the outset of my judgment that, in my view, this corporation has not been dissolved. As I have said, that difference in conclusion in regard to the existence of the old corporation may well underlie the difference in the result at which I arrive from that which commended itself to the learned judge.

I must now turn to the relevant sections of the Act, and I am happy to say that, for myself, I have not found a perusal of these sections so melancholy an experience as did the learned judge, nor do I arrive at so negative and depressing a conclusion. Nor do I think, for myself, that the legislators, and, more particularly, the draftsmen, deserve the very severe strictures which the learned judge directed against them in his consideration of the terms of this statute. The first section, taking in numerical order the sections to which it is necessary to refer, is s. 6. That was the section which directed the transfer to the Minister of Health of, among other things, the hospitals, in the sense of the physical things, the buildings and their equipment, and of what one might describe as the going concerns of those institutions. The terms so far as relevant of s. 6 (1) are :

> " Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister . . . all interests in or attaching to premises forming part of a voluntary hospital . . . and in the equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing . . . or otherwise carrying on the business of the hospital . . . but not including any endowment within the . . . next following section . . . "

Assuming for the moment that the rights arising under the will in the present case are not excluded as being an " endowment " within the meaning of the next following section, are they covered by the language which I have read ? I am content to take as part of my judgment the statement of HARMAN, J., of what the rights of the hospital, or those representing or claiming to represent the hospital (I am deliberately using inconclusive terms), were. He said (*ante* p. 48):

> " . . . the rights of the residuary legatees are rights to have the estate of the testatrix administered according to law, either by the personal representatives or by the court, and on completion of the administration to have the balance remaining in the executors' hands distributed in due proportions ".

Are those rights covered by the section ? Are they, in particular, covered by the words

> " rights . . . to which any such governing body . . . were entitled . . . immediately before the appointed day, being rights . . . acquired . . . solely for the purposes of managing "

the hospital ? The learned judge concluded that as a matter of plain English those words were not apt to cover such a right as was conferred by the present benefaction, and I entirely agree with him.

I think the matter is not one on which it is possible or useful to dilate, and I, therefore, pass to the next question—whether those rights which I defined by reference to the learned judge's judgment are covered by the terms of s. 7, which deals with endowments as forecast by s. 6 (1). To make the matter more clear, I should state that we are here dealing with a teaching hospital. Under an order made pursuant to the Act on Apr. 7, 1948, by the Minister of Health, known as the National Health Service (Designation of Teaching Hospitals (No. 2)) Order, 1948 (S.I., 1948, No. 979), the Royal Cancer Hospital, was designated a teaching hospital. Section 7 deals specifically, among other matters, with the "endowments" of teaching hospitals and their destination differs from the destination of "endowments" of other voluntary hospitals, but for the purpose of this judgment I think it is unnecessary to go through the whole matter and to explain how in the case of the different kinds of hospitals what are described as endowments are dealt with.

Section 7 (1), dealing with teaching hospitals, provides :

> "Where any voluntary hospital to which the last foregoing section applies is, before the appointed day, designated by the Minister . . . as a teaching hospital . . . all endowments of the hospital held immediately before the appointed day shall on that day, by virtue of this Act, be transferred to and vest in the board of governors constituted under the following provisions of this Part of this Act for the teaching hospital."

I will in due course deal with the constitution of the board of governors there referred to, being the first defendants in this action, but, first, to complete my analysis of s. 7 I turn to sub-s. 10, which sets out what is meant by "endowment". I preface it by recalling that under the later definition section, s. 79, the word "property" unless the context otherwise requires includes "rights". Sub-section 10 provides :

> "In this section the expression 'endowment,' in relation to a voluntary hospital, means property held by the governing body of the hospital or by trustees solely for the purposes of that hospital, being property of the following descriptions—(*a*) interests in or attaching to land other than the premises referred to in sub-s. (1) . . ; (*b*) shares, stocks, bonds, debentures and other securities, and any other personal property held by way of an investment ; (*c*) money, including any credit in a banking account ; (*d*) rights under any bill of exchange, promissory note or gratuitous covenant for the payment of money."

There is a proviso the reading of which I will for the moment postpone. It is, I think, plain that the four types of property specified show that the word "endowment" is used in a sense much wider and less precise than the sense in which that word is commonly used, meaning something which is treated as a capital asset, not itself to be spent, but the income of which is to be applied from time to time for the purposes for which the endowment was given. "Endowment" here is wider than that, but is it wide enough to include rights of the type here dealt with ? There is no evidence that there is any land involved in this case, but I am not satisfied for myself that, even if there were, it would be possible to bring in the rights here in question under para. (*a*) for the simple reason that, assuming the assets of the testatrix included land, the beneficiaries under the will would have no rights to or in that specific asset. The argument in favour of the application of s. 7 has really turned on para. (*b*), and, particularly, on the words "any other personal property"—and I insert "including rights"—"held by way of an investment". Again I share entirely the view of the learned judge that that phrase, as a matter of plain English, does not cover rights of this kind, and that to speak of rights of this kind as being "held by way of an investment" is to abuse the ordinary sense of the words which have been used. Even if it could be said that the rights given by this will were brought within one or other of the paragraphs I have read, or would otherwise be brought within any of those paragraphs, I also agree with HARMAN, J., that they would be excluded by the terms of the proviso, which is as follows :

> "Provided that an equitable interest held for the purposes of a voluntary hospital in trust property in which there are other equitable interests shall not be deemed to be an endowment of that hospital."

It is not, in the view I have taken, necessary to decide it, but it seems to me that the rights which the hospital or those representing it have are fairly covered by the phrase " equitable interest held for the purposes " of the hospital " in trust property ", *viz.*, the testatrix's assets in which other equitable interests also subsist, namely, the interests of the other individual legatees.

The result, therefore, so far is that I share the view which HARMAN, J., expressed, that neither s. 6 nor s. 7 covers this case. The conclusion as regards s. 6 defeats the claim of the Ministry of Health, and counsel for the Ministry has said that since he has served no cross notice it would not really in any case be open to him to argue the contrary. At any rate, I take it that the Minister is satisfied with the result as regards s. 6.

It was, I think, at this point that the gloom descended most heavily on the learned judge. I think he was oppressed by his feeling that since *ex concessis* the old chartered corporation had gone the result was to leave at this stage entirely in the air, so to speak, the bequest under the terms of the will, but, before coming to the solution of the remaining problem (namely : Is the bequest affected by other and later sections of the Act ?), it is necessary that I should mention those sections of the Act establishing the existing board of governors and that I should also refer to the later sections which deal with the position of the incorporated or voluntary hospitals and the committees or boards of management of those old hospitals after the change which this Act introduces. I can deal with these matters quite briefly. Section 11 (8) of and sched. III to the Act provide in this case—and, as I say, I think it is not necessary to deal at length with the whole matter—for the establishment of a board of governors for each of the designated teaching hospitals. As a matter of fact, we were told that the individuals who compose the board of governors, who are some twenty odd persons, are largely but not exclusively the same persons as formerly managed the old corporation. That, however, is a matter of interest rather than of relevance. The new body is by the terms of the schedule made a corporation, and its name is the Board of Governors of the Royal Cancer Hospital, that is the first defendant. The Board of Governors of the Royal Cancer Hospital is an entity quite different from and distinct from either the Royal Cancer Hospital (Free), the old chartered corporation, or the governing body of that corporation, namely, the old committee of management.

Section 77 provides :

> " (1) Where at the passing of this Act there is in force a . . . charter containing provisions appearing to the Minister either to be inconsistent with any of the provisions of this Act or to be redundant . . . the Minister may by order . . . "

repeal, amend or alter the charter. Sub-section (2) is to the effect that any provision of a charter which defines or limits the objects of a hospital to which s. 6 applies (and this is such a hospital) would cease to have effect in so far as that limiting provision would be inconsistent with the objects defined for the hospital by the Act. I refer to s. 77 because, as I have intimated earlier, the presence of such a section would *prima facie* be inconsistent with the view that automatically any pre-existing chartered corporation disappeared and was dissolved altogether as the result of the passing of this Act and the transfer under s. 6, or other sections of the Act, of the assets and property of the old corporation to someone else. It appears that the Minister has not yet made any order amending or repealing the terms either of this charter or, as far as we know, other charters, and I will assume that there are good reasons for that not having been done so far.

I must then make a reference to s. 78 because there is one part of that section which the learned judge particularly relied on in support of his view that the old corporation had gone. It provides :

> " (1) The following bodies, that is to say . . . (*c*) governing bodies of voluntary hospitals transferred to the Minister by virtue of this Act whose functions wholly cease in consequence of this Act ; shall as from the appointed day be dissolved . . . "

The governing body is defined by s. 79 (1) as meaning in relation to a voluntary hospital " any body, whether corporate or unincorporate, having the control and management of the hospital ", etc. The learned judge, I think, read that section as saying : " The chartered corporation, being now *functus officio*, has gone ". I think it may well be that the old committee of management (who I am disposed to think are covered by the definition of " governing body "), since they are *functi officio*, have been dissolved, but, in my judgment, there is nothing in s. 78 (1), coupled with the definition paragraph which (at any rate on the evidence in this case) has the effect that the old chartered corporation has been dissolved and has disappeared. That has this result, that, if property, by bequest or otherwise, is given to the corporation, however that property should now be administered, it still remains in the corporation unless there is something in the Act which takes it away from the corporation and transfers it to somebody else. If either s. 6 or s. 7 had applied, one would have had that result. The property would have been taken away from the hands of the old corporation and put into the new hands designated by the relevant section. I pause here to note that where those sections do apply, it is also provided that in the new hands the property transferred is free from the old trusts, but at the same time provision is made to the effect, putting it quite broadly, that so far as conditions allow the property will be administered consistently with, or so as not to disregard more than the circumstances require, the old trusts which affected it.

Therefore, in approaching the final and the only point on which I venture to disagree with the learned judge, the position is, as I have stated, that *prima facie* the property or rights, being given to the corporation, remain in the corporation. The result, if that is right, has led in the course of the argument to alternative suggestions. Either the property or the rights belonging in this way to the old corporation remain in the old corporation but are dealt with or disposed of by virtue of s. 59, or s. 60 comes into play and has the effect of transferring from the corporation to the newly created board of governors the rights which Mrs. Kellner left to the hospital. Of those two alternatives, I myself conclude in favour of the latter, and it is unnecessary for me to say anything on the former. I think that s. 60 does fit the case and, I would add, fits it, to my mind, aptly. The terms of the section are, so far as relevant :

> " (1) Where property, other than property transferred to the Minister or to the board of governors of a teaching hospital . . . under s. 6 or s. 7 of this Act, is held on trust immediately before the appointed day, and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies [*i.e.*, any old voluntary hospital] the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose of making payments, whether of capital or income—(*a*) in the case of a hospital designated as a teaching hospital . . . to the board of governors of that teaching hospital . . . ".

Sub-section (2) makes s. 60 in this respect parallel, so to speak, with the earlier sections :

> " Any sums paid as aforesaid to any such board [of governors] . . . shall, so far as practicable, be applied by them for the purposes specified in the trust instrument."

Before I deal with the argument which counsel for the Attorney-General put forward in favour of the view that this section does not apply, it is, I think, proper to observe that s. 60 occurs in pt. VI of the Act, a Part beginning with s. 52 and headed "General". The fasciculus of sections containing s. 60 may, I think, be treated as beginning at s. 57 where there is a cross-heading: "Administrative provisions". It was the view of the learned judge that s. 60, if A it applied at all, must be applied by a kind of side wind, since, when regard is had to the place in the Act where it is found and applying the well-known doctrine that a thing should be recognised by its associates, it is not in its place the sort of section which you could treat as properly intended to cover this kind of case. On that ground the learned judge referred to the attempt of counsel for the board of governors to seize this section to his comfort as being a last resource— B a *tabula in naufragio.* With all respect, I do not accept that criticism. I think it might, perhaps, have been of assistance to those charged with the administration of this Act if, in the earlier Part of the Act dealing with the transfer of property, there had been some reference to or forecast of the later general sweeping up provisions giving powers to the boards and trustees, and so on, of which this section is part, but it does not seem to me an inappropriate place in C the last Part of the Act called "General" to find provisions of a general character which operate, and, I think, were intended to operate, to bring in, among other things, classes of property not dealt with by the specific provisions as to transfer in the earlier part of the Act. However that may be, on its language I hold that s. 60 does cover and covers precisely this case.

Counsel for the Attorney-General has said that the language used postulates D four tests for the application of this section. I agree, but I think the tests are satisfied. First, according to counsel, there must be identifiable property. I think there was. I think the property was the estate of Mrs. Kellner. Secondly, he says, that property must be held on trust immediately before the appointed day. Though there was at one time some hint of an argument that the fact that probate had not been taken out until after the appointed day might make a E difference, that suggestion has not been pursued, and it seems to me true to say that the estate of Mrs. Kellner was held on trusts which were operative immediately before the appointed day. The matter is not one which requires elaborate argument, but, if that property was not held on operative trusts at that date, how was it held? I think the posing of that question provides the necessary answer. It was held, not as anybody's absolute property, F but on trust in the sense that someone was bound to apply those assets in the due course of administration, and, subject to the statutory obligations thereby imposed, to apply the residue in accordance with Mrs. Kellner's testamentary dispositions. Thirdly, says counsel, the trust must be constituted by a trust instrument. As regards that, if it is meant that the whole of the trusts, *i.e.*, the whole of the duties affecting this property, must necessarily be found in G a single trust instrument as commonly understood, namely, a will or settlement, I do not think that is a requisite of the section. If the trusts which affected this property at the relevant date were partly the statutory duties imposed by the Administration of Estates Act, 1925, and partly the trusts imposed by the will, the latter were comprehended by the former, and the former were in fact expressly introduced into the latter, it may be that the Administration of Estates Act, H 1925, can itself properly be regarded as a trust instrument. Certainly there is nothing which, according to ordinary principles, would necessitate there being but one trust instrument, but it is, I think, sufficient to say that there were at the relevant date trusts affecting this property and that such trusts are to be found in part at least in the testatrix's will. Finally, says counsel, the trusts must be of a kind indicated by s. 60 (1), that is (referring again to the language) the trust instrument must

"... authorise or require the trustees, whether immediately or in the

> future, to apply any part of the capital or income of the trust property for the purposes of any hospital . . ."

There was some discussion, in which we were assisted by the Solicitor-General, as to the meaning of that phrase "apply any part of the capital or income . . . for the purposes of any hospital". It was pointed out by Vaisey, J., during that discussion that, were it not for the words "authorise *or require*", it might be said that the phrase "apply . . . for the purposes of" was not apt to cover the case of direct payment, but, since there is here a reference both to authorising and also to the imperative "requiring", it seems to me that the phrase is quite naturally apt to cover applications in the sense of payment direct to the hospital or to the hands which receive on the hospital's behalf as persons absolutely entitled. It seems to me, therefore, that the sub-section when it is analysed covers both aptly and precisely this case.

If that is so, that is, of course, the end of the matter. The learned judge, when he dealt with this part of the argument, said (*ante* p. 49):

> "The context of this section requires that the word 'property' should not here include rights, for that which is dealt with is something to be applied for the benefit of (among others) a board of governors. The rights vested in the board of governors here cannot be applied by someone else for their benefit."

With all respect, I venture to think that the learned judge misdirected himself by regarding the property held on trust as being the rights vested in the beneficiaries under the will instead of looking at the assets vested in the executor on trust for the hospital and other beneficiaries. It may be, as I have said more than once, that he was led to this approach by his consideration that the old chartered corporation had gone, so that the only persons who could have any "rights" would be the new board of governors. Once that assumpton is made, I am inclined to agree that the application of the section becomes more complex and artificial, but it seems to me that one must regard the "property held on trust" as being the assets in the hands of the executor subject to the trusts statutory or testamentary on behalf of, among others, the existing chartered corporation. I, therefore, have formed a different view from that entertained by the learned judge on this section for the reasons which I have tried to express, and I think that s. 60 does apply.

The result is that we must now construe the section, not as requiring the plaintiff after completion of his administration to apply or pay an appropriate share of the trust property over to the old chartered corporation, but as requiring him to apply the trust property to the same extent, *i.e.*, to the extent of an equivalent share, to the board of governors of the teaching hospital now known as the Royal Cancer Hospital. If that is so, it follows, in my judgment, that the appeal is entitled to succeed and that counsel for the board of governors is entitled to the declaration which he seeks that the property—that is, the relevant share of the residuary estate—is now payable to the Board of Governors of the Royal Cancer Hospital.

SOMERVELL, L.J.: I agree. I do not wish to add anything to what has been said about the inapplicability of s. 6 and s. 7. With regard to the learned judge's observations based on the fact that this section occurs in pt. VI, I would like to say that, if one looks at the headings of all the other Parts of the Act and then asks oneself the question: Assuming that there is some provision to cover a case of this kind on the basis that it is not an endowment under s. 7 or property transferred to the Minister under s. 6, where would one expect to find it? Having regard to the structure of the Act there is only one answer and that is pt. VI. Therefore, that portion of the learned judge's reasoning does not affect my construction of this section. Nor do I follow when he says (*ante* p. 49):

> "... the expression 'the trust property' means the residue of the estate, and the question is whether the terms of the trust instrument (*i.e.*, the will) require the trustee (*i.e.*, the plaintiff) to apply a part of the capital for the purposes of the Cancer Hospital. In my judgment, this language is wholly inappropriate, and the section has nothing to do with the case."

That is a very concise statement, but I do not agree with it. On the examination to which s. 60 has been subjected by the Master of the Rolls I find no difficulty in coming to the conclusion that the section covers this case. What the position would have been if it had not, it is unnecessary to consider. I agree with what has been said as to the old corporation remaining in existence. It might have been a question of some difficulty to decide what is to happen when the charity named in the will is having its functions or a substantial part of them carried on by another body, but it is unnecessary to consider that. I think this case clearly falls under s. 60, and for those reasons I agree that the appeal should be allowed.

VAISEY, J. : I am of the same opinion. I agree that s. 60 of the Act is not inaptly placed in the sequence of sections, and does, in fact, cover the present case on a proper interpretation of its terms. Whether it was the primary intention of the legislature that it should have that effect may be doubted. There are, in my judgment, some types of cases to which s. 60 obviously and indisputably applies. Its application to the present case is only to be discovered by a microscopic examination of its terms, though I am myself entirely satisfied that the result of that examination is as indicated by my Lord. I am to this extent, but only to this extent, in agreement with the criticisms directed by HARMAN, J., against the draftsmanship of the Act, that I think the point might without any great difficulty have been dealt with in somewhat less cryptic language.

Appeal allowed. Declaration that the trustee is bound to apply the shares in paying the capital and income thereof to the board of governors under s. 60. Costs of the Attorney-General and of the trustee as between solicitor and client to be paid out of the shares of residue concerned.

Solicitors : *Farrer & Co.* (for the Board of Governors of the Royal Cancer Hospital) ; *Blundell, Baker & Co.* (for the trustee) ; *Solicitor, Ministry of Health*; *Treasury Solicitor.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Approved. FOWLER *v.* BRATT. [1950] 1 All E.R. 662.

MURDOCH LOWNIE *v.* NEWMAN. [1949] 2 All E.R. 783

MURDOCH LOWNIE, LTD. *v.* NEWMAN.

[KING'S BENCH DIVISION (Slade, J.), October 14, 17, 18, 21, 24, 1949.]

Agent—Commission—Estate agent—Contract to pay commission " in the event of business resulting "—Need for conclusion of binding contract—Prospective purchaser of property introduced—Contract for sale subject to purchaser's " being able to arrange a mortgage."

Estate agents wrote to the owner of a hotel inquiring on behalf of a client whether he was prepared to dispose of his interest in the property and adding : " We are not being retained in this matter, and presume that in the event of business resulting we can look to you for the usual scale commission authorised by the recognised institution." In his reply the owner said : " Last paragraph of your letter quite understood." The firm introduced to the owner one G., who signed an agreement under which he undertook to buy the property for £35,000 subject to his " being able to arrange a mortgage " of £25,000 if the owner were not desirous of lending that sum on first mortgage debenture of a proposed private company secured on the premises at four per cent. per annum interest. The owner subsequently changed his mind, and paid G. £1,550 in order to be released from the agreement. The estate agents claimed commission from the owner.

HELD : the words " in the event of business resulting " imported that a right to commission would accrue only when the agents introduced a person who entered into a binding contract to purchase the property, and, as the agreement with G. amounted at most to a contract that he would use his best endeavours to raise the necessary money, a binding contract to purchase had not been concluded, and the agents were not entitled to the commission.

Dictum of Lord Russell of Killowen in *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* ([1941] 1 All E.R. 46), *applied.*

Dudley Bros. & Co. v. *Barnet* (1937 S.C. 632), *not followed.*

[AS TO REMUNERATION OF AGENTS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 256-263, paras. 431-436 ; and FOR CASES, see DIGEST, Vol. 1, pp. 488-503, 508-518, Nos. *1664-1728, 1753-1801.*]

Cases referred to :

(1) *Dudley Bros. & Co.* v. *Barnet,* 1937 S.C. 632.

(2) *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper,* [1941] 1 All E.R. 33 ; [1941] A.C. 108 ; 110 L.J.K.B. 131 ; 164 L.T. 313 ; 2nd Digest Supp.

ACTION for commission on a contract for the sale of a hotel.

The plaintiffs, Murdoch Lownie, Ltd., were estate and property agents suing on a contract, entered into with them by the defendant, John Arthur Newman, the owner of a hotel, which provided for the payment by him to them of commission " in the event of business resulting " from the introduction of a prospective purchaser of the premises. The defendant signed an agreement with a person introduced by the plaintiffs for the sale of the hotel for £35,000, subject to the prospective purchaser's " being able to arrange a mortgage of " £25,000. Later, the defendant changed his mind and paid £1,550 to the prospective purchaser to induce him to release him from the agreement. SLADE, J., held that the agreement between the defendant and the prospective purchaser was not such a binding contract as was necessary to constitute " business resulting " from the introduction of the prospective purchaser by the plaintiffs and gave judgment for the defendant. The facts appear in the judgment.

Astell Burt for the plaintiffs.

Cartwright Sharp, K.C., and *Neil Lawson* for the defendant.

SLADE, J. : The plaintiffs in this action, Murdoch Lownie, Ltd., are estate and property agents. The defendant, Mr. John Arthur Newman, was at all material times, and I believe still is, the freeholder of the Shore Hotel, East Wittering, near Chichester. He is, and was also at the material times, the managing director of a company called Shore Hotel, Ltd. I was told that at the end of 1947 and beginning of 1948, Shore Hotel, Ltd., occupied the Shore Hotel under a tenancy agreement (the terms of which did not emerge) from the defendant as the freeholder. The plaintiffs claim from the defendant £707 10*s*. 0*d*. commission in respect of a contract for the sale of the Shore Hotel. If they are entitled to recover commission from the defendant, it is conceded that £707 10*s*. 0*d*. is the sum which they are entitled to recover.

Four questions arise for consideration : (i) What was the contract between the plaintiffs and the defendant ? (ii) What, on the true construction of that contract, was the event on the happening of which the right to commission accrued to the plaintiffs ? (iii) Did that event happen ? (iv) Was the party who was admittedly introduced by the plaintiffs to the defendant an able purchaser, actual or prospective, according to what I find the contract to require ?

With regard to the first question—" What was the contract between the parties to the action ? "—on Sept. 17, 1947, the plaintiffs wrote to the defendant as the proprietor of the Shore Hotel :

> " Dear Sir, *re* Shore Hotel, East Wittering. We have been asked by a special client of ours to inquire whether you are prepared to dispose of your A interests in the above hotel. The purchaser is well acquainted with the above premises and would be very willing to make a special journey from London to inspect the property. We are not being retained in this matter, and presume that in the event of business resulting we can look to you for the usual scale commission authorised by the recognised institution."

The defendant replied (omitting immaterial words) : " Last paragraph of your B letter quite understood." The construction of those two letters is purely a matter of law, and, in my judgment, the contract was that the plaintiffs were to be entitled to commission on the scale recognised by the professional institutions in the event of business resulting through their efforts, or, in other words, if they were the effective cause of business resulting. That is the answer to the first question for my consideration.

C I now come to the second question : " What, on the true construction of that contract, is the event on the happening of which the right to commission accrues to the plaintiffs ? " Three constructions were put before me in the course of the argument. Taking them in ascending order they were that the right to commission accrued (*a*) on the introduction by the plaintiffs to the defendant of a party who was ready, willing and able to purchase the property on terms D acceptable to the defendant, the vendor ; (*b*) on the introduction by the plaintiffs to the defendant of a party who entered into a binding contract with the vendor for the purchase of the property ; and (*c*) on the introduction of a party who not only entered into a binding contract for the purchase of the property, but who actually completed the purchase. Counsel for the plaintiffs contended that (*a*) was the proper construction of the contract, and alternatively, if he failed E on that, that (*b*) was the proper construction. Counsel for the defendant, on the other hand, contended that (*c*) was the proper construction, or, if he failed on that, that the proper construction was (*b*).

In support of construction (*a*), counsel referred me to a case decided in the Court of Session in Scotland, *Dudley Bros. & Co.* v. *Barnet* (1). In that case the operative words of the contract between the agents and the principal as found F by the courts were " in the event of business resulting through our efforts ", and, in my judgment, those words are indistinguishable from the words of the contract as I have found it in this case. If, therefore, I felt myself able to follow the decision of the Court of Session in that case, I should hold that (*a*) was the proper construction of the contract with which I have to deal. I find myself, however, unable to follow the construction put on those words by the G Court of Session. That any decision of the Court of Session is of the greatest persuasive authority goes without saying, and it equally goes without saying that I differ from such an authority with the greatest diffidence. I would, however, observe that *Dudley Bros.* v. *Barnet* (1) was decided in 1937, three years before *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* (2) was heard in the House of Lords. *Dudley Bros.* v. *Barnet* (1) came first before the sheriff-substitute, H who decerned in favour of the pursuers, holding that, as the pursuers had fulfilled their part of the agreement by introducing a purchaser who was able and willing to implement his contract, the defender was not entitled without just cause to defeat their claim for commission by refusing to complete the contract. The sheriff, on appeal from the sheriff-substitute, recalled this judgment on the ground that, as a contract for sale had not been finally adjusted, the pursuers were entitled only to reasonable remuneration for their services. The Court of Session, on further appeal, recalled the interlocutor of the sheriff and restored the judgment of the sheriff-substitute, holding that an agreement had been concluded by the pursuers and the defender, whereby the pursuers were entitled to commission on finding a purchaser who was willing to complete a formal contract of sale. The Court of Session construed the contract as meaning that the event on which the pursuers' right to commission accrued was merely the finding of a purchaser who was willing to complete a formal contract of sale. The word "purchaser" there must, of course, mean "potential" or "prospective purchaser." A The Court of Session found further that it was an implied term of this agreement that the defender should not, by refusing to complete such a contract, prevent the pursuers from earning their commission and that, as the defender, by preferring another purchaser, had made completion of the contract impossible, the pursuers were entitled to damages, the proper measure of which in the circumstances was the commission which they would have earned had the B contract of sale been completed.

The finding of the implied term and the right to damages would be incompatible with the law of England since the decision of the House of Lords in *Luxor's* case (2), but the first difficulty I find in understanding the decision of the Court of Session is why, on the view which they took of the matter, the pursuers were not entitled to commission as opposed to being entitled to damages. If the event C on which their right to commission accrued was the mere introduction of a ready, able and willing purchaser, *i.e.*, a person who was prepared to purchase on terms acceptable to the vendor as opposed to a person who had entered into a contract to do so, then it seems to me, in the events which the court found to have happened, they were entitled to commission and not damages. In dealing, however, with the true construction of the contract between the parties D in that case, *i.e.*, the construction of the words which, as I have already said, I find indistinguishable from the words used in the present case, the Lord Justice-Clerk (Aitchison) said (1937 S.C. 637):

> "The immediate question is—What was the contract of employment between the pursuers and the defender, particularly what was meant by the words 'in the event of business resulting through our efforts' in the E pursuers' letter of Nov. 9? I think that these words meant and were intended to mean that, in the event of the pursuers finding a purchaser of the defender's lease within the terms of their employment as agents, the usual scale commission would become payable by the defender to the pursuers in respect of the transaction. The agreement for sale would no doubt be 'subject to contract' F as understood in the law of England, which parties are agreed to mean that the matter remains in negotiation as between seller and purchaser until a formal contract is settled and the formal contracts are exchanged. It will be necessary to consider later whether the refusal of the defender to complete the contract between the purchasers and himself, assuming a contract to have been made, excludes the commission contracted to be paid by the defender to the pursuers as his agents." G

The first observation I would make on that passage is that the Lord Justice-Clerk, in using the words "finding a purchaser", must have meant "finding a person who was ready, willing and able to become a purchaser", because the word "purchaser" used in the context of a contract between principal and agent has now been held by the House of Lords to mean at least a person who actually H enters into a binding contract to purchase, and no binding contract was entered into in the case of *Dudley Bros.* v. *Barnet* (1). A little later on the Lord Justice-Clerk says (*ibid.*, 638):

> "The pursuers had succeeded in introducing to the defender a purchaser for his lease upon terms which fell within their employment as agents. The case may be put higher. The pursuers having acted within their authority as agents, an agreement for the sale of the lease had been entered into

> between Hurst and Sandler and the defender, subject to contract. As the defender has since preferred another purchaser after the pursuers had introduced Hurst and Sandler, the question is whether the defender is liable to the pursuers in payment of the commission stipulated in the contract."

Again the expression in that passage " agreement for the sale of the lease had been entered into subject to contract " shows that the word " agreement " cannot mean " contract ", because an agreement subject to contract in English law is merely an agreement to make an agreement and has no contractual force. The learned Lord Justice-Clerk proceeds (*ibid.*) :

> " We take the case upon the footing, which was hardly disputed, that Hurst and Sandler were ready and willing and able to enter into and complete a formal contract with the defender, and that the defender has declined to do so without cause assigned except that he had another purchaser. The question is whether the commission is payable in these circumstances. Treating the question as purely one of construction of the contract between the pursuers and the defender I think, as I have already said, that ' business resulting ' just meant finding a customer who was able and willing and ready to take on the terms authorised by the defender, and did not mean in the event of a sale going through to completion. In the latter sense business did not result, but that was due to the refusal of the defender to carry events to completion, and was not due to any failure of the pursuers to perform their employment, which in fact they had performed as agents of the defender."

I find myself unable to accept that construction of the words " business resulting."

In *Luxor's* case (2) LORD RUSSELL OF KILLOWEN, in the course of his opinion, said ([1941] 1 All E.R. 46) :

> " If, according to the true construction of the contract, the event has happened upon the happening of which the agent has acquired a vested right to the commission (by which I mean that it is *debitum in praesenti*, even though only *solvendum in futuro*), then no act or omission by the principal or anyone else can deprive the agent of that right. Until that event has happened, however, the agent cannot complain if the principal refuses to proceed with, or carry to completion, the transaction with the agent's client. I have already expressed my view as to the true meaning of a contract to pay a commission for the introduction of a purchaser at a specified or minimum price. It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language."

I emphasise those last words, with which I respectfully agree. It is not infrequently the case that a prospective vendor employs several agents to bring him into business relations with prospective purchasers. If the contract which he entered into with those agents entitled them to commission on the mere introduction by them of persons who were ready, willing and able to purchase the property on terms acceptable to the vendor, it would mean that if, say, five different agents introduced five different persons all of whom were ready, willing and able to purchase the property from the vendor at, for example, the same price or any other price acceptable to the vendor, the vendor would become liable to pay commission to each of those five agents. It is, as LORD RUSSELL says, possible that a vendor might be rash enough to enter into that kind of contract with an agent, but at least the language in which he does so should be, as LORD RUSSELL said, " clear and unequivocal."

In my judgment, the words " in the event of business resulting " are neither clear nor unequivocal. Indeed, I go further and say that they are ambiguous, and, as the argument in this court shows, susceptible of at least three possible constructions. They are, moreover, the words of the plaintiffs themselves, and, if all other canons of construction failed, I should construe them by resolving any ambiguity in favour of the principal and against the agent who proffered them. I do not, however, find it necessary to employ the legal maxim applicable to cases of that kind in the present case, because I am satisfied that the words " in the event of business resulting " on their true construction require at least that the right to commission shall not accrue until the agent has introduced to the principal a person who has entered into a binding contract to purchase the property. I shall deal later with what I mean by " a binding contract to purchase the property." I am fortified in my view that the words " in the event of business resulting " are by no means unequivocal by reference to later passages in the agreed correspondence which seem to me to indicate that the plaintiffs themselves were not sure what the words meant.

I now come to the third question : Did that event happen, *i.e.*, did the plaintiffs introduce to the defendant a party who entered into a binding contract to purchase the property ? I use the word " property " instead of " Shore Hotel " because there was certain other property dealt with besides the Shore Hotel. On this question it was admitted by counsel for the defendant that the plaintiffs introduced a Mr. Graham, and it is common ground that there resulted from that introduction by the plaintiffs the execution of a document dated Dec. 17, 1947. It, therefore, becomes necessary to see whether that document constituted a binding contract to purchase the property. That again may be sub-divided into two questions : (i) Is the document a contract at all ? (ii) If it is a contract, is it a contract—because the term " binding contract " means nothing more than " contract "—to purchase the property ?

Counsel for the defendant did not dispute that the document would have been a binding contract to purchase the property if it had stopped at cl. 9 instead of proceeding to cl. 10. There are three parties to the document, the Shore Hotel, Ltd.,—that is really the defendant's company—who are called " the company," the defendant, and Mr. Graham, called " the purchaser," being the gentleman admittedly introduced by the plaintiffs. By cl. 1 the company agreed to sell and Mr. Graham agreed to purchase what I may compendiously describe as the goodwill and contents of the Shore Hotel for the sum of £2,500. That £2,500 included the stock of wines and spirits and consumable dry stock up to a maximum value of £500. Any dry stock which might be there at completion over and above the value of £500 was to be taken over at a valuation and paid for in addition to the £2,500. By cl. 2 the defendant agreed to sell and Mr. Graham agreed to purchase the freehold of the Shore Hotel for the sum of £35,000. That is to say, the total money which would have to be found on completion, excluding any dry stock over the £500, was £37,500, payable as to £2,500 to the company and as to £35,000 to the defendant, credit, of course, being taken for the deposit of ten per cent. on £37,500 which was paid on the signing of the document. As I shall have to deal hereafter with the question of a mortgage, I note that cl. 3 of the document required that " a good marketable title to the freehold property shall be given." Clause 4 provided for the deposit which I have just mentioned and fixed the date for completion as Mar 1, 1948. Clauses 5, 6, 7 and 8 are not material. By cl. 9 the company agreed to take all the necessary steps to enable the purchaser to incorporate a private company embodying the name " Shore Hotel."

I now come to the important clause, cl. 10 :

> " If Mr. Newman [the defendant] shall not be desirous of lending the sum of £25,000 on first mortgage debenture secured upon the subject-matter of this contract at a rate of four per cent. per annum interest then this contract is subject to the purchaser being able to arrange a mortgage of like amount."

That clause calls for careful consideration. The first thing to notice is that there is no contractual obligation on the defendant to lend £25,000 or any other sum, either at four per cent. per annum or at all. Secondly, if he is desirous of lending it, it is not to be lent to Mr. Graham. It is to be lent on first mortgage debenture. A debenture presupposes the existence of a limited liability company, and it seems clear from cl. 9 that the intention was that Mr. Graham should form a company, obtaining the permission of the existing company, Shore Hotel, Ltd., for the use of that name by the new company. Thirdly, A there is no obligation on the defendant to notify Mr. Graham at any time whether he is or is not desirous of lending the sum of £25,000 to a company if a company were formed, *i.e.*, there is no greater duty on the defendant to notify than there is on Mr. Graham to inquire. I infer from cl. 10—and the inference, indeed, was borne out by the evidence—that Mr. Graham is saying to the defendant: "I cannot find £35,000 myself. I can only find £10,000. The remaining £25,000 B must be found by means of a mortgage. If you are desirous of becoming the mortgagee, well and good, provided you are prepared to accept four per cent. per annum interest and a company to be formed by me as the mortgagor. If you are not, well I must obtain the mortgage elsewhere."

It is, of course, clear from cl. 10 that there is only one way in which the defendant can make this document a contract binding on Mr. Graham to purchase the C property on its terms. That is by himself lending the £25,000 to the company to be formed or even to Mr. Graham himself at four per cent. per annum interest. The clause specifies the loan, as I have pointed out, to a company, but the same purpose would, no doubt, be achieved if the defendant were willing to lend the £25,000 to Mr. Graham personally. I have already emphasised that that is an act which the defendant is under no contractual obligation to perform. If D the defendant is not prepared to do that, what happens? Counsel for the plaintiff has argued with considerable force that this document is, on any view of it, contractual, because, if the defendant is not desirous of lending the money himself, it at least imposes an obligation on Mr. Graham to use his best endeavours to raise the £25,000 on mortgage elsewhere, and without deciding the point—because I find it unnecessary to do so—I will assume in favour of the plaintiffs E that the document is contractual in that sense. But, as I have said, I construe the words "business resulting," the event on which the plaintiffs' title to commission is to accrue, as requiring at least that the person introduced by them—*i.e.*, Mr. Graham in this case—shall enter into a binding contract to purchase. You do not enter into a binding contract to purchase by merely entering into a binding contract to use your best endeavours to raise the necessary money F to enable you to do so.

I find, therefore, that this document does not bind Mr. Graham to purchase the property, that is to say, either the property of the company, Shore Hotel, Ltd., or the freehold property belonging to the defendant; in other words, I find that the execution of this document did not constitute "business resulting." Whatever the expression "binding contract" may mean, it must, in my view, at G least mean a contract which is binding on the party introduced by the agent so that the principal gets something definite from the party introduced by the agent in return for the commission which he is called on to pay. In some of the reported cases a binding contract is looked on from the point of view of whether it binds the vendor. I think that "binding contract" means a contract which binds both parties, *i.e.*, which is a contract and is clothed with the H necessary form required to make it an enforceable contract in law. But whether that be so or not, I am satisfied that the expression envisages a contract which, as against the party introduced by the agent, the vendor is entitled to have specifically performed or for whose breach he is at least entitled to recover damages. In the case of this document it is manifest that the defendant may say nothing and that Mr. Graham may make no inquiry up till the date fixed for completion, and may even not have taken the necessary steps by that date to form a company to become mortgagor to the defendant. That date may arrive and the defendant may attend with his solicitor at the place fixed for completion, only to be met by Mr. Graham with the statement: "I am sorry. I have done my very best to find a mortgagee, but I have not been able to do so." On any view of the matter, it is a highly unsatisfactory position from the point of view of the defendant, and, in my judgment, not the position which was contemplated by the words: "You shall pay us commission in the event of business resulting." What business can be said to have resulted from that state of affairs?

[His Lordship said that this really concluded the case. In view, however, of the possibility of appeal he reviewed the evidence upon the fourth question—whether Mr. Graham would in fact have been able to raise the necessary mortgage in time—and held that he was not satisfied that Mr. Graham could have done so. He, therefore, gave judgment for the defendant.]

Judgment for the defendant with costs.

Solicitors: *Geoffrey B. Gush & Co.* (for the plaintiff); *Adam Burn & Son*, agents for *Howarth Hignett*, Littlehampton (for the defendant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

PREST *v.* PREST.

[Probate, Divorce and Admiralty Division (Lord Merriman, P. and Ormerod, J.), October 24, 25, 1949.]

Justices—Maintenance order—Discharge—"Resumption of cohabitation"—Decree of divorce granted to wife—Parties subsequently living together—Discretion of justices—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (*c.* 51), *s.* 2 (2).

By s. 2 (2) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925: "Where a married woman with respect to whom an order has been made under the Summary Jurisdiction (Married Women) Act, 1895, resumes cohabitation with her husband after living apart from him, or where she has before the date of the commencement of this Act so resumed cohabitation, and is at that date cohabiting with him, the order shall cease to have effect on the resumption of such cohabitation or at the commencement of this Act, as the case may be."

The parties were married in 1935, but later they separated, and on Sept. 18, 1946, a maintenance order of £2 a week was made against the husband. On Apr. 21, 1947, the wife obtained a decree absolute dissolving the marriage, but in November, 1947, the parties lived together again, and on Nov. 26, 1947, the wife wrote to the justices asking them to stop proceedings which were pending for enforcement of arrears under the order and stating that the parties intended to re-marry. On March 25, 1948, the parties having quarrelled, the husband married the woman named in the wife's divorce suit, but by agreement he paid to the wife the sum of 30*s.* a week until May, 1949. On an application by the husband to discharge the order of Sept. 18, 1946, on the ground that it had ceased to have effect under s. 2 (2) because the wife had resumed cohabitation with him in November, 1947.

Held: (i) section 2 (2) contemplates a resumption of cohabitation by a married woman with a husband to whom she is then married and not a cohabitation between parties who are no longer married because their marriage has been dissolved, and, therefore, the order did not cease to have effect by reason of the provisions of the sub-section.

Bragg v. *Bragg* ([1925] P. 20), *distinguished.*

(ii) on the facts, however, the order of Sept. 18, 1946, had been abandoned by the wife on Nov. 26, 1947, and, therefore, it should be discharged.

[AS TO DISCHARGE OF MAINTENANCE ORDER, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345 ; and FOR CASES, see DIGEST, Vol. 27, pp. 565, 566, Nos. *6237-6250*.]

Cases referred to :

A (1) *Bragg* v. *Bragg*, [1925] P. 20 ; 94 L.J.P. 11 ; 132 L.T. 346 ; 27 Digest 565, *6242*.

(2) *Mezger* v. *Mezger*, [1936] 3 All E.R. 130 ; [1937] P. 19 ; 106 L.J.P. 1 ; 155 L.T. 491 ; 100 J.P. 475 ; Digest Supp.

(3) *Kirk* v. *Kirk*, [1947] 2 All E.R. 118 ; 177 L.T. 151 ; 111 J.P. 435 ; 2nd Digest Supp.

B (4) *Wood* v. *Wood*, [1949] W.N. 59.

APPEAL by a husband against a decision of the Blackburn borough justices on Aug. 24, 1949, dismissing his application to discharge an order for maintenance made on Sept. 18, 1946, in favour of the wife. The Divisional Court now allowed the appeal, the facts of which appear in the judgment of LORD MERRIMAN, P.

C *Ormrod* for the husband.

The wife was not represented.

LORD MERRIMAN, P. : This is a husband's appeal against a decision of the Blackburn borough justices, given on Aug. 24, 1949, whereby they dismissed his application for the discharge of an order made on Sept. 18, 1946, in circumstances which are, so far as I know, unprecedented.

D There is no serious dispute on the facts. The husband's application was based before the justices and here on the allegation that the wife, in whose favour the order had been made, had resumed cohabitation with the husband within the meaning of s. 2 (2) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. Section 2 (2) provides :

E

> " Where a married woman with respect to whom an order has been made under the [Summary Jurisdiction (Married Women) Act, 1895] resumes cohabitation with her husband after living apart from him, or where she has before the date of the commencement of this Act so resumed cohabitation, and is at that date cohabiting with him, the order shall cease to have effect on the resumption of such cohabitation or at the commencement of this Act, as the case may be." F

That sub-section gives a plain indication of the alternative dates as from which the order is automatically to be vacated, and the wording is to be contrasted with the wording of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, which clearly contemplates some substantive application, for the last sentence of that section reads as follows :—

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> " If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband . . . such order shall upon proof thereof be discharged."

When these two parties began to reside together under the same roof and to H have sexual intercourse with each other, as admittedly occurred, continuously between November, 1947, and the end of March, 1948, their status was that the marriage had been dissolved by a decree absolute pronounced on Apr. 21, 1947. Nevertheless, it is argued that this living together in November, 1947—a decision avowedly taken with a view to a possible re-marriage—can properly be described as the case of a married woman with respect to whom an order has been made resuming cohabitation with her husband after living apart from him. The same argument, admittedly, would have been addressed to us had the intended re-marriage preceded the so-called resumption of cohabitation. It is argued that, if it is possible, as was decided in *Bragg* v. *Bragg* (1), for a woman, who, by reason of the dissolution of her marriage, has ceased to be a married woman and has ceased to be able to describe as her husband the man who was her husband at the time of the making of the maintenance order, to continue to hold such an order, it inevitably follows that for all purposes of the Summary Jurisdiction (Married Women) Acts, wherever the words " husband " and " wife " occur, A the parties continue the relationship of husband and wife, although that status has been dissolved. That is a startling proposition which seems to require examination.

The marriage of these parties took place in 1935. On some date between then and 1946 a separation occurred. On Sept. 18, 1946, the wife obtained an order for £1 for herself and 10*s*. for each of her two children. On Feb. 4, 1947, she B obtained a decree *nisi* against her husband on the ground of his adultery with a named woman. On some date after that there must have been a variation of the order in the husband's favour, because in November, 1947, a fresh order was made restoring the maintenance to the original amount, namely, £1 for the wife and 10*s*. for each of the two children. It is worthy of note that this variation was made some nine months after the decree absolute of divorce. Shortly after that C order was made the parties came together. The husband was a sick man, the wife took pity on him and received him into her home, and it is plain that, not merely did they sleep together as man and wife, but that re-marriage was discussed and contemplated by both parties. However, towards the end of March, 1948, the parties quarrelled, and for a short period, while they were still living under the same roof, they ceased to occupy the same bedroom. On Mar. 25, D 1948, the husband, having left the wife's home, married the woman named in the wife's divorce suit.

It was that period of living together which is said by the husband automatically to bring about a cesser of the effect of this order because it constituted a resumption of cohabitation within the meaning of s. 2 (2) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. When the parties came together in E November, 1947, proceedings were pending for enforcement of arrears under the order, but on Nov. 26 the wife wrote to the clerk to the justices a letter in which she said :

> " With reference to the letter my former husband has received ordering him to appear in court on Dec. 30, I wish to notify you that I would like to F drop the case against him. He came to me a week ago in a terrible condition. He was so ill that I took him in my home and looked after him. He is still here, and is quite unable at the moment to maintain me. He will not be fit for work for a week or two yet, but when he is we have decided to re-marry and make a fresh start. I want you to notify the magistrates of my decision and to excuse my husband's non-appearance."

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Plainly, that letter suggests that while both parties and the court had up to that moment treated this order not merely as a live order notwithstanding the divorce six months before, but as a proper subject of a variation, the wife then regarded the order and all proceedings under it as at an end. Point is added to that view of the matter by what happened when, in March, 1948, they parted. Here again, it is clear that there was a discussion between the parties about the H wife's maintenance in future. There was no suggestion that either the wife or the husband regarded the order as still being in force, but a fresh agreement was made for the sum of 30*s*. a week, and that sum was punctually paid week by week, with one exception, from Apr. 2, 1948, to May 21, 1949. The exception was that for the week ending May 22, 1948, the husband deducted 6*s*. for income tax. This evoked a violent protest from the wife in a letter dated May 26, 1948, in which she says :

> "I am not willing to pay your tax and my own as well. If the full amount is not received by me this week-end the matter will go to court, and then your separate source of income will be stopped . . . I do not want any further correspondence. If I receive the 30*s.* a week you promised, without any deductions whatsoever, you will receive the [income tax] statement you asked for. If, on the other hand, I receive less than 30*s.* this week-end I A will place the matter in the hands of my solicitor, and will have no further dealings with you except through him."

That letter is utterly inconsistent with the idea that the original order, as varied, was regarded as being still in force. By the second variation, restoring it to its original figure, the full amount would have been £2. I emphasise that for a reason which will later become apparent.

B To conclude the facts, in January, 1949, while the husband was still paying the 30*s.* a week punctually, the wife became ill and found it hard to make ends meet. She did not go to court to ask for any increase of the order on the ground that it was now insufficient. On the contrary, on Jan. 19, 1949, she wrote to her husband and asked him to lend her some money to see her through, adding : "I cannot pay out of 30*s.* a week." Finally, in the week ending May 28, 1949, C the husband reduced payment from 30*s.* to 15*s.* and continued that payment until shortly before these court proceedings. The wife reacted unfavourably against this reduction, and in a letter about the husband seeing the children she refers to the fact that he is not supporting them.

That brings me to a consideration of *Bragg* v. *Bragg* (1), a case which has consistently been followed in this court, though I am not aware that it has ever D been considered by a higher court. It is, perhaps, not unimportant to bear in mind that *Bragg* v. *Bragg* (1) was decided on s. 7 of the Act of 1895, unamended by the Act of 1925. It was a decision, therefore, given on a section which contained, *inter alia,* the words :

> "If any married woman . . . shall voluntarily resume cohabitation with her husband . . . such order shall upon proof thereof be discharged."

E Without the necessary application to the court and proof of the fact before the court this Act by itself did not discharge the order. With regard to that section the learned stipendiary magistrate had decided in a considered judgment that the mere fact that the marriage had been dissolved did not automatically vacate or discharge a maintenance order obtained by a wife. Towards the end of his F judgment he stated ([1925] P. 22) :

> "I am of opinion that the court has a discretion in these cases, and should not exercise it against a woman who has subsequently obtained a divorce, unless some good cause is shown for such exercise."

Dealing with that argument, SIR HENRY DUKE, P., says (*ibid.*, 24) :

> G "There are grounds of common-sense why an order which dealt with maintenance and not with the general obligations of married life should continue to subsist. That, however, does not conclude the matter at all. It is still necessary to see what are the limits of the justice's jurisdiction. Mr. *Frampton* [for the husband] made a shrewd remark, which went to the root of his own case. He said that the decree absolute had put an end *ipso* H *facto* to the magisterial order, and that the appellant had only gone to the magistrate to call his attention to the fact and to get him to make an order discharging the previous order. Well, if the previous order had *ipso facto* been discharged, the magistrate, of course, had no jurisdiction to do anything. If it had not been discharged, then the discharge of it depends upon s. 7 of the Act of 1895. As my brother [HORRIDGE, J.] pointed out, the appellant is put into rather a dilemma by the two arguments addressed to us : If the order is discharged *ipso facto* there is no jurisdiction of the

> magistrate to entertain this summons ; if the order is not so discharged, there is a discretionary jurisdiction."

The effect of the decision in *Bragg* v. *Bragg* (1) is that it is a matter of discretion whether or not, in the circumstances of any given case, to discharge, as against a wife whose marriage has subsequently been dissolved, an order made while she was the wife of the husband. This court, however, has said over and over again that that is not a discretion to be exercised arbitrarily or capriciously. It must be exercised judicially. This has been said in at least three reported cases, namely, *Mezger* v. *Mezger* (2), *Kirk* v. *Kirk* (3) and *Wood* v. *Wood* (4). In *Mezger* v. *Mezger* (2), where the magistrate had refused to discharge an order because the marriage had been dissolved in a foreign country on grounds not recognised by English law and also because the wife's financial position required the continuance of the maintenance, it was held that acting on either of those grounds could not possibly amount to a judicial exercise of the discretion. The same thing was held by this court in *Kirk* v. *Kirk* (3), where there had been a Scottish divorce, the husband being a domiciled Scotsman, though the maintenance order had been made in England at a time when, during the marriage, an English court of summary jurisdiction had jurisdiction over the case, and it was held there, reversing the justices, that the proper exercise of the jurisdiction was to leave the wife to such remedy by way of maintenance as she had in the Scots. courts. In *Wood* v. *Wood* (4) this court reversed a decision of justices refusing to vary an order when, again, they had, in effect, come to their decision solely on the ground that the wife needed the money. In other words, the case was covered by *Mezger* v. *Mezger* (2) in principle. I ought to add that they had completely ignored the essential fact that it was the case of a wife who had been divorced on the ground of her own adultery. In all those three cases this court exercised its own discretion on the ground that it did not consider that the justices had exercised a judicial discretion in such a way that it ought not to be interfered with.

In the present case the only point with which the justices have dealt is that regarding resumption of cohabitation. With regard to that they say :

> " We are of opinion that the resumption of cohabitation contemplated by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, and s. 2 (2) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, means a resumption of cohabitation as man and wife by a husband and wife—a resumption of the *consortium*. The parties were not husband and wife when they lived together from November, 1947, to March, 1948. A suggestion was made that the resumption of cohabitation might in any case be a mere pretence on the part of Mr. Prest, seeing that he married Mrs. Parker so soon after leaving Mrs. Prest. In view of the decision we had already arrived at, we did not consider that matter."

It is argued that that decision is wrong in law. I think it is right. Because some positive act on the part of the court is required to vacate an order on the ground of dissolution of marriage between spouses in respect of whom the order was made, more particularly when one bears in mind that *Bragg* v. *Bragg* (1) was decided under s. 7 of the Act of 1895, and because the original wife and the original husband are treated as being husband and wife for the purpose of the exercise of the discretion whether to continue or to discharge an existing order, it does not seem to me to follow, when a later statute lays down the conditions on which an existing order is automatically vacated, whatever steps may subsequently be necessary to give effect to the automatic cesser of the effect of the order, that for the purposes of the section laying down these conditions parties who are no longer husband and wife in law are to be taken to come within the words " a married woman with respect to whom an order has been made under the principal Act resumes cohabitation with her husband after living apart from him." There does not seem to me to be any necessary logical connection between the two things, and I decline to hold that this order was automatically vacated when the wife and the husband began living together again with a view to being re-married. It seems to me to be making nonsense of the whole thing. On the other hand, in my opinion, there is a ground on which these justices ought to have discharged this order in the exercise of their discretion. I do not blame them for not exercising it in this way, for they appear only to have been asked to deal with the suggested construction of s. 2 (2) of the Act of 1925. Nevertheless, we have the full facts before us, as they did. In my opinion, there was no warrant for keeping this order alive from the moment when the wife wrote the letter of Nov. 26, 1947, to the clerk to the justices. She meant by that letter, as I have suggested, that the order was terminated, and she made that still clearer by the arrangements made when the temporary association between her and her former husband came to an end a few months later. I cannot think that a belated attempt on the eve of these proceedings to re-invoke the existence of the order ought to weigh in the balance. It is a clear case, on the facts, for the exercise of the justices' discretion in only one way, and that is to discharge this order, which had, by both spouses, been regarded as a dead letter ever since November, 1947. At any rate, I think that this court has not only the right but also the duty to exercise its own discretion and that in so doing we are unfettered by any exercise of the justices' discretion, because they have never, apparently, even considered this point. That being so, this appeal, in my opinion, should be allowed, but for the reasons I have stated and not for the reasons on which the appeal was based.

ORMEROD, J. : I agree. The argument put forward by counsel for the husband appears to be as follows. Section 2 (2) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, provides that where a married woman with respect to whom an order has been made under the Summary Jurisdiction (Married Women) Act, 1895, resumes cohabitation with her husband after living apart from him, the order shall cease to have effect on the resumption of cohabitation. It is argued that, as s. 7 of the Act of 1895, with which s. 2 (2) of the Act of 1925 must be read, may be applied although the marriage has been dissolved, the provisions of s. 2 (2) should also be so applied, and, if a man and a woman who have been husband and wife, but whose marriage has been dissolved, live together again, there is a resumption of cohabitation within the meaning of the section and any order made in favour of the wife during the subsistence of the marriage can no longer have effect. I can see no justification for this argument. Such a couple merely come and live together in the same way as any other unmarried couple who may choose to live together at any time. Any children born as a result of the association, unless the parties subsequently re-married, would be illegitimate, and I find it impossible to say that what occurred here was a resumption of cohabitation by a wife with her husband. I think, therefore, the reasons given by the justices for their decision are clearly right, but at the same time, I agree with my Lord, for the reasons which he has set out in his judgment, that this is a case where the justices should have exercised their discretion, and, therefore, this appeal should be allowed and the order set aside.

Appeal allowed ; order set aside.

Solicitors : *Vizard, Oldham, Crowder & Cash*, agents for *Henry Backhouse & Son*, Blackburn (for the husband).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

SPEYSIDE ESTATE & TRUST CO., LTD. *v.* WRAYMOND FREEMAN (BLENDERS), LTD.

[Chancery Division (Wynn-Parry, J.), November 1, 1949.]

Discovery—Production of documents—Production before delivery of statement of claim—Exceptional circumstances—R.S.C., Ord. 31, *r.* 14.

R.S.C., Ord. 31, r. 14, provides : " It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the court or judge shall think right ; and the court may deal with such documents, when produced, in such manner as shall appear just."

On Dec. 24, 1947, according to the plaintiffs' case, certain goods were warehoused in the plaintiffs' name, the defendants holding the documents of title thereto indorsed in blank as fiduciary agents to sell the goods on behalf of the plaintiffs. By Jan. 19, 1948, all the goods had been sold, and the proceeds, amounting to £15,619 10*s.* 10*d.*, were received by the defendants and paid into their banking account, being there mixed with their own moneys. Various sums were paid to the plaintiffs, leaving, according to the plaintiffs, £9,269 0*s.* 1*d.* to be accounted for. The plaintiffs had been informed that on Mar. 26, 1948, the defendants had withdrawn from the banking account £15,510 in notes which had been paid to W. for a certain purpose. W. absconded with the money, and in due course the police recovered £10,800 of the notes and they were handed to the liquidator of the defendant company, or to the company itself, which had meanwhile gone into liquidation and was insolvent. The plaintiffs claimed in the action a declaration that they were beneficially entitled to a charge for £9,269 0*s.* 1*d.* on the £10,800 recovered, in priority to all interests of the defendants, or, alternatively, that they were entitled, to the exclusion of the defendants, to £9,269 0*s.* 1*d.*, part of the said £10,800. To be able to trace items through the defendants' banking account, the plaintiffs now sought, before delivering a statement of claim, discovery of the bank pass-sheets of the account from Dec. 24, 1947, to Mar. 27, 1948.

Held : if the order for discovery were not made, it was almost certain that substantial amendments would be required later of the statement of claim, because only the defendants knew what dealings there had been with the money of which they were alleged to be trustees, and the circumstances were exceptional, warranting the exercise of the court's jurisdiction under r. 14.

Gale v. *Denman Picture Houses, Ltd.* ([1930] 1 K.B. 588), *distinguished.*

[For R.S.C., Ord. 31, r. 12 and r. 14, see ANNUAL PRACTICE, 1948 edn., pp. 557-561, 564-568.]

Case referred to :

(1) *Gale* v. *Denman Picture Houses, Ltd.*, [1930] 1 K.B. 588 ; 99 L.J.K.B. 351 ; 143 L.T. 31; Digest Supp.

Procedure Summons for an order that the defendant deliver to the plaintiff copies of certain pass-sheets of the defendants' banking account prior to the delivery of the statement of claim, and for extension of time for the delivery of the statement of claim. On the facts, which appear in the judgment and are summarised in the headnote, Wynn-Parry, J., held that the circumstances were exceptional and that the jurisdiction to make the order, which the court possessed under R.S.C., Ord. 31, r. 14, should be exercised.

J. L. Arnold for the plaintiffs.

J. V. Nesbitt for the defendants.

WYNN-PARRY, J. : This is a summons in the action asking for an order against the defendant company for a limited discovery, namely, the discovery of the bank pass-sheets of the company, which is now in liquidation, covering the period from Dec. 24, 1947, to Mar. 27, 1948. The exceptional nature of the application is that it is made before the delivery of any statement of claim in the action, the writ in which was issued on May 5, 1949.

On Dec. 24, 1947, a considerable number of bottles of whisky were warehoused in the name of the plaintiffs but under the control of the defendants in the sense A that, according to the plaintiffs' case, the defendants were given the documents of title relating to the whisky with endorsements in blank as fiduciary agents on behalf of the plaintiffs to sell the whisky. Between that date and Jan 19, 1948, the whole of the stock of whisky was sold and the proceeds, amounting to £15,619 10*s.* 10*d.*, were received by the defendants and paid into their banking account, being there mixed with their own moneys. Between February and March, B 1948, various sums are said to have been paid by the defendants to the plaintiffs, leaving in March, 1948, according to the plaintiffs, £9,269 0*s.* 1*d.* to be accounted for. On Mar. 26, 1948, as the plaintiffs had been informed, the defendants withdrew from the banking account in question £15,510 in £5 notes which were paid over to a Mr. White for some specified purpose with which I am not concerned. In fact, Mr. White absconded with the money and he was subsequently C apprehended, prosecuted, and convicted. In November, 1948, the police had recovered £10,800 of the original £5 notes which, according to the plaintiffs' information, were handed over by the police to the defendants or the liquidator and are now held to await the outcome of the present action. The plaintiffs' claim in the action is for a declaration that the plaintiffs are beneficially entitled to a charge for the sum of £9,269 0*s.* 1*d.* which I have mentioned on the sum of £10,800 D in bank notes received from the police, in priority to all interests of the defendants in such sum of £10,800, and, alternatively, the plaintiffs claim a declaration that they are entitled to the exclusion of the defendants to £9,269 0*s.* 1*d.*, part of the £10,800 received from the police, and the plaintiffs claim as consequential relief all necessary accounts and inquiries. It is clear, the defendant company being in liquidation, and, as I understand, insolvent, that an action merely for E an account would be of little, or insufficient, avail to the plaintiffs and it is for that reason that the plaintiffs seek in effect to trace through the banking account and to fasten on the sum of £10,800 recovered by the police and handed over in the circumstances which I have mentioned.

The summons, as I have said, asks for the limited disclosure of the relevant bank pass-sheets of the account in question between Dec. 24, 1947, and Mar. 27, F 1948, and asks that that discovery may be ordered at this stage prior to the delivery of the statement of claim on the ground that the plaintiffs' counsel is not in a position, before such discovery, to deliver a satisfactory statement of claim, or, indeed, any other document than one which must be subject to very substantial amendment. The jurisdiction invoked is conferred by R.S.C., Ord. 31, r. 12 and r. 14. By r. 12 it is provided :

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> " Any party may, without filing an affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that H stage of the cause or matter, or make such order, either generally or limited to certain classes of documents as may, in their or his discretion, be thought fit. Provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."

Rule 14 provides :

> " It shall be lawful for the court or a judge, at any time during the

> pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the court or judge shall think right ; and the court may deal with such documents, when produced, in such manner as shall appear just."

A It will appear from a mere reading of r. 14 that there must be jurisdiction in the court to make the order asked for if the court should be so minded, and that that interpretation of the rule is correct is borne out by *Gale* v. *Denman Picture Houses, Ltd.* (1). There the plaintiff had been the controller of one of the departments of the defendant company. A quarrel arose between him and the defendant company as to whether or not he had ceased to be a director. The plaintiff by his solicitors asked the defendants for a copy of certain minutes relating to an B exchange of shares on an amalgamation, the effect of such exchange being, in the contention of the defendants, an answer to the plaintiff's case. That being refused and the writ having been issued, the plaintiff, before delivering his statement of claim, applied on summons for directions that the defendants should forthwith give him copies of their minutes relating to exchange of shares. The master made an order in favour of the plaintiff which, with slight variation, was confirmed C by MacKinnon, J. The defendants appealed to the Court of Appeal who reversed the order on the basis that the court would not, save in very exceptional circumstances, order a defendant to produce documents in his possession before the plaintiff had delivered his statement of claim, but the court, which consisted of Scrutton and Lawrence, L.JJ., made it clear that jurisdiction to accede to the application was vested in them. They emphasised, however, that the jurisdic- D tion was one which should be sparingly used and only in exceptional circumstances, and they made it clear that they did not regard the circumstances of the particular application as being very exceptional. Without quoting *in extenso* from their Lordships' judgments, it is, I think, sufficient to refer to a passage from the judgment of Lawrence, L.J., where he says ([1930] 1 K.B. 592) :

> E " Before delivering his statement of claim he [the plaintiff] applied for the production by the defendants of certain minutes of directors' meetings at which he had been present. I have listened in vain for any statement by counsel that the production of these minutes is essential to the statement of the plaintiff's claim. So far as I can see there is no difficulty in the way of the plaintiff stating his claim without the production of those minutes, F though I appreciate that they may have an important bearing upon the question whether the claim is well founded or not. It may well be that after the statement of claim and the defence have been delivered, production of the minutes will not be resisted. At the proper stage of the action all documents relating to any matters in question will have to be discovered. I however deprecate the idea that a plaintiff, after issuing a writ and before G delivering his statement of claim, can apply for discovery. This is entirely contrary to the practice, and such an application should be discouraged."

When the learned lord justice said that he deprecated the idea that a plaintiff, after issuing a writ and before delivering his statement of claim, should apply for discovery, I take him to mean that he only considered that such an application could properly be made in exceptional circumstances and not, as is suggested, H that no such application could in any circumstances be made, because, at the opening of his judgment, he said (*ibid.*, 591) :

> " The jurisdiction of the court to order discovery at any stage of an action is undoubted."

He went on to point out that it was the settled practice of the court not to make an order before the delivery of the statement of claim save in the most exceptional circumstances.

The only question, therefore, which arises for consideration on this summons is whether or not the circumstances of this case are so exceptional as to warrant a departure from what undoubtedly is the settled practice, namely, not to order any discovery, however limited, prior to the delivery of the statement of claim. It has been asserted by counsel for the plaintiffs and it has been admitted by counsel for the defendants that, at any rate so far as can be seen at this stage A of the proceedings, the documents for which discovery is called are documents which at some stage of the action must be the subject of discovery. Counsel for the defendants has with force pointed out that that circumstance of itself affords no guide for making an exceptional order for discovery prior to the delivery of the statement of claim, but it is a point which, in my view, it is relevant for the court to take into consideration. It is manifest that, in such a case as this, time B and costs will be saved if I make the order asked for. I state that because I wish to make it clear that the decision which I have arrived at is not grounded on that reason. I have clear direction both from the relevant rules and from authority that I must discover exceptional circumstances before I can make the order asked for, however strongly every dictate of common sense may press on me the advisability of making it.

C This action, as I have pointed out earlier, is an action to trace. There can be no doubt that, as regards the earlier circumstances, no difficulty stands in the way of the pleader of the statement of claim in setting out clearly, fully, and intelligibly the case on which he relies, and counsel for the plaintiffs quite rightly does not for one moment quarrel with that. There can be no doubt that the claim can be fully stated down to the point where the defendants received D the proceeds of the sale of the whisky and mixed it with their own moneys. From that point onwards different considerations appear to me to arise. It has been urged on me by counsel for the defendants that he is entitled to know what the plaintiffs' case is before any discovery is given. With that as a general proposition I have not the slightest quarrel, but on the other hand, it is urged on me by counsel for the plaintiffs that, although he agrees with what I have E said that he can plead with sufficient particularity up to the point where the proceeds of the sale of whisky were mixed by the defendants in their account, thereafter his statement of claim must in the nature of things be of the sketchiest possible character and one which almost certainly will require amendment, and probably substantial amendment, when the documents in question, the few relevant bank pass-sheets, are later discovered in the action. In my judgment, F there is great force in that submission.

I have had the advantage also of hearing counsel's sketch of the form which the later paragraphs of his statement of claim would have to take in the present circumstances if the order asked for were not made. In my view, a judge is entitled to draw on his own experience as a pleader in addition to considering and weighing the opposing views of the two pleaders before him, and I entertain G not the slightest doubt that the true conclusion is that, if the order asked for is not made, then, unless a miracle of speculation is achieved by the pleader of the statement of claim in the present circumstances, most substantial amendments will have to be made, and this because of the peculiar and unusual nature of the cause of action and the circumstance that, on the allegation, which is the foundation of the action, that the defendants were trustees of the money H in question for the plaintiffs, the defendants, and the defendants alone, know what dealings have taken place with that money. I am, therefore, constrained to the view that this is an exceptional case and one in which I ought to exercise the jurisdiction which I undoubtedly have and make the order asked for.

Discovery ordered. Costs to be costs in the action.

Solicitors: *Wigan & Co.* (for the plaintiffs); *Judge & Priestley*, Bromley (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

MINNS *v.* MOORE.

[Court of Appeal (Sir Raymond Evershed, M.R., Somervell, L.J., and Hodson, J.), October 26, 27, 1949.]

Rent Restriction—Excessive charge for furniture—" Dwelling-house to which the principal Act applies "—First letting under Rent and Mortgage Interest Restrictions Act, 1939—*Rent and Mortgage Interest Restrictions Act,* 1923 (*c.* 32), *s.* 9 (1). A

In 1947 the landlords granted a five years' lease of a dwelling-house on condition that the tenant purchased from them certain furniture at a price £585 in excess of its reasonable value. The house had not been previously let, and the provisions of the Rent Restrictions Acts applied to it because its rateable value was below the £100 limit laid down by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) (*a*). B Subsequently the tenant brought proceedings under the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1), to recover the sum of £585 as money required to be paid " as a condition of the grant . . . of a tenancy of a dwelling-house to which the principal Act applies."

Held : the phrase " dwelling-house to which the principal Act applies " C in s. 9 (1) meant a dwelling-house within the economic limits laid down by the Acts, and there was no compelling reason to read the words as meaning " a dwelling-house already let as a separate dwelling-house " ; accordingly, the provisions of the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1), applied in the case of first lettings ; and the tenant was entitled to recover the money which he had paid in excess of the reasonable value of the furniture. D

[As to Demands for a Premium or other Pecuniary Consideration for the Grant of Tenancies of Controlled Premises, see HALSBURY, Hailsham Edn., Vol. 20, p. 322, para. 382.]

Cases referred to :

(1) *Lederer* v. *Parker*, [1949] 2 All E.R. 443. E

(2) *Remmington* v. *Larchin*, [1921] 3 K.B. 404 ; 90 L.J.K.B. 1248 ; 125 L.T. 749 ; 85 J.P. 221 ; 31 Digest 572, *7200.*

Appeal of the landlords from a judgment of His Honour Judge Hargreaves, sitting at the West London County Court and dated June 22, 1949. The tenant claimed under the Rent and Mortgage Interest Restrictions Act, 1923, s. 9, the F return of the excess price paid for furniture. The landlords contended that the section did not apply to the first letting of a dwelling-house. The Court of Appeal now affirmed the finding of the county court judge in favour of the tenant and dismissed the appeal with costs. The facts appear in the judgment of Sir Raymond Evershed, M.R.

Marnham for the landlords (appellants). G

Roger Willis for the tenant (respondent).

SIR RAYMOND EVERSHED, M.R. : This appeal has raised a question of some novelty, and (like many questions under the Rent Restriction legislation) not free from difficulty, as to the application to the facts of the case of the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1), and the Increase of H Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8, which is brought into play by s. 9 if the latter section does apply. The relevant terms of s. 9 (1) are these :

> " Where the purchase of any furniture or other articles is required as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of a dwelling-house to which the principal Act applies, the price demanded shall at the request of the person on whom the demand is made, be stated

> in writing, and, if the price exceeds the reasonable price of the articles, the excess shall be treated as if it were a fine or premium required to be paid as a condition of the grant . . . and the provisions of s. 8 of the [Act of 1920], including penal provisions, shall apply accordingly."

Those last words have the practical effect that if the section does apply then the excess of the price demanded or required over the reasonable price is re-
A coverable by the tenant who paid it.

The facts of the present case are not in dispute. The house is one within the London metropolitan area, and it is one of which the rateable value does not exceed the maximum, namely, £100 a year, stated in the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1). The value exceeded the limit specified in the earlier Acts, so that the house was not subject to the application of the
B Acts before the passing of the Act of 1939. The house was let by the present landlords to the tenant in September, 1947, for a term of five years. It is conceded that on the occasion—and I use for the moment a somewhat colourless word—of the grant of this lease the landlords demanded in respect of certain furniture which the tenant was obliged to acquire a price in excess by the sum of £585 of its reasonable value. Finally, it appears that this occasion was the first time on
C which these premises were let. I say that because since, as I have already mentioned, the house was brought within the ambit of the Rent Restrictions legislation by the Rent and Mortgage Interest Restrictions Act, 1939, the standard rent would fall to be determined (according to the amended provisions of the Increase of Rent and Mortgage Interest Restrictions Act, 1920, s. 12 (1) (*a*), by reference, first, to the rent at which the house was let on Sept. 1, 1939, if it
D was so let; failing that, to the rent at which it was last let before that date; and, failing any letting before that date, to the rent at which it was first let after that date. Since we are told that the rent, which was £225 per annum, specified in this transaction of September, 1947, does, in fact, form the standard rent of the premises, I assume that that was the first occasion of the letting of this house. The tenant, having paid for the furniture the sum of £585 in excess of the reason-
E able price, brought the present proceedings to recover that excess in reliance on the application to her case of the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1), and before the county court judge she succeeded.

Upon a first reading of the sub-section I confess that, as a matter of ordinary English, it appeared to me reasonably clear that the present transaction is covered by its language. Here was a dwelling-house to which the principal Act
F (*i.e.*, the Act of 1920) applies in the sense that it was a dwelling-house brought within the Rent Restrictions Acts by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), its rateable value being below the maximum there stated. Here also was a sum demanded as a condition of the grant of the tenancy, and that sum demanded was in excess of the reasonable price of the articles specified. At a first reading of the section the answer appeared to
G be a reasonably simple one. Counsel for the landlords, however, has raised an argument of some complexity and ingenuity to the contrary effect, and it depends for its validity on the consideration that the term "dwelling-house to which the principal Act applies" in s. 9 (1) of the Act of 1923, on its true interpretation and having regard to other provisions in other parts of the Acts, must mean "a dwelling-house let as a separate dwelling." It was contended that, since when
H the requirement or demand was made, the dwelling-house was not let as a separate dwelling because at that point of time it was not yet let at all, the section does not apply to this case. To that argument there are, as it seems to me, somewhat serious logical objections. If this section means what it says, it must be reasonably obvious that at the date when the impugned requirement is made in a very great many cases the house will not be in the condition of being let. The section deals with a case where, as a condition of the grant of the lease, a demand for a premium in the shape of excessive price for furniture is made.

I agree that in some cases—perhaps many cases—the negotiations and the transaction of the grant of the new lease will take place during an existing tenancy, but the section obviously contemplates that at the time the negotiations and transaction occur there will be no letting, and it will be the letting in question which gives to the house the character of being let.

Counsel for the landlords seeks to overcome that difficulty by saying that where the house has been let so that the Rent Restrictions Acts have, according to his own interpretation, applied to it, then the terms of what has been described as the " enigmatic " s. 12 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, preserve the characteristic for the house that the Rent Acts still apply to it during periods when it is in fact untenanted. That sub-section is well-known. It provides :

> " Where this Act has become applicable to any dwelling-house . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies."

I am happy to think that it is unnecessary to attempt any further consideration of the meaning of that sub-section, and I will assume in favour of the landlords that it would provide an answer to the problem in the case of a house that once had been within the Acts by reason (*inter alia*) of having been let. That, however, does not completely fill up the gap in this argument. The argument is supported, and, at first sight, fairly and reasonably supported, by this consideration. Counsel for the landlords says that the real object of s. 9 (1) of the Act of 1923 is plainly to prevent a landlord, who is prohibited from charging a rent in excess of the standard rent, from achieving that result by a subterfuge or device such as the charge of a premium or a sale of furniture or other articles at an inflated price. Where, therefore, it is argued, as in this case, there is no pre-existing standard rent, there is no logical reason for the application of this section. If the landlords had chosen, instead of charging £225 per annum as rent and £585 too much for the furniture, to charge £500 a year rent and nothing for the furniture (assuming always the willingness of the tenant to pay) they could have done so without any infraction of the Act. There is, however, still this difficulty. A house which first comes within the scope of the Acts as a result of the Act of 1939 may, nevertheless, have its standard rent fixed by reference to a letting long before and at a time when the house was admittedly not controlled by the Acts. For example, if this house, first brought within the Acts in 1939, had been let, say, twenty years ago at £200 a year, that £200 would have been the standard rent, so that, if counsel for the landlords is right in his construction of s. 9 (1), the landlords would have been able by a subterfuge such as the one employed in the present case to get a consideration for the grant of the new controlled letting which was in excess of the real standard rent.

I do not say that these considerations are fatal to the argument, but they do at least remove what might otherwise appear to be a good logical basis for the argument. I must, therefore, proceed to see whether its premise is well founded, namely, that you must read into the words " dwelling-house to which the principal Act applies " the added words " let as a separate dwelling." I must point out that, even if those words must be read in, I am not to be taken as saying that necessarily the argument would prevail, because I still adhere to the view that this section does not contemplate a division of the transaction mentioned into a strict chronological sequence of particular events, but is dealing with it all as one transaction. On the other hand I think that, even if such a division into points of time were permissible, counsel for the landlords would not succeed, because I am not satisfied that for the purposes of this section the court is compelled to insert after the word " dwelling-house " the words " let as a separate dwelling."

I do not wish to take up time by an elaborate analysis of the provisions of these Acts, which have been, in all conscience, often enough considered by the courts, but I point out that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, which states the type of dwelling-house to which the Act applies, uses, in sub-s. (2), the well-known formula : " This Act shall apply to a house . . . let as a separate dwelling . . . " I do not read that subsection as being, in ordinary language, a definition clause. It is stating to what type of house the provisions of the Act would apply, and, when one considers the A purposes of the Act and its main provisions, it is clear that, though it has been said to give a dwelling-house something in the nature of a status, it is concerned to regulate the relationship between someone who can be described as a landlord and someone who can be described as a tenant. That formula has been changed somewhat in the later enactment. The corresponding paragraph in the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1), is that " subject to the B provisions of this section " the principal Acts shall " apply to every other dwelling-house of which the rateable value on the appropriate day did not exceed . . . " There is no reference, be it observed, in that sub-section to the phrase " let as a separate dwelling," but, by s. 7 (1) of the Act of 1939, the definitions contained in s. 16 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, are incorporated in the Act of 1939. Section 16 (1) provides :

> C " . . . unless the context otherwise requires, . . . ' dwelling-house ' has the same meaning as in the principal Acts, that is to say a house let as a separate dwelling or a part of a house being a part so let."

Counsel for the landlords says that that compels the court to treat " dwelling-house " as a term of which there is a definition, and so to read into the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1) and any other place where D you find the phrase " dwelling-house " the words " let as a separate dwelling." I cannot think that the change in the formula used in the Act of 1939 can have been intended to have made a vital change in the general conception of the application of the Acts, but, however that may be, like other interpretation clauses it is introduced with the reservation " unless the context otherwise requires."

Counsel for the tenant drew our attention to instances in the legislation in which E the words " dwelling-house to which this Act applies " cannot sensibly mean a dwelling-house that is at the particular point of time in question let as a separate dwelling. Of the examples given, one was the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 9 (1). That section deals with excessive rents in the case of furnished lettings, and it opens with the phrase :

> F " Where any person lets, or has, before the passing of this Act, let any dwelling-house to which this Act applies . . . at a rent which includes payment in respect of the use of furniture . . . "

Bearing in mind that furnished lettings are in general excluded and the terms of the sub-section itself, I think the words " dwelling-house to which this Act applies " in the sub-section can only sensibly mean a dwelling-house within G what I may call the economic limits provided by the legislation. I do not think that the argument of counsel for the tenant is got over by the fact that in *Lederer* v. *Parker* (1) the point was made that the provisions of the Act of 1920, s. 12 (2), proviso (ii) (which exclude from the ambit of the Act furnished lettings), are introduced by " save as otherwise expressly provided," and that s. 9 (1) of the Act of 1923 contains an express provision to the contrary. The point H still remains that you find this phrase " dwelling-house to which this Act applies " in a context which makes it reasonably plain that it can only mean a dwelling-house within the stated economic limits. Another example was cited by counsel for the tenant, and I refer to it because it seems to me to be a good one. It occurs in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (3). Sub-section (2) deals with the case of a certificate of a housing authority having been obtained certifying that the authority will provide alternative accommodation. Sub-section (3) provides :

> " Where no such certificate as aforesaid is produced to the court, accommodation shall be deemed to be suitable if it consists either (*a*) of a dwelling-house to which the principal Acts apply. . . "

If there is one thing that must be as plain as that the night follows the day it is that the accommodation deemed suitable must be a house which is open for occupation. To suggest that accommodation shall be deemed to be suitable if it consists of a dwelling-house already let to somebody else who cannot be got out is on the face of it an absurdity. SOMERVELL, L.J., referred during the argument to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*a*) (dealing with standard rent). He indicated that to treat " dwelling-house " always as meaning " dwelling-house let " gives a very peculiar and artificial meaning to provisions for fixing the standard rent by reference to lettings after certain dates. If a house is brought within the Act and the rent is to be fixed at the sum at which it was let after the date at which it was introduced, so to speak, the Act must contemplate the dwelling-house being within the general ambit of the Acts during the period when it is not so let.

Other illustrations might, if time and ingenuity sufficed, be found of similar instances, but the result of what I have said is, to my mind, that, looking at the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1), which is the section applicable here, I can see no compelling reason for reading into this phrase " dwelling-house to which the principal Act applies " an alleged definition which would have the effect of destroying its ordinary rational meaning and also creating logical inconsistencies which one cannot easily attribute to it.

The last point of counsel for the landlords—it is an important one—was that, if there are two views to be taken of this section, the court must prefer that one which avoids a penal consequence. In *Remmington* v. *Larchin* (2) a case in this court, it was laid down that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8, which is brought into play if the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 applies, is a penal section, and the principles which found a place in the judgments of BANKES, L.J., and SCRUTTON, L.J., to be applied in the construction of penal statutes are well-known. If there were here a fairly balanced alternative, I think that the duty of the court would unquestionably be to lean to that meaning which avoided a penalty, but, to my mind, the condition for the application of those principles is absent. Here the choice is between a natural and *prima facie* meaning of the section and a somewhat unnatural and artificial meaning only arrived at by applying an alleged definition provision which is shown to be in many other cases inapplicable. For these reasons I do not think that there is a case for saying that the penalty ought to be avoided and that we must so construe the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1), as to avoid it. I think that the conclusion reached by the county court judge was correct, and I would, therefore, dismiss the appeal.

SOMERVELL, L.J. : I agree, and I do not wish to add anything to the observations which SIR RAYMOND EVERSHED, M.R., has made with regard to the various other parts of these Acts which were relied on by the landlords. All I wish to state is my reasons for thinking that the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1), bears a plain meaning and that there is nothing else in the Acts which substitutes any other meaning or throws any doubt on it. I will start with the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8, of which this is an extension :

> " A person shall not, as a condition of the grant . . . of a tenancy . . . of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum . . . "

I do not think that one can split up the transaction and regard the requirement of the fine as something which precedes the letting. The section contemplates the whole thing being treated as one. If that is so, what must be considered with regard to a dwelling-house is not its status before the transaction is completed but its status under the transaction. If that is right, then no one disputes that under the transaction of the grant of the tenancy and the exaction of the premium the house is let as a separate dwelling to which the Act applies and the rent, if it is a first letting, will be the standard rent. That seems to me to be A the plain meaning of this section, and, for the reasons which have been given, the various provisions in other Acts which have been referred to do not seem to me to displace that meaning, or, indeed, throw any doubt on it. I have used the words of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8, but the same argument applies to the words of the Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1) :

> B "Where the purchase of any furniture . . . is required as a condition of the grant . . . of a tenancy . . . of a dwelling-house to which the principal Act applies . . ."

There again the time when you have to consider whether the premises are a dwelling-house within the Acts is that of the transaction resulting in the letting. I think the appeal fails.

C

HODSON, J. : I agree. I have nothing to add to what has been said by my Lords on the meaning of the section. In my judgment, it is quite plain and to adopt any other meaning would be straining the language, to which this court is not compelled by consideration of other sections in the Acts or any authorities interpreting this or any other section.

D *Appeal dismissed with costs.*

Solicitors : *Dod, Longstaffe & Fenwick* (for the appellants) ; *Freeborough & Co.* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

E

R. v. KEELER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Birkett, JJ.), F November 7, 1949.]

Criminal Law—Sentence—Supervision order—Duty of court to make order in absence of special reasons—Criminal Justice Act, 1948 (c. 58), *s.* 22 (1).

By s. 22 of the Criminal Justice Act, 1948 "(1) Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person [has been previously convicted of G certain offences] the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section. (2) Where any such order as aforesaid has been made—(*a*) the offender shall, on his next discharge from H prison and thereafter from time to time, inform the appointed society of his address in accordance with such instructions as may be given to him by or on behalf of the society . . ."

The applicant was sentenced at quarter sessions to eighteen months' imprisonment. The learned chairman stated that he was not going to make a supervision order under s. 22 (1), but he gave no reasons for that decision.

HELD : (i) the words of s. 22 (1) were mandatory ; it was the duty of a court, after imposing the sentence specified in s. 22 (1), to make a supervision order in the absence of special reasons, which, if they existed, ought to be stated; and in the present case an order ought to have been made.

APPLICATION for leave to appeal against a sentence of eighteen months' imprisonment imposed on the applicant at the Kent Quarter Sessions.

In refusing the application, the Court of Criminal Appeal now held that, if it were intended not to make a supervision order under s. 22 (1) of the Criminal Justice Act, 1948, in a case to which that sub-section applied, the special reasons for taking that course must be stated, and in the present case an order should be made.

No counsel appeared.

LORD GODDARD, C.J., delivered the following judgment of the court. The sentence imposed by quarter sessions was quite a proper sentence, but, in imposing it, the learned chairman said :

> " My attention has been drawn to a requirement of the Criminal Justice Act, 1948, which provides in such a case as yours that the court shall make an order requiring you to notify your address to an appropriate society for dealing with the after-care of prisoners, unless, having regard to the circumstances, including the character of the offender, it otherwise determines. In your case, in the exercise of the court's discretion, I do not propose to make such an order."

The requirement of s. 22 (1) of the Criminal Justice Act, 1948, is that a supervision order shall be made unless on certain specified grounds there is reason why it should not be made. We can see no reason in this case why the order should not have been made, and the court desires to say that where a court refrains from making an order under the sub-section it is desirable that they should state the reasons why they are taking that course. We wish to point out that the words of the sub-section are mandatory in the same way as, in the case of certain offences under the Road Traffic Act, 1930, the offender must be disqualified for holding a driving licence in the absence of special reasons. It has been held by the Divisional Court that, if justices in cases under the Road Traffic Act, 1930, refrain from making the order for disqualification they must state what are their special reasons for doing so, that this court may have an opportunity of considering them on appeal. The same considerations apply under s. 22 (1) of the Criminal Justice Act, 1948. It is the duty of a court to make the order unless they find some special reasons for not doing so, and the court ought to state what those special reasons are.

In the present case we asked the learned chairman to tell us what were the reasons, and he gives as a reason for coming to his conclusion one which ought not to have prevailed, namely, that one of the justices

> " . . . suggested to me that the machinery for tracing prisoners who failed to notify their changes of address imposed an embarrassing burden on the society concerned and might tend to undermine relations between the society and the prisoner."

That might have been a matter to be brought to the attention of Parliament when they were making this provision, but we cannot agree that that is a good reason for refraining from making an order which Parliament has said shall be made unless there are special circumstances, including the character of the prisoner, which would justify the justices in not making the order. The order ought to have been made in the present case. In future, we hope that a court which is refraining from making an order under s. 22 (1) in a case in which the provisions of the section would otherwise apply will state the reasons which move them not to make the order. The order in this case must be made.

Application refused.

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

R. *v.* SPEAKMAN

[Court of Criminal Appeal (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 7, 1949.]

Criminal Law—Sentence—Corrective training—Supervision order—Power of court to make—Criminal Justice Act, 1948 (*c.* 58), *s.* 22 (1), (2).

The appellant pleaded Guilty at quarter sessions to housebreaking and larceny and was sentenced to three years' corrective training, the previous convictions having been admitted and necessary notices proved. No order was made under s. 22 (1) of the Criminal Justice Act, 1948, which requires that where a person is convicted on indictment of an offence punishable with two years' imprisonment or more and certain previous convictions are established, the court, if it sentences him to imprisonment for twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall be subject to the provisions of the section requiring him after his discharge from prison to notify his address to an appointed society for dealing with the after-care of prisoners.

Held : that s. 22 (1) applied only where a sentence of imprisonment for twelve months or more, and not where a sentence of corrective training, had been passed, and that the order made by the recorder ought to stand.

Appeal against sentence.

The appellant pleaded Guilty at Winchester City Quarter Sessions to a charge of breaking and entering premises and stealing money therein and was sentenced to three years' corrective training. He was a person who could properly be sentenced to corrective training under s. 21 (1) of the Criminal Justice Act, 1948, but the court granted leave to appeal in order that it might consider whether a supervision order under s. 22 (1) should have been made. The court now dismissed the appeal and held that an order under s. 22 (1) could only be made after a sentence of imprisonment, as distinct from one of corrective training, had been imposed.

No counsel appeared.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued : It is clear that this man is eminently qualified for a period of corrective training, and there is no reason to interfere with the sentence of three years' corrective training which the learned recorder passed, but, in passing sentence, the learned recorder refrained from making a supervision order under s. 22 (1) of the Act of 1948. Section 22 (1) provides :

> " Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment ; or (*b*) has been previously convicted of an offence for which he was sentenced to corrective training, the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section."

The court gave leave to appeal because they desired to consider the question whether or not this was a case in which an order under s. 22 (1) should be made, but we think the learned recorder was right in deciding not to make an order because s. 22 (1) only applies if the court sentences a person to a term of imprisonment of twelve months or more, and imprisonment and corrective training are alternative sentences. An offender who is sentenced to corrective training automatically comes under the provisions of sched. III to the Act, which deals with the release on licence of a person sentenced to corrective training or preventive detention, and, therefore, the provisions of s. 22 (1) do not apply. Accordingly, there is no reason to alter the sentence of the learned recorder by making an order under s. 22 (1), and the sentence which was passed on the appellant will stand. The appeal is dismissed.

Appeal dismissed.

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

R. *v.* ALLEN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Croom-Johnson and Lynskey, JJ.), October 13, 1949.]

Criminal Law—Sentence—Corrective training—Notice of intention to prove previous convictions—Proof of service—Averment of convictions in indictment—Sentence set aside—Criminal Justice Act, 1948 (*c.* 58), *s.* 23 (1).

By the Criminal Justice Act, 1948, s. 23 (1) : "For the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention . . . no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the conviction or sentence ; and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury."

The appellant pleaded Guilty to a charge of housebreaking at quarter sessions, and, after hearing evidence of his character and previous convictions, the recorder sentenced him to four years' corrective training. Service of the notice of the two previous convictions required under s. 23 (1) before a sentence of corrective training could be passed had not been proved, nor was the appellant asked if he admitted the convictions.

HELD : no proof of the service of the notice required by s. 23 (1) having been given at the trial, the sentence of four years' corrective training must be set aside, and a sentence of four years' imprisonment would be substituted.

Per curiam : The judges of the King's Bench Division have resolved that, although it is not necessary in point of law that indictments should contain any averments with regard to previous convictions, it is desirable that they should do so in order to direct the attention of courts pointedly to the requirements of s. 23 (1).

APPEAL by leave against a sentence of four years' corrective training passed by the recorder at Plymouth Quarter Sessions.

The Court of Criminal Appeal now allowed the appeal on the ground that the provisions of the Criminal Justice Act, 1948, s. 23 (1), had not been observed and substituted a sentence of four years' imprisonment to date from the date of conviction.

Baerlein for the appellant.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant pleaded Guilty before the recorder of Plymouth to a charge of housebreaking, and the recorder, having heard his character, which is extremely bad, sentenced him to four years' corrective training. So far as the length of the sentence is concerned, the court thinks that there is nothing to be said. The appellant is 28 years of age, and his convictions began in 1938. In 1939 he was sent to Borstal. He was, apparently, released from Borstal very quickly because in December, 1939, he was charged with larceny and his Borstal licence was revoked. In 1941 he was sentenced for shopbreaking and larceny, and four other offences were taken into consideration. In 1942, at the Woolwich magistrate's court, he received altogether twelve months for the larceny of £27. At quarter sessions in April, 1943, he received twenty-one months' imprisonment with hard labour for shopbreaking and the larceny of property valued at a considerable sum. In 1945 at Coventry he was sentenced to six months for the larceny of cigarettes. At Plymouth, in September of that year, he received eighteen months for shopbreaking, and in 1946 he was again sentenced at Plymouth, on this occasion to nine months' imprisonment with hard labour for storebreaking. In December, 1947, there was a summary conviction. So, he has been convicted time and again, and these sentences have had no effect on him. Obviously, there is need for him to be put away for some time, and the recorder gave him corrective training in the hope that he would benefit by it. He has appealed and the court has to see whether or not the conditions which the statute lays down before a sentence of corrective training can be imposed were fulfilled.

One or two cases have come before this court in which due attention has not been paid to the provisions of s. 23 (1) of the Criminal Justice Act, 1948, with regard to proof of the service of the notice mentioned in the sub-section, and also regarding the necessity of asking a prisoner whether he admits the previous convictions which must be proved before a sentence of corrective training or preventive detention can be given. The judges of this Division, who form the judges of the Court of Criminal Appeal, have recently taken this matter into their consideration, and have resolved that, although it is not necessary in point of law that indictments should contain any averments with regard to previous convictions, it is desirable in future that they should do so*. It is desirable for the reason that, if the indictment contains the averments, which the clerk of the peace or the clerk of assize will in consequence put to the prisoner, the attention of the court will be directed pointedly to the requirements of the sub-section.

There is no doubt that this was a perfectly proper case for corrective training, but, unfortunately, no evidence was given that notice of two previous convictions had been served on the appellant. It is true that a police officer went into the box and proved a great many previous convictions, but the statute requires that before a sentence of corrective training can be passed notice of intention to prove two previous convictions must be served on the offender, and before a sentence of preventive detention can be passed notice of intention to prove three previous convictions and sentences of imprisonment must be so served. It is also provided that an offender must be asked whether he admits the previous convictions. As service of the appropriate notice was not proved in this case, the court has no option but most reluctantly to set aside the sentence of corrective training and substitute for it one of imprisonment. They do not see any reason why, in taking that course, they should reduce the term, because this is obviously a case in which a young man has shown by his conduct that he intends to lead a life of crime. The sentence is, therefore, amended from four years' corrective training to one of four years' imprisonment, to date from the date of conviction, as leave was given.

Sentence varied.

Solicitor : *Registrar of the Court of Criminal Appeal* (for the appellant).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

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* But see R. v. Dickson (*post* p. 810).

R. *v.* DICKSON.

[Court of Criminal Appeal (Lord Goddard, C.J., Hilbery and Lynskey, JJ.), October 31, 1949.]

Criminal Law—Sentence—Corrective training—Preventive detention—Notice of intention to prove previous convictions—Proof of service—Admission of convictions by offender—Attachment of notice to indictment—Criminal Justice Act, 1948 (*c.* 58), *s.* 21 (1) (2) ; *s.* 23 (1).

Before a prisoner can be sentenced to preventive detention or corrective training under the Criminal Justice Act, 1948, s. 21 (1) and (2), certain previous convictions must be proved, but by virtue of s. 23 (1) no account may be taken of these unless the offender and the proper officer of the court have been served with notice, at least three days before the trial, that it is intended to prove such convictions. If the offender does not admit the convictions the question must be determined by the verdict of a jury. The appellant pleaded Guilty to charges of two offences. He had been served with the proper statutory notice setting out the previous convictions it was intended to prove, and had signed a statement admitting them, but at the trial no evidence was given that the notice had been served on him nor were the convictions put to him.

Held : (i) in all cases where the court has to determine whether an offender liable to a sentence of preventive detention or corrective training should be so sentenced (*a*) the prosecution should prove service on the offender of the notice under s. 23 (1) ; (*b*) the clerk of assize or the clerk of the peace should put the convictions mentioned in the notice to the offender and ask if he admits them ; (*c*) the offender, or his counsel, should be handed a copy of the Prison Commissioners' Report provided for by s. 21 (5).

(ii) either an averment of the previous convictions should be included in the indictment or the notice itself should be attached to the indictment.

(iii) the provisions of s. 23 not having been observed in the present case, the sentence of preventive detention could not stand and a sentence of seven years' imprisonment must be substituted.

Cases referred to :

(1) *R.* v. *Allen*, p. 808, *ante*.

(2) *R.* v. *Davis*, [1943] 1 All E.R. 305 ; [1943] K.B. 274 ; 112 L.J.K.B. 355 ; 168 L.T. 256 ; 107 J.P. 75 ; 2nd Digest Supp.

(3) *R.* v. *Butterwasser*, [1947] 2 All E.R. 415 ; [1948] 1 K.B. 4 ; 111 J.P. 527 ; 2nd Digest Supp.

(4) *R.* v. *Browes*, [1949] 2 All E.R. 449 ; 113 J.P. 454.

Appeal against sentence.

The appellant pleaded Guilty at Bristol Assizes to a charge of receiving stolen property and was sentenced by Lewis, J., to ten years' preventive detention. He was not asked in open court whether he admitted the previous convictions in the statutory notice served on him under the Criminal Justice Act, 1948, s. 23 (1), nor was evidence given that the notice had been served. The appeal was allowed and a sentence of seven years' imprisonment substituted. The facts appear in the judgment of Lord Goddard, C.J.

James Burge for the appellant.
Fay appeared for the Crown.

LORD GODDARD, C.J. : The Criminal Justice Act, 1948, provides two new forms of sentence. One, under s. 21 (1), can be passed where a prisoner, who is not less than 21 years of age, is convicted on indictment of an offence punishable with imprisonment for two years or more, he having been convicted since he attained the age of 17 on at least two previous occasions of such an offence. He can be sent to corrective training instead of imprisonment for a term of from two to four years. Under s. 21 (2) a prisoner of not less than thirty years of age, who is convicted on indictment of an offence punishable with A imprisonment for two years or more and has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence and has on at least two of those occasions been sentenced to Borstal training, imprisonment, or corrective training, can be sent to preventive detention for a term of not less than five or more than fourteen years. Section 22 (1) of the Act provides :

> B "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment ; or (*b*) has been previously convicted of an offence for which he was sentenced to corrective training, the court, if it sentences him to a term of imprisonment of twelve C months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section."

By s. 23 it is provided :

> D "(1) For the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention or to be ordered to be subject to the provisions of the last foregoing section, no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the conviction or sentence ; and unless E any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury."

That section does not provide that the admission must be made in court, but it contemplates a notice being served on the prisoner three days before the trial and then provides that, unless a previous conviction is admitted, the question F must be determined by a jury.

It is the duty of courts strictly to follow the section. The question which arises in this case is of a highly technical nature. This appellant pleaded Guilty to two offences of a very serious character, and there is no question that he is just the sort of man whose previous history indicates that he is a very proper subject for a long term of preventive detention. The point that is taken on G his behalf is that the procedure which ought to be followed was not followed. In accordance with the practice which has been standardised, apparently, as police practice (I think at the suggestion of the Home Office), a notice of the convictions which it was proposed to prove against him for the purpose of determining whether he was liable to a sentence of preventive detention was served on the appellant. The three previous convictions alleged were specified H in the notice. The appellant signed a statement at the bottom of the notice admitting the convictions, but, unfortunately, evidence was not given at the trial that the notice had been served and the appellant was not asked the definite question whether he admitted the convictions. LEWIS, J., asked the police officer whether the provisions of s. 21 (5) of the Act had been complied with. That sub-section provides :

> "A copy of any report or representations in writing made to the court by the Prison Commissioners for the purposes of the last foregoing sub-

> section shall be given by the court to the offender or his counsel or solicitor."

There are, therefore, three things that must be done—the proof of the notice and the admission by the prisoner and the giving of the Prison Commissioners' report. The court finds that in the present case the only thing that was said in court was that the Prison Commissioners' report had been served on the appellant. LEWIS, J., having before him the statement which had been served on the appellant regarding previous convictions, with his signature at the bottom admitting the convictions, probably thought that was enough, forgetting for the moment that, strictly speaking, his signature ought to have been proved.

The court thinks this is a good opportunity for stating what, in its opinion, is the proper procedure to be adopted by all courts in regard to proving the matters which are required to qualify an offender to receive a sentence of corrective training or of preventive detention. After a plea or verdict of Guilty has been returned, a police officer should be called by counsel for the prosecution who should prove that he has served a notice on the offender as provided by s. 23 (1) of the Act three days before the trial. When that has been proved the clerk of assize or the clerk of the peace, as the case may be, should put the contents of that notice to the offender and get his admission or denial in open court. Then the offender or his counsel should be handed a copy of the Prison Commissioners' report. It may be that the offender will have signed the admission on the form to which I have referred. When he comes into court he may say that he disputes one of the convictions and wishes to withdraw the admission. If so, the judge who is presiding at the trial will, no doubt, consider what is to be done. We do not say what should be done as the matter does not arise here. The object of serving the offender with the notice three days before the trial is to give him an opportunity to say that he disputes a particular conviction. If he does, the matter can be dealt with by getting the proper evidence, which is a copy of the conviction and proof of the identity of the offender.

I want to add one word more with regard to this somewhat troublesome matter of the procedure to be followed in these cases. As I stated in *R.* v. *Allen* (1), the judges of the King's Bench Division have considered this matter, and, as I notified clerks of assize and clerks of the peace, they have come to the conclusion, because of the mistakes or omissions which we have found to have taken place, that it would be desirable, although it is not required by law, to put an averment in the indictment of the previous convictions so that the attention of the court may be directed to them. It has been pointed out to us by various clerks of assize and clerks of the peace that that may cause difficulty because, especially at a heavy assize or quarter sessions, when the indictments are drawn it is not always known that the police are going to put forward previous convictions with a view to getting an offender qualified for one of these new sentences. The court is of opinion, therefore, that one of two courses can be taken. Either an averment should be put in the indictment in the form the judges have suggested, or (as has been done in this case) the notice which is served on the offender should be attached to the indictment. That has been done, I now find, on other circuits and at other quarter sessions. If that is done, it will be a sufficient record, although it is necessary, of course, that proof should be given that the notice was served, and, above all, it should be borne in mind that the convictions must be put to an offender in open court. Therefore, in future, it will be open to clerks of assize and clerks of the peace either to include the averments in the indictment, or, if they find it more convenient, to attach the notice to the indictment. It must be attached to the indictment, so that, if the case comes up to this court we shall have copies before us.

In the present case we feel obliged to set aside the sentence of preventive detention because we cannot find that the appellant was ever asked in court whether or not he admitted the convictions, nor was any evidence given that the notice had been served on him. It is purely a technical point, because no one has the least doubt that it was served and that he admitted the convictions. If, therefore, the sentence of preventive detention has to be set aside, the question is what sentence should be substituted for it. [HIS LORDSHIP reviewed the facts and the appellant's record and said that the court had come to the conclusion that a sentence of seven years' imprisonment must be substituted.]

A *Sentence varied.*

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Freeborough & Co.* (for the Crown).

[*Reported by* H. McL. MORRISON, ESQ., *Barrister-at-Law.*]

B

R. *v.* APICELLA.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Birkett, JJ.), November 7, 1949.]

Criminal Law—Sentence—Corrective training—When an appropriate punishment C *—Fulfilment of statutory conditions not sufficent to justify sentence—Duty of court to consider facts and circumstances of the case—Criminal Justice Act,* 1948 (*c.* 58), *s.* 21 (1).

The applicant applied for leave to appeal against a conviction of horse-stealing. He was thirty years of age and had four previous convictions, the last being in 1941 when he was sentenced to twelve months' imprisonment D for receiving stolen property, this being his only previous conviction of an offence of dishonesty. The requirements of the Criminal Justice Act, 1948, s. 23 (1), were fulfilled, and he was sentenced to two years' corrective training, against which he did not appeal.

HELD : the application for leave to appeal against conviction must be dismissed. Although there was no appeal against the sentence, which E must, therefore, stand, the court desired to point out that it was not proper, taking into consideration all the facts of the case, to impose a sentence of corrective training. Sentences of corrective training or preventive detention ought not to be passed merely because the statutory conditions with regard to the imposition of such sentences were fulfilled, or because the Prison Commissioners reported that the offender was fit for such a sentence. Such F sentences were designed rather to import an extension of the principles underlying Borstal treatment, and in every case the duty of the court was, not only to see that the requirements of the statute had been fulfilled, but also to weigh up the facts and circumstances.

Case referred to :

(1) *R. v. Askew, ante* p. 687.

G APPLICATION for leave to appeal against conviction.

The applicant was convicted at Essex Quarter Sessions of stealing two horses, and was sentenced to two years' corrective training. In refusing the application the court made further observations on the imposition of sentences of preventive detention and corrective training and the duty of the court to consider the H particular facts and circumstances before awarding such sentences. The facts appear in the judgment of the court delivered by BIRKETT, J.

No counsel appeared.

BIRKETT, J., delivered the following judgment of the court. The applicant, Bernard Apicella, was convicted at Essex Quarter Sessions on Sept. 1, 1949, of stealing two horses, and he was sentenced to two years' corrective training. He applies to this court for leave to appeal against conviction only. [HIS LORDSHIP stated the facts and continued :] The application for leave to appeal against conviction is dismissed, and strictly, the case should end there because there is no appeal against sentence, but there is one word of some importance I am desired to say on this matter. The applicant is thirty years of age, and there are four previous convictions against him. Notice of intention to prove two previous convictions—in 1939 and in 1941—was given to him under s. 23 (1) of the Criminal Justice Act, 1948. For the first offence he received a sentence of three years' Borstal training on a charge of unlawful wounding and for the second he received twelve months' imprisonment for receiving stolen property. Since 1941 there have been no criminal proceedings against him at all, and the conviction of 1941 is the only one of dishonesty against him up to this moment. These two convictions he admitted. What it is desired I should say is this. The mere fact that the conditions of the statute dealing with corrective training are fulfilled is by no means a reason why a sentence of corrective training should be imposed. The sentence of corrective training under the Criminal Justice Act, 1948, s. 21 (1), is designed, in the view we take, rather to import an extension of the principles underlying Borstal treatment. Section 21 (1), lays down the conditions under which corrective training may be imposed, and there is no doubt that theoretically the applicant could be sent to corrective training because the conditions had been fulfilled. But s. 21 (1) further provides :

> " . . . if the court is satisfied that it is expedient with a view to his reformation and the prevention of crime that he should receive training of a corrective character for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of corrective training . . . "

The present case was one where a man had stolen two horses. He had had no conviction since 1941, a matter of eight years, and he had only one previous conviction of an offence of dishonesty. The view the court takes is that this was not a case in which it was proper for corrective training to be imposed. Before a sentence of corrective training is passed it is not enough that the mere elements of the statute have been fulfilled so that the prisoner is eligible for corrective training. The court must consider all the facts of the case and the design of the statute before imposing the sentence. Here there is no appeal against sentence and therefore the court can do nothing, and this sentence of two years' corrective training must stand, but it is important that the minds of those who are concerned with the administration of the Act should be drawn to this matter and should see that when corrective training is imposed the facts of the case justify it.

I ought to add that this court [see *R.* v. *Askew* (1)], when dealing on another occasion with a sentence of preventive detention under s. 21 (2) of the Act, pointed out that when the imposition of such a sentence was being considered it was not enough that the conditions of the statute had been fulfilled and that the Prison Commissioners' in their report under s. 21 (4) had stated that the man was physically and mentally fit for a sentence of preventive detention. The court must consider the facts of the case. Similarly with regard to corrective training. The mere fact that the Prison Commissioners report to the court that there is no reason why a sentence of corrective training should not be imposed if the court thinks fit is no reason of itself why corrective training should be given. With regard to both preventive detention and corrective training, it is the duty of the court not merely to see that the statutory conditions are fulfilled, but also to weigh up the facts and circumstances of the case and then decide the appropriate sentence.

Application dismissed.

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

GREEN AND OTHERS *v.* COGGINS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Somervell, L.J., and Hodson, J.), October 28, 1949.]

Rent Restriction—Part of dwelling-house used for business purposes—Tenant's removal to another house—One room still used as a dwelling—Onus of proof—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 12 (2), *proviso* (ii).

In 1938 the tenant was granted the tenancy of premises consisting of a dance hall, cafe, and cloakrooms on the first floor and an upper part which was used as a dwelling-house by him and his family. In 1946 the tenant bought a house in the neighbourhood and moved into it with his family. That house became his home, but he continued to use one of the rooms on the upper floor of the original premises as a bedroom. He slept there on, on an average, two nights of the week and still used the ground floor for the purposes of his business. The landlords issued a summons for possession on the ground that the premises were no longer used as a dwelling-house, and were, therefore, outside the protection of the Rent Restrictions Acts.

HELD : the judge was entitled to consider, as he did in this case, that the premises had been let in 1938 as a dwelling-house and that the onus of proof lay on the landlords to show that that user, which still continued, was not a user of what was originally a dwelling-house entitling the tenant to claim protection ; there was evidence to support the finding of the judge that the premises were still used as a dwelling-house ; and, therefore, the Court of Appeal could not interfere.

[AS TO CONTROLLED PREMISES PARTLY USED FOR BUSINESS OR OTHER PURPOSES, see HALSBURY, Hailsham Edn., Vol. 20, p. 315, para. 371 ; and FOR CASES, see DIGEST, Vol. 31, pp. 558, 559, Nos. *7057-7067,* and 2nd Supplement.]

Case referred to :

(1) *Langford Property Co., Ltd.* v. *Athanassoglou,* [1948] 2 All E.R. 722 ; [1949] 1 K.B. 29 ; [1949] L.J.R. 461 ; 2nd Digest Supp.

APPEAL by the landlords from an order of His Honour JUDGE PEEL, K.C., made at Blackburn County Court on June 27, 1949. The judge dismissed the landlords' application for the possession of the premises, the ground of the application being that they were solely used for business purposes and that their occupation under the Rent Restrictions Acts, 1920 to 1939, had ceased. The Court of Appeal now dismissed the appeal with costs. The facts appear in the judgment of SOMERVELL, L.J.

J. W. Stansfield for the landlords.
Beney, K.C., and *Shorrock* for the tenant.

SOMERVELL, L.J. : This is an appeal from a decision of His Honour JUDGE PEEL. It was an action for possession, and the question is whether the Rent Restrictions Acts, 1920 to 1939, are available to the tenant in the circumstances which have arisen. The original letting was in 1938, and the premises consist of a dance hall and a cafe and a number of rooms, some on the ground floor, which were mostly used as cloakrooms, and some on the first floor. It is conceded that when the tenant took the lease originally the premises were let as a dwelling-house, and, by reason of proviso (ii) to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), the Act applied to them although part of them was used " for business, trade, or professional purposes." In 1946 the tenant bought another residence into which he and his family moved, and it became their home. The tenant, however, continued to use as a bedroom at the original premises one of the rooms which he and his family had previously occupied. He slept there, the judge found, on an average two nights a week for reasons connected with his business in running the premises—the dance hall and so on. Dances continued to a late hour and sometimes he had to be on the premises early in the morning, and it was convenient for him to sleep and have meals on these two nights a week. The learned judge said :

> "The tenant has done that, not to make a case against the landlords for protection under the Rent Acts, but for convenience—so that he might be on the premises early to cook breakfasts and to clean the premises. He was acting *bona fide* and in a reasonable manner."

In September, 1948, the present landlords bought the reversion of these premises, and they have brought these proceedings for possession, contending that, in the circumstances, the tenant cannot plead the protection of the Rent Restrictions Acts because the premises are not now let as a dwelling-house.

The county court judge decided in favour of the tenant, holding that he was entitled to claim the protection of the Acts. The judge refers to proviso (ii) to s. 12 (2) which deals with the position where a part of a dwelling-house is used for business or professional purposes, and he refers also to a decision of this court in *Langford Property Co., Ltd.* v. *Athanassoglou* (1). The question is whether there was any evidence on which the judge could come to the conclusion that these premises were let as a dwelling-house on the material date having regard to their size and the number of rooms and the fact that only one room was occasionally used for dwelling in the ordinary sense. Can it be said that the premises properly come within the expression in the proviso, a dwelling-house part of which is used "... for business, trade, or professional purposes"? I can imagine a case where the part used as a shop or offices is so large compared with what is used as a dwelling-house that it could not be said that those words applied. In the present case I think that the judge was entitled to take into consideration the history of the matter and the fact that these premises were originally let as a dwelling-house. The onus was on the landlords to show that the user, which still continued, was not a user of what was originally a dwelling-house which entitled the tenant still to claim the protection of the Acts. The case is near the borderline, but there was some evidence on which the judge could come to a conclusion favourable to the tenant, and, therefore, we cannot interfere with his decision. This appeal should be dismissed.

HODSON, J. : I agree.

SIR RAYMOND EVERSHED, M.R. : I also agree. I venture to add that the basis of the decision must be that there was some evidence, when regard is had to all the circumstances, including the earlier user, on which the judge could hold that this property at the material date was still let as a dwelling-house. I should also add that there was a second point, which counsel for the landlords indicated, that, even if the premises were a dwelling-house, nevertheless the character of the tenant's personal occupation was not such, having regard to his other home, as entitled him now to claim the protection of the Acts, and, accordingly, that this case was distinguishable from such cases as *Langford Property Co., Ltd.* v. *Athanassoglou* (1). The point was not pressed, but it seems to me that, once it is conceded that this was a dwelling-house at the material date, there is no ground for quarrelling with that part of the judge's judgment. The appeal will be dismissed.

Appeal dismissed with costs.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Ramsbottom, Liddle & Dixon*, Clitheroe (for the landlords) ; *F. J. Thairlwall & Co.*, agents for *E. Rennison & Co.*, Blackburn (for the tenant).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

SMILEY *v.* TOWNSHEND.

[KING'S BENCH DIVISION (Lynskey, J.), October 26, 27, 1949.]

Landlord and Tenant—Requisition—Land—Requisition during lease—Covenant to repair—Breach—Assessment of damages—Damage to reversion—"Damage" —Landlord and Tenant (Requisitioned Land) Act, 1944 (*c.* 5), *s.* 1 (1)—*Landlord and Tenant Act,* 1927 (*c.* 36), *s.* 18 (1).

A By s. 1 (1) of the Landlord and Tenant (Requisitioned Land) Act, 1944: "Where, in the exercise of emergency powers, possession of any land comprised in a lease is taken on behalf of His Majesty, then, during the period while possession so taken is retained, no remedy for breach of any repairing covenant contained in the lease shall be enforced, whether by action or otherwise, in respect of any damage to the land occurring during that period; B and if the lease determines while possession of the land is so retained, or if upon possession of the land being given up, compensation in respect of the taking of possession thereof becomes payable for any such damage to the person entitled to the benefit of the covenant, no remedy for breach of the covenant shall at any time be enforced as aforesaid in respect of that damage."

C On Dec. 20, 1944, leasehold property, the subject of a covenant to "sufficiently repair . . . and . . . yield up . . . all the said demised premises in . . . good thorough and substantial repair", was requisitioned under the Defence (General) Regulations, 1939, and was so requisitioned at all material times. In January, 1945, a schedule of the condition of the premises was prepared on behalf of the plaintiff landlord and the then tenant jointly D which showed the dilapidations existing at the date of requisition. The lease was assigned to the defendant on May 11, 1945, and on June 24, 1947, it expired while the property was still requisitioned. In estimating the cost of making good the dilapidations for which the defendant was liable the surveyors for both the parties based their figures on the schedule of condition of 1944 and referred to the actual condition at the date of expiration of the E lease only for the purpose of measuring up disputed items. They agreed the cost of making good the dilapidations at £585. On a claim for this sum as damages for breach of the covenant to repair,

HELD: (i) in view of the provisions of s. 1 (1) of the Act of 1944 the cost of making good the dilapidations should be assessed by reference to the schedule of condition at the date of requisitioning in order to exclude all F damage occurring thereafter, but from the cost of the dilapidations at the date of requisitioning must be deducted the cost of any subsequent repairs of such dilapidations, whether effected by the defendant or by the requisitioning authority, up to the date of the expiration of the lease, the defendant only being bound to pay for dilapidations existing at the time of the requisition which still existed at the end of the lease.

G (ii) although the property was under requisition at the expiration of the lease and was likely to continue to be requisitioned thereafter, there might still be damage to the reversion under s. 18 (1) of the Landlord and Tenant Act, 1927, such damage being the difference between the value of the reversion subject to requisition with the dilapidations for which the defendant was responsible and its value if there had been no such dilapidations. H

(iii) damage within the meaning of the Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1 (1), meant physical damage to the property and not a breach of covenant resulting in damages; the sub-section, therefore, excluded liability only for actual damage or dilapidations occurring during the period of requisition and not the defendant's breach of covenant to repair or deliver up in a good state of repair which had occurred only during that period.

(iv) the plaintiff, therefore, was entitled to recover the sum claimed, less the value of repairs to the pre-existing dilapidations which had been carried out by the requisitioning authority during the requisition.

[AS TO DAMAGES FOR BREACH OF COVENANT TO REPAIR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 219-221, paras. 239-241 ; and FOR CASES, see DIGEST, Vol. 31, pp. 339-343, Nos. *4820-4859*.

FOR THE LANDLORD AND TENANT (REQUISITIONED LAND) ACT, 1944, s. 1 (1), s. 5, see HALSBURY'S STATUTES, Vol. 37, pp. 338, 340.]

ACTION for (*inter alia*) damages for breach of covenant in a lease to deliver up premises in a good state of repair.

The parties were successors in title to the parties to a lease of premises for 98 years as from June 24, 1849. The premises had been requisitioned under the Defence (General) Regulations, 1939, before the assignment of the lease to the defendant, and they continued under requisition until after the expiration of the lease. At the time of the requisition the cost of dilapidations was agreed by surveyors acting on behalf of both the landlord and the then tenant at £585.

LYNSKEY, J., held that the plaintiff landlord was entitled to recover that sum, less the value of repairs to such dilapidations carried out by the requisitioning authority during the requisition.

H. J. Phillimore for the plaintiff.
L. A. Blundell for the defendant.

LYNSKEY, J.: The plaintiff, David de Crespigny Smiley, claims from the defendant, John Somerville Townshend, damages for breach of a covenant to repair and to deliver up certain premises known as 31, Montpelier Square, Knightsbridge, at the termination of his lease in a good state of repair. The plaintiff is the successor in title to a Mr. Thomas Weatherly Marriott, who, on June 24, 1849, granted to one William Henry Atkinson (of whom the defendant is a successor in title) a lease of these premises for a term of 98 years at a yearly rent of ten guineas. That term expired on June 24, 1947. One of the terms of the lease was :

> "The said Henry William Atkinson his executors administrators or assigns also will at all times during this demise well and sufficiently repair uphold support glaze pave tile slate plaster whitewash paint paper cleanse empty amend and otherwise keep the said messuage or tenement and premises hereby demised and every part thereof and all vaults fences waterclosets sewers drains and appurtenances belonging or to belong thereto in good thorough and substantial repair and will at the expiration or other determination of this demise peaceably yield up unto the said Thomas Weatherley Marriott his heirs and assigns all the said demised premises in such good thorough and substantial repair and condition as aforesaid together with all chimney pieces hearths covings slabs windows casements shutters doors fastenings waterclosets partitions fixed presses shelves drawers cisterns pipes pumps posts pales rails and all other fixtures and things which shall be affixed or fastened to the said demised premises at any time during the said term and particularly will once in every third year during the said term paint all the outside wood iron and other painted works of or belonging to the said demised premises twice over with proper oil colour in a good and workmanlike manner and in like manner paint all the inside wood iron and other painted work of or belonging to the same premises once in seven years of the said term."

It is for breach of the terms of that covenant that these proceedings are brought.

The defendant became the assignee of this lease on May 11, 1945, but on Dec. 20, 1944, the premises had been requisitioned under the powers contained in the Defence (General) Regulations, 1939, by the Westminster City Council acting on behalf of the authorised Minister. The premises have remained under requisition ever since. In January, 1945, on the instructions of both the then lessor and the then lessee, Messrs. Harrods made a schedule of the condition of the premises. It was agreed by the parties that that schedule correctly set out the description of the premises with its existing dilapidations at the date of requisition. At the time of the assignment to the defendant there had been a sub-lease in existence to a Mrs. Yeathered made on July 11, 1912, and she had been in actual occupation of the property, but on Oct. 24, 1945, she gave up the lease to the defendant, who thereupon became entitled to possession subject to the Crown requisition. When the lease expired on June 24, 1947, the plaintiff required payment by the defendant of the cost of repairing the dilapidations which, he said, existed at that time. A surveyor, Mr. Ward, was instructed by the plaintiff to examine the premises and prepare a statement of the cost of repairing the dilapidations. Mr. Ward priced out this cost on the basis of the dilapidations shown in the schedule of condition of January, 1945, regard being had to the compensation the Westminster City Council would pay in respect of damage, additional damage, or lack of repair, which might result during their period of occupancy. On Oct. 23, 1947, Mr. Ward met Mr. Ling, the surveyor acting for the defendant. Mr. Ling adopted the same method of dealing with claims for dilapidation when premises had been requisitioned and both surveyors agreed that the cost of making good the dilapidations as shown in the schedule of condition, allowance being made for any further lack of repair for which the council might have to pay, was the sum of £585. Mr. Ling stated that from a practical point of view, whatever the law might be, that would represent the damage to the plaintiff's reversion.

The case originally came before the court by means of a specially endorsed writ claiming the sum of £585 as on an account stated. In the meantime the defendant had taken the view that, while he might be responsible for dilapidations of a structural character, namely, dilapidations in the actual structure itself, he was not and could not be responsible for dilapidations to decorations. The accounts agreed between Mr. Ward and Mr. Ling were then separated into items in respect of structural dilapidations and items in respect of decorative dilapidations. The total of the agreed structural dilapidations was £141 10*s.* 6*d.*, and the defendant paid the plaintiff that sum.

The plaintiff puts forward his case purely on the basis of breach of the covenant to deliver up in a good state of repair. When Mr. Ward was cross-examined it appeared that the defendant disputed the figures on which the claim was based. It was clear that Mr. Ward and Mr. Ling had based their figures entirely on the schedule of condition of 1944, and, though not entirely disregarding the actual condition of the premises on June 24, 1947, when the lease expired, they had only examined the premises then for the purpose of measuring up disputed items. The question arises whether the two surveyors applied the right principle in arriving at their figure. In my view, they have not. One has to assess the cost of making good dilapidations as at the date of the expiration of the lease. That seems to be settled by authority. The only way to arrive at what the dilapidations are and their extent is by examining the actual condition of the premises at the expiration of the lease.

The matter is complicated by reason of the Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1 (1) of which provides:

> "Where, in the exercise of emergency powers, possession of any land comprised in a lease is taken on behalf of His Majesty, then, during the period while possession so taken is retained, no remedy for breach of any repairing covenant contained in the lease shall be enforced, whether by action or otherwise, in respect of any damage to the land occurring during that period; and if the lease determines while possession of the land is so retained, or if upon possession of the land being given up, compensation in respect of the taking of possession thereof becomes payable for any such

> damage to the person entitled to the benefit of the covenant, no remedy for breach of the covenant shall at any time be enforced as aforesaid in respect of that damage."

Prima facie it would seem that there is excluded from any claim for damages for breach of covenant to deliver up in a good state of repair any damage which arose during the period of requisition. "Damage," by s. 5 of the Act of 1944, includes dilapidations, so that an examination alone of the premises at A the expiration of the lease would not be enough, because that would show damage which had occurred during the period of requisition as well as lack of repair which existed at the date of the requisition. What Mr. Ward and Mr. Ling did was to take the schedule of condition as at the date of the requisition and assume that any damage occurring thereafter was not recoverable under the lease and also that during the period of requisition no repairs had been done B in respect of the dilapidations which existed at the date of the requisition. It seems to me, apart from the other question which arises in this case, that it is right to use the schedule of condition as a starting-point to find out what are the amounts payable for breach of the covenant, but one must also take into account the condition at the end of the lease to find out how far those dilapidations which existed at the commencement of the requisitioning were C still in existence and whether repairs had been carried out to them, either by the tenant, who was enjoying the benefit of the requisitioning, or by the requisitioning authority. The defendant is only bound to pay for dilapidations which exist at the termination of the lease. To arrive at the true amount of these dilapidations one must first take the damage or disrepair existing at the commencement of requisitioning, see how far that damage has been repaired or D ameliorated by the time the lease expires, and so assess the damage which has not been caused during the requisitioning period for which the local authority may or may not be responsible.

In answer to that contention counsel for the defendant relies on the provisions of the Landlord and Tenant Act, 1927, s. 18 (1), and says that, even if there has been a breach of the covenant to repair and deliver up in a good state of repair, in E fact there has been no damage to the reversion because the premises are still under requisition and there is no immediate likelihood of the requisition ending, and, even if the defendant had carried out his obligations under his covenant to repair, the benefit of those repairs would have disappeared by the time the plaintiff was able to take possession since the premises would then be just as bad as if the defendant had not repaired them. In those circumstances, says F counsel, there can be no damage to the reversion, because the reversion would not have benefited if the obligations had been fulfilled. It seems to me that that argument is based on the fallacy that it looks on the reversion as a reversion expectant on the period of requisition. In other words, it takes as the test how the value of the property will be affected when it is released by the Westminster City Council. In my view, that is not the proper test to apply. To ascertain G whether there has been any damage to the reversion here, the proper course is to find out what is the degree of repair for which the defendant is responsible and by what amount approximately is the value of the existing reversion, subject to requisition, reduced by reason of that lack of repair. In other words, one has got to ask oneself first, supposing this covenant had been complied with and the premises were on sale subject to requisition immediately after the expiration H of the lease, what price would they have brought, and, secondly, what would have been their value in the state of disrepair for which the defendant is responsible? The difference would be the damage to the reversion for which the defendant is responsible. It seems to me that is the correct answer because the person who is buying the reversion subject to requisition is buying it subject to a liability and that tends to depreciate the price compared with what he could have got if he could have had vacant possession. Would the price be depreciated more by reason of the lack of repair for which the defendant may be responsible and so induce the prospective purchaser to offer a less price ? I am satisfied on the evidence, both of Mr. Ling and of Mr. Ward, that there would be a reduction in that price in those circumstances. The amount of it is another question, but I am satisfied that there would be damage to the reversion by reason of the lack of repair for which the defendant, as distinct from the Westminster City Council, is responsible.

The next point taken by counsel for the defendant is that under the Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1 (1),

> " . . . no remedy for breach of any repairing covenant contained in the lease shall be enforced, whether by action or otherwise, in respect of any damage to the land occurring during that period . . . "

Counsel says that damage there does not mean physical damage to the structure or decorations, but that it means a breach of covenant the result of which causes damage, and, therefore, the breach is itself damage to the land within the meaning of that sub-section. On that basis he argued that, as the defendant became the assignee of the lease only during the period of the requisition, and, as his breach of covenant could not arise before he became assignee, his breach at that stage would be damage to the land, and, therefore, the plaintiff's claim would be excluded by reason of the sub-section. He goes on to argue that the covenant to deliver up in a good state of repair would also be covered as damage to the land, because the lease expired during the period of requisition and, as the damage flowed from the breach of covenant and was not the physical damage to which the Act refers, therefore the plaintiff's claim is destroyed under the sub-section. By s. 5 of the Act of 1944 :

> " ' Damage ' includes dilapidations, but does not include war damage within the meaning of the War Damage Act, 1943."

In my view, under the Act of 1944, and under the Compensation (Defence) Act, 1939, to which reference is made in the Act of 1944, both war damage and matters for which compensation is given are matters of physical damage to the property and the words " any damage to the land " in s. 1 (1) of the Act of 1944 mean damage of a physical nature, actual structural damage or damage to decorations, all of a nature which injures the land, the building, the decorations to the building, or the fitments, and not something in the nature of a breach of obligation by the lessee to the lessor.

[HIS LORDSHIP assessed the value of the repairs of dilapidations carried out by the Westminster City Council during the requisitioning up to the termination of the lease at £150, and deducting that sum and the sum of £141 10*s*. 6*d*. already paid from the figure of £585 claimed, gave judgment for £293 9*s*. 6*d*.]

Judgment for the plaintiff with costs.

Solicitors : *Withers & Co.* (for the plaintiff) ; *Woodham, Smith, Borradaile & Martin* (for the respondent).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Applied. MIDDLETON *v.* BALDOCK.
[1950] 1 All E.R. 708.

Considered. WABE *v.* TAYLOR
[1952] 2 All E.R. 420.

OLD GATE ESTATES, LTD. *v.* ALEXANDER AND ANOTHER.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.JJ.), October 31, 1949.]

Rent Restriction—Possession—Dwelling-house left by tenant—Wife remaining in occupation—Tenant's furniture remaining on premises—Purported surrender by tenant of premises by agreement.

A statutory tenant living with his wife in a flat which constituted the matrimonial home left the premises following a quarrel with his wife, and purported to surrender them to the landlords by agreement. His wife remained in occupation with the use of his furniture. On the wife's refusing to quit the premises, the husband gave her written notice revoking any authority which she might have from him to occupy the flat. In proceedings by the landlords against the tenant and his wife for possession,

HELD : the tenant had not given up possession, as he remained in occupation through his wife and furniture, and, accordingly, his statutory tenancy had not been terminated.

Dictum of LORD GREENE, M.R., in *Brown* v. *Draper* ([1944] 1 All E.R. 246), *applied.*

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, p. 334, para. 400 ; and FOR CASES, see DIGEST, Vol. 31, pp. 575-578, Nos. *7226-7289*.]

Cases referred to :

(1) *Brown* v. *Draper*, [1944] 1 All E.R. 246 ; [1944] K.B. 309 ; 113 L.J.K.B. 196 ; 170 L.T. 144 ; 2nd Digest Supp.

(2) *Skinner* v. *Geary*, [1931] 2 K.B. 546 ; 100 L.J.K.B. 718 ; 145 L.T. 675 ; 95 J.P. 194 ; Digest Supp.

(3) *Hutchinson* v. *Hutchinson*, [1947] 2 All E.R. 792 ; 2nd Digest Supp.

APPEAL by the tenant and his wife from an order of His Honour Deputy JUDGE GORDON CLARK sitting at Marylebone County Court, on June 2, 1949, whereby he granted to the landlords possession of certain premises within one month. The Court of Appeal allowed the appeal. The facts appear in the judgment of BUCKNILL, L.J.

Share for the tenant and his wife.
David Lloyd for the landlords.

BUCKNILL, L.J. : This is an appeal against an order for possession within a month of a flat, made by DEPUTY JUDGE GORDON CLARK sitting at Marylebone on June 20, 1949. The landlords own a block of flats called Dudley Court, Upper Berkeley Street, and they let Flat No. 100 unfurnished to the tenant, Mr. Alexander, on Aug. 19, 1941, for a term of three years at a rental of £130 per annum. After the end of that term the tenant continued in occupation as a statutory tenant with his wife and the rent was raised to £150. There is no dispute that the furniture belonged to the tenant. In November, 1948, the tenant and his wife had a matrimonial dispute which ended in the tenant leaving his wife and the furniture in the flat. On Dec. 18, 1948, he wrote to the landlords saying that he was giving up the tenancy and that he would not be responsible for the rent on and after Dec. 25. The landlords replied by saying that it was necessary, under the Rent Restrictions Acts, for him to give three months' notice to determine his tenancy, but he could, if he wished, give up possession of the premises, and they asked him to sign an enclosed letter. The tenant signed this letter which read as follows :

> " As arranged with you I confirm that I have given up possession of the above flat to you, and enclose the key relating to the premises."

He did not enclose the key. After a futile attempt by the landlords to persuade the tenant's wife to leave the flat—she claimed that she was the tenant and was willing to go on paying the rent—on Mar. 8, 1949, the landlords' solicitors wrote an important letter to the tenant :

> "Dear Sir, We refer to our interview with you of the 3rd instant. As we then explained it is not possible for you to effectively deliver up possession of the flat you formerly occupied at Dudley Court by giving notice to quit or signing a statement that you are in fact giving up possession, since there A remains in the flat your furniture and your wife, who in this respect is impliedly there with your authority. We understand that it will not be possible for you to remove your furniture. As a result we regret that in the event of proceedings being taken as is our clients' intention, it will be necessary to join you as a party as well as your wife. It would materially assist our clients if you would sign a revocation of your wife's authority. B In the hope that you will be prepared to do this, we enclose a document for this purpose and if it meets with your approval, perhaps you will sign it and return it to us."

At the end of April, 1949, the tenant returned to the flat and resumed occupation of it.

C The whole point is whether the tenant ever did effectively deliver up possession of the flat. The landlords themselves seem to think that in March he had not given up possession, and, having regard to the facts that the furniture was his, that it and his wife were in the flat, and that he did not even give up the key, it seems to me that at that time he had not given up possession. On Mar. 11 he signed the document referred to in the letter of Mar. 8, which was addressed to D his wife and was as follows :

> "Please take this as formal notice of the revocation of any authority or leave which I may have at any time granted or given to you to occupy the said flat."

Nothing effective happened after that, and the summons for possession was issued E on Apr. 1 against both the tenant and his wife. It is clear that, if the tenant had given up possession of the flat by the time the summons was issued, this case does not fall within the Rent Restrictions Acts. On the other hand, if he had not given up possession, the case comes within the Acts and the judge should not have granted possession. The learned judge has dealt with the case on the assumption that the Rent Acts did not apply and that this was an ordinary F case in which the husband had given up possession and the wife was in effect a trespasser.

The authorities on the point which were reviewed by the learned judge laid down propositions which are familiar in this court. The case which helps us the most is *Brown* v. *Draper* (1) where the facts were somewhat similar. A husband was the tenant of a house on a weekly tenancy. As in this case, he left G the house in a dispute with his wife, and his wife and child remained in occupation of the house with the use of his furniture and he continued to pay rent. He received notice to quit from the landlord and he then stopped paying the rent, but he did not revoke his leave to the wife to reside in the house nor did he remove his furniture. Later the landlord brought proceedings against the wife for trespass and at the hearing, the husband, who was not made a party to the proceedings, H gave evidence that he had no interest in the house. It was held by the Court of Appeal that the husband was still in possession of the house, and the only way he could be deprived of the protection of the Rent Acts was by his going out of possession or having an order for recovery of possession made against him. There are obviously differences between that case and this, because the proceedings there were merely against the wife for trespass, but the passage which I think does throw some light on the present case is where LORD GREENE, M.R., reading the judgment of the court, said ([1944] 1 All E.R. 246) :

> "This appeal raises a novel and interesting point under the Rent Restrictions Acts . . . It is convenient to pause here and consider the position of Joseph Draper himself under the Acts, in the light of the facts as above stated. If he had given up possession of the house to the respondent [landlord] on the expiration of the notice, or subsequently, he would have placed himself outside the protection of the Acts, since that protection is based on the statutory restriction on the power of the court to make an order for recovery of possession. If the tenant voluntarily gives up possession, no occasion for the operation of the statutory restriction arises. The landlord takes possession without the necessity of obtaining an order of the court ; and there is nothing in the Acts which prevents him from doing so. But Joseph Draper did not give up possession. He not only left the appellant [wife] in occupation without taking any steps to revoke the licence which he had given her to continue living there, but he left his furniture in the house in her charge."

Lord Greene, M.R., continued (*ibid.*, 248) :

> "This argument raises an important question, the answer to which will affect many cases of common occurrence. We will take one example. The tenant of a house held for a fixed term goes abroad on military service, leaving his wife in the house. While he is abroad, the lease comes to an end. At common law the wife thereupon becomes a trespasser and the landlord can take proceedings to recover possession from her. Do the Rent Restrictions Acts prevent the landlord from taking this course ? In our opinion, they do. If the contrary were true, the consequences would be lamentable. In such a case the possession of the wife must, we think, be regarded as the possession of the husband and cannot be treated as unlawful so long as the husband has the right to claim the protection of the Acts. As we have already pointed out, the only ways in which the husband can lose the protection of the Acts are by giving up possession, which in the case assumed he can only do by removing his wife (or, perhaps, by revoking his permission to her to live there) and removing any furniture, etc., which belongs to him ; or by having an order for possession made against him. The right conferred on the husband to claim the benefit of the Acts entitles him, if at the expiration of the tenancy he remains in possession (and possession by his licensee or by leaving, for example, his furniture in the house is sufficient for that purpose), to remain in possession of the house unless and until an order is made against him ; and the landlord is no more entitled to treat his licensee as a trespasser than he is entitled to treat the tenant himself as a trespasser."

That passage is very appropriate to the present case because, in the first place, the tenant did nothing towards removing the furniture in the flat, and so long as it was there he retained possession to that extent. It was not open to the landlords to let the flat unfurnished while the furniture was there and the tenant could not remove his wife otherwise than by breaking the law and forcibly carrying her out. It is not necessary for this court to decide whether he could lawfully revoke his permission for her to live there, but in the absence of circumstances showing that she was in the wrong and had forced him to leave her I should have very great doubt whether any revocation of permission to an innocent wife to live in the matrimonial home in which the husband had lived with her and from which he had deserted her would have any valid legal effect. In my judgment, the learned judge was wrong in holding, as he did, that the tenant had given up possession. I think he did not. That being so, I think that this appeal should be allowed.

SOMERVELL, L.J. : I agree with the learned judge that the point in this case is whether possession was given up by the tenant before the summons was issued because, in my view, if possession was not given up then, the landlords clearly cannot rely on what I may call the *Skinner* v. *Geary* (2) principle in the events which have happened, namely, the return of the tenant to the flat and his wife before the date of the hearing. The learned judge on the point whether possession had been surrendered said :

> " The second point taken by counsel for the defendant was that Mr. A Alexander never effectively gave up possession ; that he remained, so to speak, a statutory tenant in possession *malgré lui*, by virtue of the presence in the flat of his wife and his furniture ; and that, consequently, this vicarious possession enured to his benefit when he changed his mind and resumed occupation."

I do not propose to read the letters which my Lord has already read. It seems B plain to me on them that the landlords took the line which one would have expected, that, having got the tenant to sign the document purporting to give up possession of the flat, they then discovered that the wife and the furniture were still there and that the wife was unwilling to go, and they, therefore, could not get possession of the premises to which they were entitled on the termination of the tenant's possession, whether as original contractual lessee or as C statutory tenant. Counsel for the landlords admits that it could not be suggested that possession had been effectively surrendered up to Mar. 8, 1949, but he submitted that the formal revocation of the licence which was signed by the tenant must be regarded as amounting in law in itself to a surrender of possession. One thing is clear, namely, that in the letter of Mar. 8 the landlords did not so regard it and did not ask the tenant to sign the document on the basis that it D would enable him to say that he had surrendered possession. I think that in taking up that line they were perfectly right. The wife and the furniture remained in the house. It is unnecessary to decide what would be the position if a husband had cleared the house of furniture, and his wife had insisted on remaining in the unfurnished house, and he had then given to the landlords a revocation of the licence to his wife. That case can be dealt with when it arises E and it might turn on the question whether the landlords accepted that position as a proper surrender. The fact that the furniture was left in the house, however, seems to me in itself sufficient to prevent this tenant being able to establish that possession was surrendered, and for these reasons I think the appeal must be allowed.

F **DENNING, L.J.** : If a statutory tenant goes out of occupation, leaving lodgers or sub-tenants or no one in the house, he ceases to be entitled to the protection of the Rent Restrictions Acts, but he does not, in my opinion, lose the protection if he goes out leaving his wife and furniture there. The reason is because the wife has a very special position in the matrimonial home. She is not the sub-tenant or licensee of the husband. It is his duty to provide a roof G over her head. He is not entitled to tell her to go without seeing that she has a proper place to go to. He is not entitled to turn her out without an order of the court : see *Hutchinson* v. *Hutchinson* (3). Even if she stays there against his will, she is lawfully there, and, so long as she is lawfully there, the house remains within the Rent Acts and the landlord can only obtain possession if the conditions laid down by the Acts are satisfied. I agree that the appeal should be allowed.

H

Appeal allowed with costs.

Solicitors : *Beach & Beach* (for the tenant and his wife) ; *Stilgoes* (for the landlords).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Re SIMSON (*deceased*). SIMSON *v.* NATIONAL PROVINCIAL BANK, LTD., AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), November 1, 1949.]

Family Provision—Fund on which provision to be charged—Division of burden between legacies and residue—Duty of executor where application to be expected A *—Duty of executor to file evidence—Need to join legatees as defendants—Inheritance (Family Provision) Act,* 1938 (*c.* 45), *s.* 1 (1).

By his will, a testator bequeathed legacies amounting to £6,100 to Mrs. B., who had been his housekeeper up to the date of his death, legacies of £2,600 in value to his wife from whom he had for many years lived apart, £500 B to each of two nephews, and the residue, amounting to some £3,000, to his two children. The widow, who had been receiving £200 a year under a separation agreement, asked that the court should make reasonable provision for her maintenance under the Inheritance (Family Provision) Act, 1938, s. 1 (1).

HELD: assuming that the bequests to the widow would produce £104 per annum it was proper that she should be awarded under s. 1 (1) £96 C per annum, to be borne as to two-thirds thereof rateably by the legacies other than the widow's and as to one-third by the residuary estate.

Per curiam : In cases under the Inheritance (Family Provision) Act, 1938, it is the paramount duty of an executor to avoid embarrassing the court and to think carefully before allowing any part of the estate to be paid out to any beneficiary while an application under the Act is either D pending or impending. During the time within which an application under the Act can be made, *i.e.*, during the six months from the date on which representation is first taken out, and there is a possibility of an application being made, the executor distributes the estate at his risk. Duties and debts can be paid, but no distribution to beneficiaries should be made while there is any possibility that an application under the Act will be made. E

Although it is not desired to lay down a definite rule that in every case the executor must always file an affidavit on these applications, it should be the normal thing that the executor should do so and put the court in possession of the facts so far as known to him, or, in the case of a bank, so far as known to its officials.

There is far too widespread an idea that legacies are bound to be paid in F full and that provision under the Act will be made at the expense of the residue, but legatees need not always be made defendants to these applications. If the court thinks that a legatee may be affected, it will direct an adjournment and that notice be given to an absent legatee, who may possibly be joined as a party.

[AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, Hailsham G Edn., Vol. 34, pp. 429-445, paras. 486-505 ; and FOR CASES, see DIGEST Supp.]

ADJOURNED SUMMONS by which a widow applied for reasonable provision to be made for her maintenance out of the testator's estate under the Inheritance (Family Provision) Act, 1938, s. 1 (1).

VAISEY, J., held that the widow should be paid, in addition to her benefits H under the will, £96 per annum to be charged rateably on the legacies and the residuary estate. As, however, the widow had stated, through her solicitor, when the summons was before the master, that she made no claim against certain persons who were entitled together to pecuniary legacies amounting to £1,000, VAISEY, J., ordered that the widow should be paid only £87 per annum, the difference of £9 being the proportion of £96 which he would have charged on the said legacies. The facts appear in the judgment.

W. F. Waite for the widow.
A. F. M. Berkeley for the executor.
Rees-Davies for Mrs. Burgess, a pecuniary legatee.
T. A. C. Burgess for the residuary legatees.

VAISEY, J. : The plaintiff, Mrs. Lilly Louisa Simson, is the widow of the testator, James Tudhope Simson. The first defendant, the National Pro- A vincial Bank, Ltd., is the executor of his will. The second defendant, Mrs. Kathleen Beryl Burgess, is a legatee under the will, and so are the last two defendants, James Alexander Simson and Irene Mary Simson, who are the only children of the testator and the plaintiff. The summons asks that such reasonable provision as the court may think fit shall (subject to any conditions or restrictions) be made out of the testator's net estate for the maintenance of the plaintiff.

B In substance the will of the testator gives to the second defendant, Mrs. Burgess, bequests of a total value of £6,100 net after paying legacy duty. It gives to the widow legacies amounting in value to £2,600, again after discharging legacy duty. There are two legacies of £500 each to two nephews of the testator. Subject to those gifts the estate is divisible in equal shares between the two children. The total net value of the estate is some £14,000. It will be observed C that the available residue for division between the children is not much more than £3,000. The story is a not unfamiliar one. The testator and his wife separated, and they entered into an agreement for separation which contains some elaborate provisions in regard to financial matters. It will suffice for me to say that, as a result of those provisions and in the events which have happened, the widow was in receipt of £200 a year from her husband down to the date of D his death which happened on Apr. 24, 1948.

It has been suggested to me that the capital amounting to £2,600 of which the widow has been placed in control under the will has to be taken into consideration by me, not in any strictly arithmetical way, but as part of the circumstances which I have to consider, and with that I agree. It has also been suggested to me by counsel for the widow that, if that sum of money is considered to have an E income value of some £78 a year, taking the return at three per cent., his client ought in fairness to have that sum, namely, £78 a year, made up to the £200 which she has been receiving hitherto by granting her under the provisions of the Inheritance (Family Provision) Act, 1938, s. 1 (1), an annual sum of £122. I say at once that I think that is about the limit of what the widow ought to ask in the circumstances. I do not overlook the fact that the £2,600 might well be F invested or made use of at a higher rate of interest than three per cent. I think possibly it might be invested at four per cent. and bring her in £104 per annum. The defendant, Mrs. Burgess, who, under the terms of the will, takes nearly half of this not very large estate, had been the testator's housekeeper for many years before and down to the date of his death. She repudiates the idea that she was living with him in any sense which she might regard as offensive, and she says G that she was his housekeeper and nothing else, and I deal with the situation on that footing.

I have, first, to decide what the widow ought to have out of the estate by way of proper maintenance, but I have also to decide out of what part of the estate the provision should be made, because it is an illusion all too prevalent that these provisions are always, or primarily, made out of residue. That is a mistake. H There may be cases, for instance, in which the testator has left a very large pecuniary legacy to a perfect stranger and a small residue to members of his family to whom he has some moral obligation. It is obvious that, if any such provision as I am now asked to make has to be made, it ought not in every case to come out of the residuary estate, but may well be directed to fall on some particular portion of the estate. Indeed, I consider I have a free hand in the matter, because by the Inheritance (Family Provision) Act, 1938, s. 3 (1), it is provided that where an order is made under the Act, then, for all purposes, the will shall have effect, and be deemed to have had effect as from the testator's death, as if it had been executed with such variations as may be specified in the order for the purpose of giving effect to the provisions for maintenance thereby made. In the present case Mrs. Burgess, who had no such moral claim on the testator as she might have had if she had been living with him as his wife, receives benefits under the will amounting to more than £6,000, while the testator's own children, who are obviously not in affluent circumstances receive much less. A The daughter is said to be earning her living as private secretary to the visiting medical staff of a hospital. She is 31 years of age and her salary is, in the mother's belief, sufficient to keep her. Her savings appear to amount to no more than £100 of War Loan which was left to her by her grandfather (the widow's father), and a few National Savings Certificates. The son is a captain in the Royal Engineers and is married, living on his army pay and a small B disability pension as a result of wounds in the last war. He also has had a legacy from his maternal grandfather of £200. None of these people is in affluent circumstances, and I cannot regard the position as one in which those to whom the testator is under a paramount obligation, *i.e.*, his wife and children, were in any way so situated that that paramount obligation could be, or should be, disregarded. Mrs. Burgess, no doubt, served the testator very faithfully as house- C keeper, though as nothing else. She appears to have been given board and lodging by the testator, but to have received no salary from him, and it may be that these bequests to her are to some extent compensation for something in the nature of what I may call "back pay."

This case involves all sorts of considerations which I find very difficult to bring to a conclusion which is altogether satisfactory, but I am going to assume D that the widow has within her power, from the legacies which were left to her by her husband, to provide for herself an income of £104 a year, *i.e.*, four per cent. on £2,600. That leaves £96 to be made up, and that is the sum which I should propose to award to her. From what source has that to come ? In my judgment, the proper allocation of that sum is that two-thirds of it, *i.e.*, £64 a year, should come out of the pecuniary legacies, *i.e.*, those given to the nephews and to Mrs. E Burgess, and the remaining £32 should come out of the residue. The proportions in which the pecuniary legacies are given are, roughly, one-seventh, that is to say, £1,000 to the nephews, and six-sevenths, that is to say, £6,000 to Mrs. Burgess, and it seems to me that that £64, which I think should fall on the pecuniary legacies, ought to fall as to one-seventh on the nephews and six-sevenths on Mrs. Burgess. F

The order which I should make, but for a matter to which I am about to refer, is that the will should be read as taking effect from the testator's death as if there had been a preliminary bequest of an annuity during widowhood of, taking round figures, £55 a year charged on and payable out of the income of the bequests given to Mrs. Burgess, £9 a year charged on the income of the bequest given to the nephews, and £32 a year charged on the income of the benefits given to the G two children by way of residue. Unfortunately, a step was taken, which, in my judgment, was very ill-advised. When the parties were before the master (I quote the master's note) : "The [widow] by her solicitor concedes that she makes no claim against the nephew legatees and is willing that they should be paid in full." That may have been done without due consideration of the consequences, but I think that, while the widow will take £55 a year charged H on Mrs. Burgess's interests and £32 a year charged on the children's interests, her disclaimer before the master has deprived her of, and she has given up any right to, the £9 which I think ought to be charged against the interest of the nephews. I wish it to be made quite clear that in these cases it is the paramount duty of the executor to avoid embarrassing the court and to think carefully before allowing any part of the estate to be paid out to any beneficiary while any application under this Act is either pending or impending. If these legacies to the nephews have been paid, as I understand they have, the matter comes before me in a form which adds further embarrassment to an already embarrassing jurisdiction. I wish it to be distinctly understood that during the time within which an application under the Inheritance (Family Provision) Act, 1938, can be made, *i.e.*, during the six months from the date on which representation is first taken out, and there is a possibility of an application being made, the A executor distributes the estate at his risk. Duties and debts can be paid—there is no question about that—but no distribution to beneficiaries should be made while there is any possibility that an application under this Act will be made.

Another thing I want to say is this. In this case the executors have not filed any evidence, and I am told that the master said that he did not think any evidence was necessary provided the executors furnished the parties with all B proper particulars on a piece of paper. That may be all right in very simple cases, but here, where there were several matters which wanted clearing up, it seems to me not a very convenient course. I will instance one such matter. In the separation deed a provision was inserted as to events conditional on what certain policies were worth at the date of the deed, *i.e.*, Feb. 18, 1929. When I asked counsel for the executors to tell me what the figure was, he could not do C so. In my judgment, in a case like this with obvious complications and doubts and difficulties about that and other matters, it is the duty of the executors to file an informative affidavit telling the court what is known to them, and what it is necessary for the court to know in order to deal properly with the matter. I think it is very unfortunate that, with an estate of £14,000, the parties should have been left to find out as best they could from slips of paper what the executor D thought was the net value of the estate for the purposes of the Act. Although I do not want to lay down a definite rule that in every case the executor must always file an affidavit on these applications, I cannot help feeling that it should be the normal thing that the executor should do so and should put the court in possession of the facts so far as known to him, or, in the case of a bank, so far as known to its officials. I regret that there is no affidavit in this case, and I E think that it would have been much better if I had been fortified with that information which I have had rather to drag out from the parties on points on which they were not very clear themselves.

It does not follow from what I have said that all the legatees must always be made defendants to these applications. It may well be that sometimes the court is given a little trouble because it thinks that there are legatees who, perhaps, F are not fully aware of the risk they run of having some part of the provision sought for thrown on them, and it may well be that the court will direct an adjournment and that notice be given to absent legatees and, possibly, that other legatees be joined as parties. I agree that sometimes it is difficult to know whether legatees should be made parties or not, but I cannot help observing from my experience in these applications that there is far too widespread an idea that G the legacies are bound to be paid in full and that provision under the Act will be made at the expense of residue. Residue, of course, is the normal and obvious place from which provision shall be made, but there are a large number of cases—and I think this is one—in which it is plain that residue ought not to be asked to shoulder the whole of the burden.

Order accordingly. Costs of all parties as between solicitor and client to be taxed H *and paid out of the estate.*

Solicitors: *Field, Roscoe & Co.*, agents for *Stockton, Sons & Fortescue*, Banbury, Oxford (for the plaintiff and the third and fourth defendants) ; *Robinson & Bradley*, agents for *Frank White & Williams*, Ilford, Essex (for the first defendant) ; *Elborne & Garland*, Ilford, Essex (for the second defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

KELLY *v.* BATTERSHELL AND ANOTHER.

[COURT OF APPEAL (Bucknill, Cohen and Asquith, L.JJ.), October 18, 19, 20, 1949.]

Landlord and Tenant—Derogation from grant—Implied covenant—Common scheme—Top floor of house let as residential flat by oral tenancy agreement—Other floors originally let as flats by written agreements containing similar covenants as to user—User as private dwelling only—Whole house, excepting top floor, converted into hotel—Rights of tenant of top floor.

In June, 1937, F. became the tenant of 86, Lancaster Gate, and, by the agreement, dated Dec. 20, 1937, granting him the lease, he agreed *inter alia* (*a*) not to use the premises for any purpose other than that of a private dwelling-house, except in accordance with the provisions of two licences which permitted their user as a private residential club, (*b*) not to allow on the premises any sale by auction or entertainment to which the public could obtain admittance, and (*c*) not to cause or suffer to be done on the premises any act which might be an annoyance, damage or disturbance to the superior landlords or their other tenants or neighbours. F. retained the ground floor and basement of the premises for use as a club, and sub-let the other floors as flats, and in 1940 he granted a tenancy of the top floor to the plaintiff at a rent of £60 a year. All the tenancies, except that of the plaintiff, were by formal written agreements containing covenants in substantially similar terms, and among the covenants by the tenants were (*a*) " Not to allow any sale by auction on the premises nor exhibit on any part thereof any sign . . . that apartments are to be let . . . but shall use the same as a private dwelling only," and (*b*) " Not to do or suffer to be done any act or thing which may be or grow to the annoyance of the landlord or other occupants of the said premises . . . or which may be contrary to the terms of the lease under which the landlord holds the property . . . " Although there was no written agreement in regard to her tenancy, the plaintiff alleged that in taking the tenancy she had relied on a statement, made to her by F. during the negotiations, that he required the tenants to use their flats for residential purposes as he proposed to maintain the house for private residents. In November, 1946, F. sold his interest in the whole house to the defendants, who were already conducting a hotel in the next house. The whole of No. 86 was empty at the time, except for the first floor and the premises occupied by the plaintiff on the fifth floor. In 1947 the defendants began to use No. 86 as part of the hotel, and in June, 1948, they incorporated the whole house, except for the top floor, into the hotel. By the erection of a door, the premises occupied by the plaintiff were turned into a self-contained flat by the end of 1948. In an action by the plaintiff in the county court claiming damages and an injunction to restrain the defendants from using the premises, or any part of them, for any purpose other than that of private residence, or in such a manner as might be detrimental to the quiet enjoyment by her of her flat.

HELD : (i) the user of the lower part of the house was merely an interference with the plaintiff's convenience, amenity or privacy and was not of such a serious nature as to frustrate the use of the premises for the purpose for which they were demised ; and, therefore, the fact of the incorporation of the premises in a hotel did not amount to a derogation from the grant made to the plaintiff.

(ii) in any event, the question whether particular circumstances amounted to a derogation from the grant as distinct from a mere interference of amenities was a question of fact, and there was evidence on which the county court judge could decide in favour of the defendants.

(iii) even assuming that there had been a statement of intention by F. during the negotiations for the tenancy that he would not permit the user of any of the other floors of the premises except as private dwellings, a covenant to that effect could not be implied in the tenancy agreement between F. and the plaintiff. why? pg 837 B

(iv) a letting scheme could not be inferred in regard to the house in question, which was originally built as one dwelling and never physically split into separate dwelling-houses; the covenants in the written agreements between F. and the other tenants of the house were inserted, not by reason of a letting scheme, but to ensure, so far as possible, that the terms of the head lease were not infringed; and, therefore, the plaintiff's claim failed.

Newman v. *Real Estate Debenture Corpn., Ltd. and Flower Decorations, Ltd.* ([1940] 1 All E.R. 131), *distinguished.*

[As to Derogation from Grant, see HALSBURY, Hailsham Edn., Vol. 20, pp. 243, 244, paras. 271, 272; and for Cases, see DIGEST, Vol. 31, pp. 134-136, Nos. *2688-2707.*]

Cases referred to:

(1) *Rawnsley* v. *Lancashire and Yorkshire Ry. Co.*, (1887), 35 W.R. 771; 13 Digest 535, *873.*
(2) *Browne* v. *Flower*, [1911] 1 Ch. 219; 80 L.J.Ch. 181; 103 L.T. 557; 31 Digest 135, *2703.*
(3) *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
(4) *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479; 12 Digest 611, *5052.*
(5) *Broome* v. *Pardess Co-operative Society of Orange Growers* (*Est.* 1900), *Ltd.*, [1940] 1 All E.R. 603; 109 L.J.K.B. 571; 162 L.T. 399; Digest Supp.
(6) *Elliston* v. *Reacher*, [1908] 2 Ch. 374; 77 L.J.Ch. 617; 99 L.T. 346; *affd.* [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701; 40 Digest 309, *2646.*
(7) *Renals* v. *Cowlishaw*, (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 40 Digest 316, *2686.*
(8) *Spicer* v. *Martin*, (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53 J.P. 516; 31 Digest 166, *2997.*
(9) *Grant* v. *Derwent*, [1928] Ch. 902; 97 L.J.Ch. 434; *affd. on other grounds*, [1929] 1 Ch. 390; Digest Supp.
(10) *Hudson* v. *Cripps*, [1896] 1 Ch. 265; 65 L.J.Ch. 328; 73 L.T. 741; 60 J.P. 393; 31 Digest 135, *2701.*
(11) *Alexander* v. *Mansions Proprietary, Ltd.*, (1900), 16 T.L.R. 431; 31 Digest 158, *2915.*
(12) *Newman* v. *Real Estate Debenture Corpn., Ltd. & Flower Decorations, Ltd.*, [1940] 1 All E.R. 131; 162 L.T. 183; Digest Supp.
(13) *Gedge* v. *Bartlett*, (1900), 17 T.L.R. 43; 31 Digest 158, *2914.*
(14) *Sayers* v. *Collyer*, (1884), 28 Ch.D. 103; 54 L.J.Ch. 1; 51 L.T. 723; 49 J.P. 244; 40 Digest 329, *2776.*
(15) *Jaeger* v. *Mansions Consolidated, Ltd.*, (1902), 87 L.T. 690; *on appeal* (1903), 87 L.T. 694; 31 Digest 97, *2368.*

Appeal by the plaintiff from an order of His Honour Judge Bensley Wells, at Marylebone County Court, dated Apr. 13, 1949.

The plaintiff was the tenant of the top floor of 86, Lancaster Gate, London, W., the defendants being her present landlords. The defendants, who were running a hotel in the adjoining house, bought No. 86 in 1946 and proceeded to incorporate it, except for the top floor, into their hotel. The plaintiff brought an action against them, claiming damages for alleged breaches of covenant and an injunction to restrain them from using the premises for any purpose other than that of private residence, or in such a manner as was detrimental to the quiet enjoyment by her of her flat. She contended (*a*) that there was a derogation from the grant made to her by her original landlord, and (*b*) that there was a breach of a letting scheme. The county court judge held (*a*) that there was no derogation from grant, and (*b*) that there was no letting scheme in regard to A the premises, and he refused the plaintiff's claim for damages and an injunction. The plaintiff's appeal from the judge's order was now dismissed by the Court of Appeal. The facts appear in the judgment of COHEN, L.J.

Salt, K.C., and *Michael Hoare* for the plaintiff.
R. E. Megarry for the defendants.

B

BUCKNILL, L.J. : I will ask COHEN, L.J., to give the first judgment.

COHEN, L.J. : The plaintiff, Miss Kelly, claims to be the tenant of a private flat consisting of the top floor (the fifth floor) of 86, Lancaster Gate, under a tenancy alleged to have started in about June, 1940. She alleges that the tenancy is a tenancy from year to year of unfurnished premises at a rental of £60 per annum. The landlord from whom she claims to hold was Mr. Stephen C Foster, who had himself acquired his lease in 1937, the term starting from June 24, 1937, although the agreement granting it was only executed on Dec. 20, 1937. The lease of Dec. 20, 1937, contained a covenant restricting the user of the premises which in its original form was in these terms :

> "The lessee shall not nor will during the continuance of the term hereby D granted carry on or permit or suffer to be carried on any trade profession or business on the said demised premises or any part thereof (except for professional purposes of a doctor or a dentist provided no lunatics are kept thereon and no dispensing is done on the demised premises) or use the same for a school or academy or permit the said messuage or dwelling-house to be occupied in any other manner than as a private dwelling-house only except E in strict accordance with the provisions of the two licences copies whereof are set out in sched. II hereto."

Shortly speaking, those licences permit the user of the premises as a private residential club. The lease also contains one or two other restrictive covenants to which counsel for the defendants referred us, the first of which is :

F

> "Not to hold or permit any sale by auction or exhibition or any meeting or dance, concert or other entertainment to which the public or any section thereof can obtain admittance otherwise than by personal unsolicited invitation of the tenants or any resident on the demised premises."

Another is to the effect that the lessee would not at any time during the term cause or suffer to be done on the demised premises any act or thing which might G be or grow to be an annoyance, damage or disturbance to the superior landlords or any of their other tenants or lessees or other neighbours of the adjoining or neighbouring houses or premises.

At the time of the commencement of the plaintiff's tenancy, the third and fourth floors were separately occupied, the fourth floor by a Miss Pesterre and the third floor by a Mrs. Trew, who had apparently obtained her tenancy agree- H ment on Aug. 31, 1937, before the actual lease to Mr. Foster was signed, but after the date on which his tenancy in fact commenced. The first and second floors were occupied by Lady Cobham, while the ground floor and basement were occupied by Mr. Stephen Foster, the landlord, and were used by him to carry on a kind of club. There are one or two things to be observed about these tenancies. The tenancy to Mrs. Trew of the third floor does not appear to have been of a self-contained flat, as the premises are described as :

> " . . . the third floor of the premises known as No. 86, Lancaster Gate, Hyde Park, in the county of London, comprising three rooms and kitchenette, the bathroom on the half landing below and cupboard on second floor landing."

So, too, the lease of the fourth floor contained three rooms and a kitchenette and the bathroom and w.c. on the half landing below. There were two tenancy A agreements affecting the fifth floor before the plaintiff obtained her tenancy. All the tenancies I have mentioned, other than the tenancy to the plaintiff, were the subject-matter of formal agreements reduced into writing, and the covenants contained therein were substantially in the same terms. The covenants by the tenant in each of the agreements were seven in number. The first was the usual covenant to pay rent, the second was a covenant in the not unusual B form against assigning or under-letting, and the third was to repair and deliver up in good repair. The fourth, which is the first of the important covenants, is in these terms :

> " Not to allow any sale by auction on the premises nor exhibit on any part thereof any sign plate placard or bill that apartments are to be let or that any business is carried on upon the said premises, but shall use the C same as a private dwelling only."

The fifth covenant, on which counsel for the plaintiff also relied, is in these terms :

> " Not to do or suffer to be done any act or thing which may be or grow to the annoyance of the landlord or other occupants of the said premises or D of the surrounding neighbourhood or which may be contrary to the terms of the lease under which the landlord holds the property or whereby the current fire insurance may be invalidated."

The sixth was not to keep any animals on the premises without the consent in writing of the landlord, and the seventh was to keep the windows clean and properly curtained and the chimneys regularly swept and not to place any E articles or thing on the landings or staircase.

So far as the plaintiff was concerned, no written agreement was entered into as regards her tenancy. The plaintiff says that Mr. Foster offered her the premises by a letter or letters which she has lost and cannot now produce. She says that he first offered her the premises at £105 per annum, but that she refused to consider that rental and it was finally agreed that she should take the premises F at a rent of £60 per annum. I must refer in a little more detail to her evidence on this point. She said :

> " I agreed to take the flat at that rent [£60 per annum]. This was for an unfurnished flat, but it included electric light. There was only one meter in the house. Gas not included as I had my own meter. Mr. Foster told me that all the tenants in the house were occupying their flats as private G dwelling-houses and that it was his intention to maintain the house as such. I agreed to use my flat only as a private dwelling. I regarded the undertaking *re* user of the flats in the building as important."

She had not previously called it " undertaking ".

> " I would not have taken the flat if the other parts of the house had been H business premises or usable otherwise than as private dwelling-houses."

She said that in 1940 her flat was an open flat, *i.e.*, just the rooms and the landing and the flight of stairs from the floor below, and was in no sense a self-contained flat. In cross-examination she said that it was in May or June, 1940, that Mr. Foster told her he required the tenants to use their flats for residential purposes as he proposed to maintain the house for private residents, that this statement had been made during the negotiations for her tenancy, and that she relied on it when she decided to take the tenancy.

It appears that after the plaintiff had taken the tenancy and entered into possession there was some alteration in the situation, in that some of the flats were no longer let as flats but the rooms were let off singly, as individual rooms, with furniture and meals. At that time, Mr. Foster was retaining the ground floor and basement as a club. In his evidence on that subject he said :

> " From about 1937 I used part of the premises as a club or lecture centre— a membership club which gave members the right to attend lectures and use a library on my premises at 86. I used the entire ground floor and basement for this purpose. The club averaged 800 members every year. Membership 10*s*. per annum. There were lectures or social or concert every night. I provided about 500 teas a week, that is, units of light refreshment. The club continued throughout my occupation of the house. Plaintiff never complained about my activities—she was a member of the club."

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The plaintiff, on the other hand, said that she did not know he was running a club. She only knew he had a library of psychic books which many people came to borrow.

On Nov. 4, 1946, Mr. Foster contracted to sell his interest in the whole house to the defendants, who were running a hotel, called the Dominions' Hotel, next door, at Nos. 87 to 89, Lancaster Gate, and wished to include No. 86 in the hotel. At the date of completion of the sale, on Nov. 11, 1946, the whole of No. 86 was empty except for the first floor and the premises occupied by the plaintiff on the fifth floor. The plaintiff suspected the purpose for which the sale took place, and on Jan. 6, 1947, she wrote to the town clerk endeavouring to persuade the local authority to prevent the user of the premises as a hotel or for any other purposes than as private dwelling-houses. In March or April, 1947, according to the plaintiff's evidence, the defendants commenced to use No. 86 as part of the hotel, but at that time there were no through communications on the various floors between Nos. 86 and 87. In March or April, 1948, the defendants commenced to incorporate the whole of No. 86, except for the top floor, into the hotel, and I think that by June, 1948, the incorporation was complete. There can, I think, be no doubt that as soon as the work commenced the plaintiff knew what the defendants were doing. She was undoubtedly dissatisfied with the effect of the change from private residences, or private rooms, to the hotel, and in the course of her evidence she refers to certain incidents of which she complains. [HIS LORDSHIP dealt with the plaintiff's evidence in regard to these incidents, and also with her complaint in regard to the temporary closure of the front door of No. 86, but this complaint was not pressed, as the door had now been re-opened.] The plaintiff became aware of the user of the premises as a hotel as early as March, 1947, but at that time there was no incorporation. She became aware of the incorporation as soon as it was made, but it was not until Jan. 3, 1949, that she took any active steps to put a stop to that of which she complained. On that date the plaint in this matter was issued.

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Paragraph 1 of the particulars of claim states the alleged tenancy. Paragraph 2 states the nature of the building, which I have already sufficiently described except for the fact that it had, as the plaintiff said

> " a single staircase affording access to all floors and a single exterior entrance door affording access to and from the street on the ground floor with private letter boxes at the said door."

Paragraph 3 is in these terms :

> " During the negotiation of the said tenancy the said Foster who was himself in occupation of the said ground floor and basement orally represented to the plaintiff that it was his intention to maintain the character of the said premises as a private dwelling-house for carefully selected tenants only and the plaintiff accepted the said tenancy in reliance upon the said representation. In the circumstances aforesaid the said Foster as landlord

> impliedly covenanted both for himself and his successors in title to permit the plaintiff quietly to enjoy the amenities of her said flat and to enjoy in common with the other occupants of the said premises the use of the front entrance and its appurtenances and staircase and to maintain the character of the said premises as a private dwelling-house as aforesaid and that he would not use or permit the use of the said premises or any part thereof for any purposes other than that of private residence or in such a manner as to cause any detriment or inconvenience to the plaintiff in the use and enjoyment of her said flat."

In para. 4 the plaintiff sets out the breaches of which she complains, including the incorporation of the four lower floors into the hotel and other matters, to which I need not at the moment refer. In para. 6 she alleges that by reason of the matters she has stated she has been and continues to be put to inconvenience and has suffered damage, and has been and is being deprived of the quiet enjoyment of her flat and of the amenities appurtenant thereto, and she claims damages and an injunction to restrain the defendants from using or permitting the use of the premises, or any part thereof, for any purpose other than that of private residence, or in such a manner or for such purpose as is, or may be, detrimental to the quiet enjoyment by her of her flat. A defence was put in which sets up an entirely different tenancy, alleging a furnished tenancy of, I think, only one room, and containing a number of denials. I think the only portion of the defence to which it is necessary for me to refer is the allegation in para. 4, which is in these words :

> " At the time of the said assignment and the said grant neither the representation nor the covenant referred to in para. 3 of the particulars of claim was registered as a land charge and the defendants took both the said assignment and the said grant in good faith and without notice either of the said representation or of the said covenant."

On those pleadings the matter came before the learned judge, but the plaintiff did not rely on the covenant for quiet enjoyment. She based her case on two grounds, the first being that there was a derogation from the grant to her made by Mr. Foster. She said that, by letting the premises to her for a private dwelling-house only, he was under an obligation not to use the remainder of the premises in such a way as to derogate from the grant which was a grant for a particular purpose, namely, the use of the house as a private dwelling. She also said that there was a letting scheme, and that it was a breach of the obligations of the defendants under that letting scheme to use the premises otherwise than as private residences. The learned judge ultimately dismissed both the action and the counterclaim, which was for a declaration that the the tenancy under which the plaintiff held was a furnished monthly tenancy.

In dismissing the action he dealt first, on Mar. 18, with the allegation of a letting scheme, but no order was drawn up on that date. On Apr. 13 he dealt with the remainder of the claim and dismissed both the action and the counterclaim. The way this was dealt with led counsel for the defendants to raise a preliminary point. He said that on Mar. 18 the learned judge had dismissed the claim for an injunction based on the letting scheme argument and that, therefore, notice of appeal from that judgment should have been given within the permitted time calculated from that date. He cited in support of his argument a decision of the Divisional Court in *Rawnsley* v. *Lancashire and Yorkshire Railway Co.* (1), the headnote to which is in these terms :

> " When the finding of a jury in a county court is complained of, the 21 days within which an appeal may be entered is to be calculated from the time when the verdict was given, although the judgment upon it was not given until a subsequent date."

In that case the verdict of the jury had been given, but the aggrieved party applied to the county court judge for a new trial. The judge dismissed the application and directed the order to be drawn up, and the Divisional Court held that the time must be calculated from the date on which the verdict of the jury was given. That, counsel for the defendants suggested, was analogous to the present case, but his argument, which I must say was not strenuously pressed, breaks down, as I do not think the county court judge in the present case disposed in any way of the claim for an injunction on Mar. 18, but merely gave his reasons for rejecting one of the grounds on which counsel for the plaintiff tried to support that claim. I might add that, had we taken a different view, I do not think we would have felt much difficulty in extending the time for an appeal. On Apr. 13 the judge dismissed the action and counterclaim, holding that the plaintiff was a tenant from year to year, and he held that the rateable value of the plaintiff's flat did not exceed £100 a year. From this finding the defendants have not appealed, and we are only concerned now with the question of what covenants expressed or implied were binding on the landlords as against the plaintiff.

As I have said, before the learned county court judge only two things were discussed, first, derogation from grant, and, secondly, scheme. As to the first, the argument was that, as the premises were let for use as a private dwelling-house only, the defendants, as successors in title to Mr. Foster, could not derogate from that grant by so using or permitting the user of the adjoining premises as to render the demised premises materially less fit for the purpose for which they were demised. The county court judge dealt with that argument in this way. First, he referred to a passage from the judgment in *Browne* v. *Flower* (2) where PARKER, J., said ([1911] 1 Ch. 226) :

> " Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made."

The county court judge then said that it was clear, from the judgment of PARKER, J., that a user of the lower part of the house which merely interfered with convenience, amenity, or privacy, was not a breach of the implied covenant not to derogate from the grant unless the interference was of such a serious nature as to frustrate the use of the premises for the purpose for which they were demised. He then cited these words of PARKER, J. (*ibid.*, 227) :

> " Much as I sympathise with the plaintiffs, it would, in my opinion, be extending the implications based on the maxim that no one can derogate from his own grant to an unreasonable extent if it were held that what has been done in this case was a breach of an implied obligation."

Having stated the law in those terms, the county court judge then turned to the facts and said :

> " Even if all the facts relied on by the plaintiff in this case were proved up to the hilt, they would not, in my view, amount to derogation from grant, either individually or collectively. At the highest they would amount to an interference with the plaintiff's amenities. The plaintiff has for the past two years been, and is still, occupying the flat as a private residence and is desirous of continuing to do so ; in these circumstances the suggestion that what has been done by the defendants frustrates the use of the premises for the purpose for which they were demised is putting the case far too high."

I agree with the conclusion of the learned county court judge. I am unable to take the view that the mere fact of incorporation in a hotel necessarily involves a derogation from the grant made to the plaintiff. I would add that some of the

incidents referred to in the statement of claim have, in fact, been rendered impossible by the erection of a door at about Christmas, 1948, which turns the plaintiff's premises into a self-contained flat, an advantage which it did not previously possess. Moreover, the fact that the third and fourth floors are now bedrooms would make a noisy party less likely than when they were used as sitting rooms. Be that as it may, it seems to me plain that the judge did not
A misdirect himself as to the law, and the question whether particular circumstances amount to a derogation from a grant, as distinct from mere interference of amenities, seems to me to be a question of fact. Even, therefore, if I did not agree with the conclusion of the judge, as I do, I do not think it would be competent for us to disturb his finding.

I turn, therefore, to the second ground, and before us that has been split into
B two parts, (i) implied covenant, and (ii) alleged letting scheme. First, as to implied covenant, the covenant which counsel for the plaintiff asks us to imply is to be inferred, he says, from the following elements: (i) the obligation binding on her to use the premises as a private dwelling-house only; (ii) the terms of the other written tenancy agreements, all of which, including the previous tenancy agreements relating to the fifth floor, contain provisions in similar terms restrict-
C ing the user for the purposes of private dwelling; and (iii) the surrounding circumstances—and I think this was the most important and the one on which he most relied—and the fact that the plaintiff had lived on the premises and knew when she became a tenant that all the floors were occupied as private dwellings. I must, of course, add that her evidence—I will deal later with the question how far it was accepted—was that Mr. Foster said that it was his
D intention to use the whole building as private dwellings.

It is important to bear in mind the principles that govern us as to the implication of covenants which are not expressed in the agreement between the parties. Counsel for the defendants called our attention to the principle as stated in *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* (3), where Lord Wright said ([1941] 1 All E.R. 52):

> E "The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well-recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that 'it goes without saying,' some term not expressed, but necessary to give to the
> F transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties."

What is the term that it is sought to imply here? It is a term that the landlord
G will covenant not to permit the user of any of the other floors except as a private dwelling-house. The effect of such a clause would be to tie the hands of the landlord so long as Miss Kelly's tenancy continued. I have already read the passages of the evidence which deal with this matter. I think it is fairly plain that the highest that it can be put is that, according to Miss Kelly, Mr. Foster stated that it was not his intention to use the rest of the building except as private dwelling-
H houses. Mr. Foster denies that he said anything of the kind, though he admits that it was in accordance with his then practice not to permit such user except for the purpose indicated. We are asked to turn a statement of intention into an implied covenant. The passage I cited from Lord Wright's speech indicates how difficult it is to imply a covenant into a written agreement. It seems to me that one must be even more careful before implying a covenant into an oral tenancy. First, in such a case you have to decide what was said, and then imply something from what you find to have been said. A test commonly applied is

that suggested by SCRUTTON, L.J., in *Reigate* v. *Union Manufacturing Co. (Ramsbottom)* (4), cited by LORD WRIGHT ([1941] 1 All E.R. 57) in the *Luxor* case (3) and by MACKINNON, L.J. ([1940] 1 All E.R. 612) in *Broome* v. *Pardess Co-operative Society of Orange Growers* (*Est.* 1900), *Ltd.* (5). SCRUTTON, L.J., said ([1918] 1 K.B. 605) :

> " A term can only be implied if it is necessary in a business sense to give efficacy to the contract ; that is, if it is such a term that it can confidently A be said that if at the time the contract was being negotiated someone had said to the parties, ' What will happen in such a case,' they would both have replied, ' Of course, so and so will happen ; we did not trouble to say that ; it is too clear.' Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

B Counsel for the plaintiff, in his able argument in reply, applied that test. He said that the officious bystander would have said : " Surely you intend to include a covenant by the landlord that he will not permit the user of the rest of the building for any other purpose than a private dwelling." He added : " Can there be any doubt that both Miss Kelly and Mr. Foster would have answered that question in the affirmative ? " He said that at that stage Mr. Foster would C have been most anxious, with bombing raids about to start, or already started, to secure a tenant for the top floor of his building and would agree to almost any condition to secure that, even at the low rent of £60 per annum. I find it quite impossible to reach that conclusion. I think it is much more likely that Mr. Foster would have said : " How can I possibly say how I shall use the rest of the building when the war is over? " I do not think, applying the D officious bystander test, that it is possible to be sure that both parties would have agreed that the covenant, which it is now sought to imply, should be included in the tenancy.

I pass, therefore, to the other aspect of this second question, and that is the question whether there was a letting scheme. It is common ground that letting schemes are based on the same principles as building schemes, and the principle E in regard to building schemes is conveniently stated by PARKER, J. ([1908] 2 Ch. 384) in *Elliston* v. *Reacher* (6) :

> "In my judgment, in order to bring the principles of *Renals* v. *Cowlishaw* (7) [a proper building scheme case] and *Spicer* v. *Martin* (8) into operation it must be proved (1.) that both the plaintiffs and defendants derive title under a common vendor ; (2.) that previously to selling the F lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots subject to restrictions intended to be imposed on all the lots, and which, though varying in details as to particular lots, are consistent and consistent only with some general scheme of development ; (3.) that these restrictions G were intended by the common vendor to be and were for the benefit of all the lots intended to be sold, whether or not they were also intended to be and were for the benefit of other land retained by the vendor ; and (4.) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit H of the other lots included in the general scheme whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, I think that the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor irrespective of the dates of the respective purchases. I may observe, with reference to the third point, that the vendor's object in imposing the restrictions must in general be

> gathered from all the circumstances of the case, including in particular the nature of the restrictions. If a general observance of the restrictions is in fact calculated to enhance the values of the several lots offered for sale, it is an easy inference that the vendor intended the restrictions to be for the benefit of all the lots, even though he might retain other land the value of which might be similarly enhanced, for a vendor may naturally be A expected to aim at obtaining the highest possible price for his land. Further, if the first three points be established, the fourth point may readily be inferred, provided the purchasers have notice of the facts involved in the three first points ; but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point."

B The first difficulty in applying that principle to the present case is this. The pleadings contain no reference to or suggestion whatever of a letting scheme, and it was that, no doubt, which led the learned judge to say, at the commencement of his judgment on Mar. 18 :

> "In my view no facts necessary to found a scheme have either been C pleaded or proved."

That the point should be properly pleaded is, I think, clear. There are observations to that effect in *Grant* v. *Derwent* (9), to which counsel for the defendants called our attention. I think the general principle is quite plain that the facts relied on must be pleaded before the court can properly deal with the matter, particularly, as in the present case (as counsel for the defendants pointed out), D there was nothing in the agreement to show what was the area alleged to be covered by the scheme, and it was only before us that counsel for the plaintiff made it quite plain that he contended that the whole house was subject to the scheme. Nevertheless, the learned judge did go into the matter and held that it was not proved, and I should be reluctant to deal with this matter on the basis that it failed on a point of pleading. I think the proper course when the point E was raised would have been—I can well understand how this course was not adopted—to insist on the plaintiff amending her pleading so as to make it quite plain what was the scheme which she relied on, and what was the area covered by that scheme. Be that as it may, counsel for the plaintiff made it quite clear that the scheme, which, he alleges, is a scheme affecting the whole of the house, including the basement and the ground floor, and that the restrictive covenants, F which he alleges, are embodied in the scheme and are to be found in the covenants contained in the written document of which the one between Mrs. Trew and Mr. Foster, which I have read, can be taken as an example. Counsel for the plaintiff agreed that certain of those covenants could not be said to be part of the scheme. They were the ordinary landlord and tenant covenants, but he said that cl. 4 (dealing with sales by auction and user as private dwelling-house only) and cl. 5 G (dealing with nuisance and annoyance to the landlord or other occupiers) were scheme covenants, and part of the scheme. I do not think that he particularly relied on the covenant not to keep any animals on the premises without the consent in writing of the landlord, but it might be possible that he could rely to some extent on that covenant.

In support of his case on this point counsel for the plaintiff called our attention H to *Hudson* v. *Cripps* (10), *Alexander* v. *Mansions Proprietary, Ltd.* (11) and *Newman* v. *Real Estate Debenture Corporation, Ltd., and Flower Decorations, Ltd.* (12). He also mentioned *Gedge* v. *Bartlett* (13), though he did not actually refer us to the report of that case. In *Hudson* v. *Cripps* (10) the building in question, known as Oxford Mansions, was a large block containing at least 21 flats. After considering the provisions of the agreement between the parties, NORTH, J., came to the conclusion that there was a scheme for the general management of the building. I do not think I need refer to that case in detail. It is sufficiently referred to in *Newman's* case (12), to which I shall have to turn later. In *Alexander* v. *Mansions Proprietary, Ltd.* (11) the building in question was St. Ermin's Mansions, a large block of flats in Westminster. There again, STIRLING, J., was of the opinion that there was a scheme, but he did not grant an injunction. The report (16 T.L.R. 432) states that the learned judge said:

> "Having regard, however, to a certain amount of delay on the part of the plaintiffs and to all the facts of the case, his Lordship thought he might, in accordance with the law as stated in *Sayers* v. *Collyer* (14), exercise his discretion by saying that justice would best be done by directing an inquiry as to damages."

Both these cases dealt with buildings of substantial size, and the sheet anchor of the argument of counsel for the plaintiff was *Newman* v. *Real Estate Debenture Corporation, Ltd.* (12), a decision of ATKINSON, J. In that case the court was dealing with a single building in South Audley Street, the ground floor of which was used as a shop. The shop was shut off from the upper floors, and the upper floors were, and always had been, used as residential flats. There were other points besides the question which is relevant to this matter, *viz.*, whether there was a scheme under which the building could be used only for residential purposes, but this question was thoroughly examined by ATKINSON, J. He stated the facts and he read covenants from the head lease under which the lessor to Mr. Newman held, and which contained (*inter alia*) a covenant restricting the user of the premises against carrying on a business, a covenant against keeping any fowls, and a covenant against making or permitting to be made any alterations. It was plain that, while the ground floor was designed as a shop, the rest of the building was designed for, and laid out as, high-class residential flats. The whole building had always been so used. The leases of the premises had always been in the same form and contained a series of covenants which bound each of the lessees and were in identical terms. Those covenants are set out in the report ([1940] 1 All E.R. 136, 137), and I need not read them all in full. It is to be observed that covenant (*i*) was a covenant :

> "... to occupy and use the demised premises as private dwelling-rooms only and not to use the same or any part thereof or permit the same or any part thereof to be used for any trade business or calling whatsoever ..."

Covenants (*j*) and (*k*) were :

> "(*j*) Not to permit any public auction or sale. (*k*) To observe and comply with all reasonable regulations and arrangements which may from time to time be made by the lessor for the proper management of the building or for the general comfort and convenience of the tenants and occupiers thereof and not to do or permit anything which may be contrary to or inconsistent with such of the covenants and conditions of head lease of the building from His Grace the Duke of Westminster as appear herein and to indemnify the lessor in respect of any breach by the lessee of such covenants and conditions."

There were other covenants, but I do not think I need read them in full, except that I should observe that ATKINSON, J., said (*ibid.*, 138) :

> "There were, in fact, no written regulations, because the lease itself contains a number as to washing, coal and one thing and another."

In other words, the lease contained all those kind of regulations which one generally finds applicable to flats forming part of a block of flats. ATKINSON, J., said (*ibid.*, 137) :

> "It is plain that each lease shows on the face of it that it was made in respect of a residential flat forming part of a building which was used for

> the same particular purpose. The restrictions were clearly intended to be, and were in fact, for the benefit of the flats and their tenants. The restricted user cannot be explained as being necessary to secure compliance with covenants in a head lease. I have no doubt that each lessee either knew or took it for granted that the restrictions imposed on him were also imposed on the other lessees, and were so imposed for their mutual benefit *inter se.* A I have no doubt that the various lessors knew that their lessees so believed, and that it was upon that basis that they took their leases. Mr. Ritchie, who acted for Mrs. Turrill, and who was called as a witness, said they wanted all the lessees to take it for granted that the only permitted user of all the flats was for residential purposes, and that the appearance of the building would itself create that impression. A general observance of the B restrictions was certainly calculated to enhance the value of the various flats, and would enure for the benefit of their occupiers as well as for that of the lessors."

After referring to *Hudson* v. *Cripps* (10), *Gedge* v. *Bartlett* (13) and *Jaeger* v. *Mansions Consolidated, Ltd.* (15), ATKINSON, J., dealt with *Elliston* v. *Reacher* (6). He set out the passage which I have already read, and said ([1940] 1 All E.R. C 140) :

> " If one applies what is there said to a block of flats, a scheme certainly is established and a covenant implied binding the lessor not to act in contravention of it where it is established that, previous to the demise to the plaintiff, the lessor or his predecessors in title had designed and constructed the building for letting as residential flats, subject to restrictions D intended to be imposed on all the flats, which, though possibly varying in detail, were consistent, and consistent only, with a general scheme of management, that these restrictions were intended by the lessor to be and were in fact for the benefit of all the flats, and that the plaintiff took his lease upon the footing, or in the belief, that the restriction would enure for the benefit of the other flats, and on the well-founded assumption that E there were similar restrictions binding the other flats, which would in turn enure for his benefit. Undoubtedly a general observance of these restrictions would in fact enhance the value of the flats, and it is, therefore, an easy inference that the lessor intended the restrictions to be for the benefit of all the flats. I think that everything there applies to this case."

F I do not think there is anything more in the judgment of ATKINSON, J., to which I need refer. I will observe that there is an editorial note on that case ([1940] 1 All E.R. 132) in which it is said :

> " The principle generally known as the building scheme is commonly applied to a substantial area. It has in the past been applied to blocks of flats of considerable size, but not, apparently, to a building of the size here G considered. However, no lower limit to the size of the ' building estate ' has ever been suggested, and it seems logical that the principle should be applied even to a small number of flats in a single building, since the user of any one part of the premises must materially affect the comfort of the remainder."

I think it may fairly be said that *Newman's* case (12) represents the high-water H mark of cases where a scheme can be inferred. It certainly represents the high-water mark of reported cases in which it has been inferred. Counsel for the defendants says that he would, if necessary, have been prepared to challenge the correctness of the decision in that case. I see no reason for us to do so, as, even if we accept it as correct law, in my opinion, it does not govern the case now before us.

When the matter was before the learned county court judge he rejected the argument that there was a scheme on two grounds. First he said :

> " *Newman* v. *Real Estate Debenture Corporation, Ltd.* (12) was something of an innovation. It would be a great innovation to apply it to a small house not converted into separate self-contained flats but where each floor is let to a separate tenant."

Secondly, he said :

> " The various tenancy agreements of which evidence has been given are consistent with the desire of the landlord to protect himself because of terms in his own lease. In *Newman's* case (12) there were no covenants in the head lease to explain the restrictive covenants in the leases to the various tenants."

With both those comments I respectfully agree. Counsel for the plaintiff said that the conclusion based on the alleged desire of the landlord to protect himself because of terms in his own lease broke down on fact because the covenants in the sub-leases went much further than was necessary to secure compliance with the covenants in the head lease—first, because they were absolute covenants against user other than as a private dwelling-house, whereas the superior landlord had wider powers of user than as a private dwelling-house, and, secondly, because there were clauses included to which there were no corresponding clause in the head lease. He referred in particular in this connection to the provision that the landlord was not to exhibit on any part of the premises any sign, placard or bill saying that apartments were to be let. I agree with the contrary submission made by counsel for the defendants. It seems to me that, although the terms of the tenancy agreement do not agree absolutely with the provisions of the head lease, they are such as could reasonably and would naturally be put into a tenancy agreement relating to a small flat in order to ensure, as far as possible, that the terms of the head lease were not infringed. I say " as far as possible," because the very splitting up of this building into separate leases was of itself, I think, a technical breach of the head lease, in that the covenant therein was for user as a single private dwelling-house. I also agree with the learned judge that it would be a strong order to extend the principle of the cases brought to our attention to an amorphous building of this kind, originally built as one dwelling and never physically split into separate dwelling-houses. It seems to me that we should be straining the principles applicable to a scheme far beyond what is reasonable or natural if we were to apply the principle of *Newman's* case (12) to the present case.

I would observe in particular that in *Newman's* case (12) there was in each of the tenancy agreements a clause binding the tenants to observe and comply with all reasonable regulations and arrangements which might from time to time be made by the lessor for the proper management of the building. Now that necessarily suggests to one's mind that some general scheme, intended to be applied to the whole building, is contemplated. There is no such clause here. There are only seven covenants all told, and only two of them, it is suggested, could formally constitute part of a scheme. In those circumstances it seems to me that it would be very wrong to infer (I quote again from the judgment of PARKER, J. ([1908] 2 Ch. 384) in *Elliston* v. *Reacher* (6)

> " . . . that these restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold whether or not they were also intended to be and were for the benefit of other land retained by the vendor."

For the words " common vendor," I should say, in this case, " common lessor."

I would add that the scheme is alleged to be a scheme for user as private dwelling-houses only, but from the very beginning ground floor and basement were used by the common lessor for the purpose of carrying on a club of some kind or another. I would further add that this is not a case where we are dealing only with the intention to be inferred from the surrounding circumstances. Mr. Foster gave evidence and deposed to the fact that he had no intention of carrying out a scheme, and that his only intention was to grant tenancies of some kind to the various parties. The learned judge thought that that evidence was inadmissible. I see no reason why, if the fact that has to be decided is the intention of someone, his own evidence of what that intention was should be excluded. Be that as it may, I think that counsel for the plaintiff was justified in his comment that in a case of this kind, where a witness is giving evidence in 1949 in regard to something that happened in 1940, the surrounding circumstances in 1940 may be a better guide to the man's intention than what he says on the subject in 1949, nine years later, without any documents to corroborate the evidence he then gives. But, applying the test of surrounding circumstances, for the reasons I have given I think it is impossible to come to the conclusion that in this case we can attribute to Mr. Foster the intention required in order to establish a letting scheme.

As we have come to this conclusion, it necessarily follows that the appeal should be dismissed. It is, therefore, unnecessary for me to deal with the interesting question which was raised as to what the position would have been had we reached a contrary conclusion, and, in particular, it is not necessary for us to deal with the two points mentioned by counsel for the defendants at the end of his argument, *viz.*, (i) Is the plaintiff entitled to enforce the scheme ? (ii) Does the burden bind the present defendants who claim under Mr. Foster ? It is also unnecessary for me to say what would have been the relief we would have granted had we been of a contrary conclusion. I think there would have been a good deal of force in an argument based on *Alexander* v. *Mansions Proprietary, Ltd.* (11) that this is not a case where an injunction might have been granted.

BUCKNILL, L.J. : I agree that the appeal will be dismissed for the reasons given by COHEN, L.J.

ASQUITH, L.J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Warmingtons* (for the plaintiff) ; *Forsyte, Kerman & Phillips*, agents for *G. Rowberry*, Gloucester (for the defendants).

[*Reported by* C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

PARIS *v.* STEPNEY BOROUGH COUNCIL.

[COURT OF APPEAL (Lord Goddard, C.J., Asquith, L.J. and Vaisey, J.), October 27, 1949.]

Master and Servant—Injury to workman—Liability of employer—Garage fitter—Need to provide goggles—Workman with only one eye—Injury to other eye.

A workman who, owing to a cataract, only had the use of one eye, was employed as a fitter in the garage of the defendant Borough Council. On the day in question, while he was using a hammer to remove a bolt on a vehicle, a chip of metal flew off and entered his good eye, so injuring it that he became totally blind. The defendants did not provide goggles for the workman to wear while he was engaged in such an operation.

HELD : the operation on which the workman was engaged was not a dangerous operation and there was no general duty on the defendants to provide goggles for their workmen ; the fact that the consequences of an accident to an eye would be more serious to him than to a man with normal sight did not impose a greater duty on the Borough Council to provide protection for him than the duty owed by them to other employees ; and, therefore, the Borough Council could not be held liable for the injury.

[AS TO MASTER'S DUTY AT COMMON LAW, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187-194, paras. 313-328; and for Cases, see DIGEST, Vol. 34, pp. 194-220, Nos. *1580-1824*.]

Appeal by the workman and Cross Appeal by the employers, the Stepney Borough Council, from a judgment of Lynskey, J., dated Apr. 11, 1949, who held that the employers were negligent in not providing goggles to the workman, a one-eyed man, who on May 28, 1947, while working in the employers' garage suffered an injury causing total blindness. The learned judge awarded the workman £5,250 damages. The Court of Appeal now allowed the cross appeal holding that, the fact that the workman had only one effective eye, did not enlarge the duty owed by the employers towards him. The court directed that the workman's appeal should stand over for three months with liberty to apply under s. 29 (2) of the Workmen's Compensation Act, 1925.

Beney, K.C., and *Marven Everett* for the workman.
H. Edmund Davies, K.C., and *A. L. Stevenson* for the employers.

LORD GODDARD, C.J.: This is an appeal from a judgment of Lynskey, J., in an action brought by a workman against his employers, the Stepney Borough Council, for an injury which he received to his eye. The learned judge gave judgment for the workman.

When the workman entered the service of the employers he had one eye which was useless owing to cataract, and the accident has rendered his other eye useless, so that the man is blind. The point which has been argued is one of some general importance, because it affects the duty which is owed by an employer to his workmen.

The workman was employed in the employers' garage as a fitter and part of his duty was to attend to the maintenance and cleaning of motor vehicles. The vehicle on which he was engaged at the time of the accident was what is known as a gulley cleanser. A 'U' piece that had to be removed from the back axle, was fastened on by a bolt, and owing to rust, the workman used a hammer to knock out the bolt. In doing so a piece of metal flew off the bolt and entered his good eye. It is said that there was a breach of duty on the part of the employers because they did not supply goggles, it being well-known that specks of metal will fly off bolts of this description, but the evidence fell far short of showing that there was any duty on an employer to supply goggles in the ordinary way. There is no finding by the learned judge that this was a dangerous operation, and on the evidence it seems to be clear there could not have been such a finding. To knock out a metal bolt is an operation which any chauffeur who is attending to his employer's car might be called on to do at any moment. Of course, if a hammer is used in knocking a piece of metal it is always possible that a chip of the metal will fly off, but to say that it is, therefore, a dangerous operation would be extravagant. The operation is not to be classed as dangerous because very occasionally, or in the course of years, an accident may happen.

The way that the learned judge has decided the case and the ground on which counsel for the workman has endeavoured to uphold the judgment is that as this workman had one eye only a greater duty was owed to him than was owed to other persons because the consequences of an accident would be so much more serious. The judgment is summed up in one passage which is to this effect:

> "The result is, in my view, in this case on the evidence, even of the defendants [employers] apart from that of the plaintiff [workman], that I am satisfied here that there was so far as this particular plaintiff was concerned, a duty on the employers to provide goggles and require the use of goggles as part of their system. In these circumstances it seems to me that the employers have failed in their duty and the plaintiff is entitled to recover."

In other words, the learned judge is deciding that there was a duty on the employers to provide a particular protection for this particular man, but, with great respect to the learned judge, I think he is confusing the obligation of the employers with the damage which may result to this particular workman. Before it is established that there was an obligation on the employers to provide goggles, or any particular protection, to the workman, it has got to be shown that he was engaged in a dangerous operation. He was not. If two men had been employed on the operation, one with two good eyes and one with only one good eye, the risk would have been exactly the same, and, as there was no particular risk or danger in this operation, neither man would have been exposed to an unusual danger. The duty of the employer is not to expose his workmen to unusual danger and to supply them with proper plant for the carrying out of their duties. If, therefore, there was no unusual danger, and if it was a matter of ordinary working in the ordinary course of business and trade which does not require the use of goggles, there was no obligation on the employers to provide them. The fact that if an accident does happen, the damage which a particular workman will suffer will be greater, does not seem to me to be the test in this case. So far as I can see, there was no unusual danger to which the workman was exposed. He was not exposed to any greater danger than any other man who was employed in the garage ; it was not in itself a dangerous operation ; the goggles were not a thing which it was the duty of the employers to provide in carrying out this particular operation, and I cannot see, therefore, that there was a duty to provide goggles because if an accident did happen the consequences would be greater to one man rather than to another.

For these reasons I regret that I cannot agree with the judgment of the learned judge, and, in my opinion, this appeal should be allowed.

ASQUITH, L.J. : I am of the same opinion. It is not entirely clear whether the learned judge is holding that the duty to provide and enforce the use of goggles applies to all men doing this particular job and *a fortiori* to a man with a particular disability as the workman suffered from, or whether he is saying it is only a duty owing to this particular employee. On the whole I am satisfied that he means the latter, and, if he did, I respectfully agree with the views stated by my Lord. The disability can only be relevant to the stringency of the duty owed to the workman if it increases the risk to which the workman is exposed. A one-eyed man is no more likely to get a splinter or a chip in his eye than is a two-eyed man. The risk is no greater, but the damage is greater to a man using his only good eye than to a man using two good eyes. The quantum of damage, however, is one thing, and the scope of duty is another. The greater risk of injury is not the same thing as the risk of greater injury, and the first thing seems to me to be relevant here. For these reasons I agree with my Lord that the appeal should be allowed.

VAISEY, J. : With great respect to LYNSKEY, J., it seems to me that his judgment involves a certain confusion of thought. For myself I cannot see how the fact that the workman had only one eye can really have been material to the point which he had to decide. The consequence of an accident to him would certainly be liable to be specially serious, but the risk of danger was precisely the same to him as it was, or would have been, to a workman with two eyes. The learned judge did not find that the risk of danger here was of such a character that it was the general duty of the employers to take precautions against it, and I cannot for myself see that they were under any particular duty in the case of a particular employee merely because the personal consequences to that employee would be greater than they would be to some of his fellow employees. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors : *W. H. Thompson* (for the workman) ; *Thomas V. Edwards* (for the employers).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* DUNCANSON.

[King's Bench Division (Croom-Johnson, J.), October 27, 1949.]

Income Tax—Annuity "free of income tax and surtax"—Computation of annuitant's total income for surtax purposes—Inclusion of amount of repaid income tax returned by annuitant to trustees—Income Tax Act, 1918 (c. 40), *s.* 27, *All Schedules Rules, r.* 19.

By a will and deeds of family arrangement an annuitant was entitled to an annuity of £2,000 free of income tax and surtax. In accordance with the rule in *Re Pettit* ([1922] 2 Ch. 765), she handed over to the trustees of the will £68 17*s.* 6*d.* representing that proportion of the income tax reliefs to which she was entitled which the annuity bore to her total income. She claimed that, in computing her total income for surtax purposes, the amount of such payment should be excluded.

Held : the sum so handed over to the trustees was not money to which the annuitant was beneficially entitled, and, therefore, it was properly excluded in computing her total income for surtax purposes.

[As to Annuities Free of Tax, see HALSBURY, Hailsham Edn., Vol. 17, pp. 258-263, paras. 526-529 ; and for Cases, see DIGEST, Vol. 28, pp. 74-77, Nos. *398-421.*]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Cook,* [1945] 2 All E.R. 377 ; [1946] A.C. 1 ; 114 L.J.P.C. 69 ; 173 L.T. 211 ; 26 Tax Cas. 489 ; 2nd Digest Supp.
(2) *Hunter's Trustees* v. *Mitchell,* 1930, S.C. 978 ; Digest Supp.
(3) *Re Pettit,* [1922] 2 Ch. 765 ; 91 L.J.Ch. 732 ; 127 L.T. 491 ; 39 Digest 167, *587.*
(4) *Re Hutty,* unreported, but referred to [1922] 2 Ch. 768.
(5) *Re Jones,* [1933] Ch. 842 ; 102 L.J.Ch. 303 ; 149 L.T. 417 ; Digest Supp.
(6) *Re Kingcome,* [1936] 1 All E.R. 173 ; [1936] Ch. 566 ; 105 L.J.Ch. 209 ; 154 L.T. 462 ; Digest Supp.

Case Stated by the Special Commissioners of Income Tax.

The Special Commissioners had found that the grossed equivalent of the sum of £68 17*s.* 6*d.* paid over by the annuitant to the trustees did not form part of the gift of the annuity under the will and did not fall to be included in the annuitant's total income for surtax purposes. The Crown appealed, and Croom-Johnson, J., before whom it was agreed to consider only the net figure of £68 17*s.* 6*d.*, held (without prejudice to the question of the amount to be deducted from the assessed figure) that the amount handed to the trustees should be excluded.

Donovan, K.C., J. H. Stamp and *R. P. Hills* for the Crown.

Graham-Dixon for the taxpayer.

CROOM-JOHNSON, J. : This is a Case stated by the Special Commissioners on an appeal by the taxpayer, Mrs. Duncanson, against an assessment to surtax in the sum of £5,481, for the year ending Apr. 5, 1947, made on her under the Income Tax Acts. The only question raised by the appeal is whether the sum of £68 17*s.* 6*d.* is properly included in the taxpayer's total income for surtax purposes, which, I suppose, can be taken to be that described in the Income Tax Act, 1918, s. 27 (1). I confess that I have found the question a difficult one, and my mind has been in a state of indecision through most of the argument. The amount involved is small, but I was told that a serious question of principle is at stake.

Under the will of her husband, who died on Oct. 19, 1933, the taxpayer became entitled to an annuity of £5,000 expressed to be "free of income tax and surtax." By subsequent deeds made, as I understand, by way of family arrangement, the taxpayer released a part of the annuity, and at the material time the estate of her late husband was liable to pay to her only an annuity of £2,000 per annum free of income tax and surtax. On paying her the annuity, the trustees deducted income tax at the standard rate pursuant to r. 19 of the All Schedules Rules. Accordingly, she made a claim under the Income Tax Act, 1918, s. 27, alleging that, having regard to her total income, including whatever was the right income from this tax-free annuity, more tax had been deducted at the source than she was liable to pay. That repayment claim was ultimately allowed in the sum of £68 17*s.* 6*d.* It was said in the Case that that was attributable to the "said annuity of £2,000," but it has been agreed at the Bar that the real meaning of that word "attributable" is that it is so much of the deductions and allowances to which she was entitled in a claim under s. 27 in respect of the annuity in question. On receiving that £68 17*s.* 6*d.* the taxpayer paid it to the trustees of her husband's estate, and claimed that, rightly regarded, the amount of her annuity was only to be arrived at after deducting the £68 17*s.* 6*d.* from the totality of the tax which she had suffered by way of deduction. The point really arises in the course of assessing surtax, but it has been agreed before me that all I need have regard to is that £68 17*s.* 6*d.*, and what flows from that, according to which way the decision should ultimately be, will be dealt with between the parties in the appropriate way so far as liability to surtax is concerned. The Special Commissioners came to the conclusion that the grossed equivalent of £68 17*s.* 6*d.* ought not to have been included, and, accordingly, they reduced the assessment to the sum of £5,373. The Crown appeals.

The question of the proper construction of a bequest in a will of such an annuity has had to be examined on many occasions, but I do not think that I need look further than *Inland Revenue Comrs.* v. *Cook* (1). In that case VISCOUNT MAUGHAM, who made the leading speech, said ([1945] 2 All E.R. 380) :

> "Gifts by will of annuities free from income tax have been common in both Scotland and England for many years, and have given rise to a large number of reported decisions. At an early stage there was a little hesitation in dealing with them, for it was and is apparent that a named annual sum cannot literally be given free from income tax, since the annuitant must normally pay income tax on his or her income, and what is sometimes called a benevolent construction had to be applied if the plain intention of the will was to be carried out. That intention could be achieved by the simple means of holding that the testator must have intended to give, in addition to the fixed annuity, such a sum as would enable the trustees in each year to discharge the income tax on the total amount of the fixed annuity and the additional sum and to pay the balance which in the normal case would be the exact amount of the stated annuity to the annuitant. Unless there is something special in the language of the will, which prevented that construction being adopted, that became the recognised construction in cases of gifts of annuities of fixed amounts free of income tax both in England and Scotland."

The noble Lord then cites a Scottish case, *Hunter's Trustees* v. *Mitchell* (2), particularly a passage (1930 S.C. 982) in which LORD SANDS made certain observations which LORD MAUGHAM quotes.

It has to be borne in mind that, in the normal way, trustees in such a case, receiving the general income of so much of the estate as has not been distributed among the parties entitled under the devises and bequests in the will, pay income tax out of the general fund of income, and then, out of the net fund of the income, after paying tax, they have to pay the net amount of the annuities. As the fund out of which an annuity is paid is a fund achieved after the payment of tax, it follows that, in effect, the tax in respect of the annuity has been paid. Applying the benevolent construction spoken to by LORD MAUGHAM, it follows, in arriving at the true benefit which the annuitant gets from the estate, if the bequest of the annuity is to be upheld as not offending against the general principle of the Income Tax Acts, that it is necessary to go through a process which is called "grossing," not a word which I much admire, but one which is now used to explain a well-known process. It starts with the problem : What is the sum of money which, after it has suffered tax at the standard rate, will provide the net annuity free of tax given by the will ? Once that has been found, there is not much difficulty about the matter. A

If I were left to deal with this question as *res integra,* I might have come to a certain view under the Income Tax Act, 1918, All Schedules Rules, r. 19, which applies in the case of an annuity in a will. A person liable to make a payment of an annuity :

> ". . . shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due. The person to whom such payment is made shall allow such deduction upon the receipt of the residue of the same, and the person making such deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid." B C

There is no provision, so far as I am aware, under which the person making the payment—in this case the trustees—has any power or any right to make a claim to repayment on behalf of the annuitant of tax so deducted from his or her income except in a way which I will indicate when I come to look at the authorities on a somewhat similar branch of the subject. Rule 19, of course, does not prevent the annuitant making his claim under s. 27 of the Act for the return of tax alleged D to be overpaid. As I have already explained, that is what happened in this case. It might have been possible, perhaps, to say that, but for the authorities, when the trustees had deducted tax at the standard rate pursuant to r. 19 and paid the annuity as provided in the will, the terms of the will had been satisfied, leaving it to the annuitant to make his claim for repayment and entitling him to say that the money which he was allowed by way of repayment was his own money. E In other words, it might have been attractive at one time to say that "free of tax" could be construed to mean "free of such tax as the trustees were entitled, and, indeed, bound to deduct, and the annuitant bound to allow, pursuant to r. 19", but this matter is, I think, governed, among other things, by what was said in *Cook's* case (1), to which I have referred. In that case the whole question of this grossing principle came up for examination. The annuitant was F entitled to an annuity at the rate of £100 per annum payable "free of all deductions including income tax and government duty." The annuity was paid wholly out of income which had been brought into charge to income tax, and, therefore, out of a fund which had borne income tax. The trustees then paid the £100 in accordance with the terms of the will by two payments of £50 each at two periods of time in the course of each year. Miss Cook, the annuitant, then claimed G repayment of income tax, and the Crown took the point, among others, that she had not paid tax and was not liable to pay tax, because her income was under the exemption limit of £125, if it was right to assume that the actual amount of the tax free income was to be regarded, namely, £100, and that she could not make a repayment claim. The House of Lords, affirming the decision of the majority of the General Commissioners at Edinburgh, ultimately held H that she was so entitled. The method adopted there was to look and see what truly was the income which was derived by the annuitant from this gift of a tax free annuity. It is perfectly true, as counsel for the Crown has pointed out to me, that the claim for repayment was in that form and that the basis of it was by putting in a figure of income grossed by adding tax at the standard rate, which then was seven shillings. Without going in detail through the speeches which were delivered in the House of Lords, I think, by three of their Lordships, and an opinion from which I have derived some assistance, of the Lord President, LORD NORMAND, in the Court of Session, it is plain that the House of Lords held that that was the right method of approach, but I think they did more than that. I think that at least two of their Lordships accepted the view that the deduction under r. 19 of tax at the standard rate was, as LORD MAUGHAM called it (*ibid.*, 381), " a provisional calculation." LORD MAUGHAM seems to have held A (*ibid.*) that the amount of the annual benefits given on the true construction of the will was £100 plus the sum which might ultimately be proved to be payable by the annuitant for income tax for that year so as to leave £100 for her personal behoof. In other words, I gather that on that basis one would add back the real amount of tax which had been suffered, and not the notional figure, which I have suggested, based on r. 19. If that is right, it would follow, as I judge from B some observations by LORD PORTER at the end of his speech (*ibid.*, 390), that, if the annuitant does make a claim for repayment—that is for adjustment of tax to acertain the right amount—and recovers something on the basis that what has been deducted under r. 19 is too much, that money is caught, as it were, by the words of the will " free of tax " and must be handed over to the trustees, who had paid the tax by paying the tax on the fund out of which the C annuitant was paid.

If that is the right view of this case, it would seem to follow that, if the Revenue got tax at nine shillings in the pound, for the purpose of grossing the value of the tax free annuity one would add back nine shillings in the pound, but, if it turns out that the annuitant is not ultimately proved to be liable to pay that amount of tax, but must pay something less, to that extent the trustees are D entitled to receive the repaid money so that it falls into the balance of the income of the residuary estate and remains in their hands for whomsoever is entitled to it.

This certainly adds a complication, and, but for three cases which have been cited to me, I might have been tempted, if the matter had come to me as a new matter, to have held that the amount in question is one which the annuitant E would be entitled to put into her own pocket, and would be something which would leave her with the full amount of tax grossed and added back for the purpose of making a return of her true income under s. 27. The matter is not, however, free from authority, even apart from LORD PORTER's observations in the *Cook* case (1). In *Re Pettit* (3), a case decided by ROMER, J., this point as to who was entitled to money which an annuitant obtained by way of repayment F came up for decision. Incidentally, I observe that *Re Pettit* (3) was cited in *Cook's* case (1). The decision was that the annuitant did not take the money for himself, but was entitled only to such proportion of the amount repaid as was not referable to the annuity. To be quite certain that I am putting it accurately, I take this from the headnote :

> " *Held*, that the residuary estate of the testator is entitled to such pro- G portion of the sum so repaid as the annuity bears to the total income of the annuitant."

It is true that, apparently, the only question really litigated in that case was whether these sums, or any part thereof, formed part of the residuary estate of the testator. It is also true, as far as I have been able to discover, that r. 19 was not cited to the learned judge. ROMER, J. ([1922] 2 Ch. 769) says that in H an earlier case, *Re Hutty* (4), where it had been agreed that some of the repaid money had to go back to the estate, SARGANT, J., had decided :

> " that the trustees were entitled in each case to such proportion of the total sum repaid as the annuity bore to the total income of the annuitant."

But in *Re Pettit* (3), when the whole question was raised and dealt with, ROMER, J., came to the conclusion that it was not money which the annuitant was entitled to have in his own pocket and keep, for he says (*ibid.*, 770) :

> "... I cannot understand on what ground it can be suggested that such excess should be retained by the annuitant who has not paid it, and not be handed back to the residuary legatees who have."

I think by "residuary legatees" he means the trustees, who are ultimately liable to account to the residuary legatees.

That case was examined by Eve, J., in *Re Jones* (5). In that case r. 19 was cited. The question was whether, on the language of the particular bequest of the annuity, the reasoning of the judgment in *Re Pettit* (3) applied. It was held that it did not. The language there was "such an annuity as after deducting therefrom income tax at the current rate for the time being would amount to the clear yearly sum of £350 free of duty." The learned judge not only accepted *Re Pettit* (3) as being a decision which bound him, but he appears to have accepted its correctness, and the case was apparently argued on that basis. In 1936 Bennett, J., had to solve the problem of what was to happen if the annuitant declined to make a claim for repayment of tax notionally overpaid under s. 27. After all, why should the annuitant make a claim if the money has to be handed over to the trustees ? That point came up for decision in *Re Kingcome* (6). Again I need not cite passages from the judgment, but the learned judge, accepting the law as laid down by Romer, J., in *Re Pettit* (3), took the view that, in the circumstances, the court ought to do everything it could to enable the income tax that had been overpaid to be recovered, and held that the annuitant was a trustee of her statutory right

> "to recover for the benefit of the testator's estate the tax overpaid in respect of her annuity and was bound at the request of the trustees to sign a proper application form for that purpose."

I do not think that I shall serve any useful purpose, as a judge of first instance, in examining the reasoning of that case or coming to any independent conclusion of my own about it. The case binds me.

It seems to me that the result in the present case is this. Here is a sum of money, £68 17*s*. 6*d*., which this annuitant has succeeded in getting back from the Revenue. That sum was handed over by her to the trustees of the estate. I think, on the authorities, she was bound to hand it over. Accordingly, it was not money to which she was beneficially entitled. It was money which she received as a bare trustee for the trustees. She had no other duty to perform, once she had it, other than the duty to hand it over to them. In those circumstances, I do not think it is correct to say that it was her income at all. It follows that the answer to the question is that the Special Commissioners came to a right conclusion. I can see no trace of any misdirection, or of the consideration of anything which is improper for them to consider. The result is that the appeal fails and there must be an order in favour of the taxpayer. I understand the parties have made an agreement about this matter, which raises a question of some public importance, by which the costs of the taxpayer will in any case be paid by the Crown. In those circumstances, it is unnecessary that I should make any formal order about it.

Appeal dismissed.

Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Tamplin, Joseph & Flux* (for the taxpayer).

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

Reversed. H.L. [1951] 1 All E.R. 1078.

STONE v. BOLTON AND OTHERS.

[Court of Appeal (Somervell, Singleton and Jenkins, L.JJ.), October 13, 14, November 2, 1949.]

Nuisance—Negligence—Sport—Cricket—Injury from ball hit from ground into highway.

During a cricket match a batsman hit a ball which struck and injured the plaintiff who was standing on a highway adjoining the ground. The ball was hit out of the ground at a point at which there was a protective fence rising to seventeen feet above the cricket pitch. The distance from the striker to the fence was about seventy-eight yards and that to the place where the plaintiff was hit some ninety-eight yards. The ground had been occupied and used as a cricket ground for about ninety years and there was evidence that on some six to ten occasions in a period of thirty-five years a ball had been hit into the highway, but no one had been injured. The plaintiff claimed damages from the defendants, as occupiers of the ground, in nuisance and, alternatively, negligence.

Held : (i) the fact that occasionally a ball had been hit into the highway did not create a sufficient interference with the use and enjoyment of the highway as to constitute a nuisance.

Castle v. *St. Augustine's Links, Ltd.* ((1922), 36 T.L.R. 615), *distinguished.*

(ii) (Somervell, L.J., *dissentiente*) there being a foreseeable risk of a ball being hit into the road, the defendants were under a duty to take reasonable care to avoid injury to anyone on the road ; they had failed to carry out this duty ; and, therefore, they were liable in negligence to the plaintiff.

Per Jenkins, L.J. : The case is, I think, one to which the doctrine of *res ipsa loquitur* can be fairly applied : *Byrne* v. *Boadle* (1863) (2 H. & C. 722). The plaintiff is struck and injured by a cricket ball hit out of a ground occupied and controlled by the defendants. Surely that circumstance in itself suffices to place on the defendants the burden, at least, of showing either that the event was one which they could not reasonably have foreseen as a consequence of their use of the ground for cricket, or that the event was one which they had taken all reasonably practicable steps to prevent. This burden the defendants have, as it seems to me, wholly failed to discharge.

Decision of Oliver, J. ([1949] 1 All E.R. 237), *reversed.*

[As to Degree of Care Ordinarily Required, see HALSBURY, Hailsham Edn., Vol. 23, pp. 571-587, paras. 825-840 ; and for Cases, see DIGEST, Vol. 36, pp. 16-21, Nos. *68-101*.]

Cases referred to :

(1) *Castle* v. *St. Augustine's Links, Ltd.*, (1922) 38 T.L.R. 615 ; 36 Digest 186, *300*.

(2) *Rylands* v. *Fletcher*, (1868), L.R. 3 H.L. 330 ; 37 L.J.Ex. 161 ; 19 L.T. 220 ; 33 J.P. 70 ; 36 Digest 187, *311*.

(3) *Byrne* v. *Boadle*, (1863), 2 H. & C. 722 ; 3 New Rep. 162 ; 33 L.J.Ex. 13 ; 9 L.T. 450 ; 36 Digest 51, *315*.

(4) *Ward* v. *Abraham*, 1910 S.C. 299 ; 36 Digest 52, *h*.

Appeal of the plaintiff from a decision of Oliver, J., at Manchester Assizes, dated Dec. 20, 1948, dismissing the plaintiff's claim for damages for negligence and nuisance.

The plaintiff claimed damages for injuries received when she was struck by a cricket ball while standing in a road adjoining a cricket field occupied by a cricket club of which the defendants (who were sued on behalf of themselves and all other members of the club) were members. Oliver, J., held that there was no evidence of negligence and that nuisance had not been established. The

Court of Appeal, by a majority, now allowed the appeal. The facts appear in the judgments.

Nelson, K.C., and *H. Burton* for the plaintiff.

F. H. Dean for the defendants.

Cur. adv. vult.

Nov. 2. **SOMERVELL, L.J. :** I will ask Singleton, L.J., to deliver the first judgment.

The following judgments were read.

SINGLETON, L.J. : The defendants are occupiers of a cricket ground which has been used as such for eighty or ninety years. An alteration was made in the ground about the year 1910. A builder wished to have some of the ground at the northern end. An arrangement was arrived at under which the club allowed the builder to have the land he wanted, and, in return, the builder gave the club a strip of land beyond what was up to that time, their southern boundary. Beckenham Road was constructed on part of the land which had been given up by the club and at a later stage houses were built on that road. The plaintiff lives at 10 Beckenham Road, and on Aug. 9, 1947, she was standing on the roadway by her garden gate when she was struck on the head and injured by a cricket ball, the result of a hit by one of a visiting side engaged in a Saturday afternoon match against the Cheetham 2nd XI. She brought an action against the defendants claiming damages for personal injuries, alleging that the defendants were negligent, and, also, that the striking of a cricket ball into the road was, and constituted, a nuisance for the consequences of which the defendants were responsible in law. Oliver, J., gave judgment for the defendants with costs.

On the appeal counsel put nuisance in the forefront of the plaintiff's case, and in support of it he relied, not only on the allegation as framed in the statement of claim, but on the fact that, over a long period, balls had from time to time being hit into Beckenham Road, alleging that the defendants were causing a public nuisance thereby, and that, as the plaintiff had suffered damage therefrom, she was entitled to succeed. It seems to me that an answer to the nuisance claim as pleaded is that the striking of the ball which hit the plaintiff was not the act of the defendants or of any servant or agent of theirs or of anyone for whose acts they are responsible. The player who struck the ball is not a party to the action. The claim that the defendants caused a public nuisance in promoting or arranging cricket matches on this ground causes greater difficulty. There is no doubt that balls were hit over the fence and into Beckenham Road from time to time over a long span of years. The evidence of both sides shows that. There is, however, nothing to show that, before this accident, any discomfort or interference had been caused. There is no evidence of any complaint or of any inconvenience to anyone before Aug. 9, 1947. In these circumstances, I am not disposed to hold that the playing of cricket on this ground constituted a public nuisance by reason of the fact that occasionally—and it was very seldom—a ball was hit into Beckenham Road. Reliance was placed by counsel for the plaintiff on the decision in *Castle* v. *St. Augustine's Links, Ltd.* (1). In that case the evidence was to the effect that golf balls were very frequently sliced on to or over the public highway. There was evidence of substantial interference with the use and enjoyment of the road. In that respect the case is distinguishable from the one before this court.

I now come to deal with the claim based on negligence, which is in effect an allegation that the defendants failed to exercise the care which the circumstances demanded. The ground is surrounded by a hoarding. On the western side, adjoining Waterloo Road, the hoarding is twelve feet high and it is useful in providing revenue from advertisements. On the northern, or Beckenham Road, end the hoarding is approximately seven feet high, but it is on higher ground so that the top of it is seventeen feet above the level of the wicket.

The plan shows that the length of the ground from north to south measured to the boundary, is 413 feet. Beyond that there is a short distance at each end between boundary and hoarding. The wickets are pitched nearer to the northern end than to the southern end of the ground. It would appear from the evidence of Mr. Milsom, one of the defendants, that this resulted from the alteration of the ground in 1910 or 1911. The wickets were left opposite the pavilion which A is on the western side of the ground. The result is that the northern wicket is 152 feet from the northern boundary whereas at the other end there is a distance of 195 feet between the southern wicket and the southern boundary, and in each case a further seventeen feet or thereabouts between boundary and hoarding. The ball which caused the injury was hit by the batsman at the southern wicket. OLIVER, J., in the course of his judgment, said that the distance from the striker B to the fence was about ninety yards. I cannot make it so much as this. Allowing sixty-six feet, the length of the pitch, I make it 152 plus 66 plus 17 = 235 feet or about seventy-eight yards. From the northern end wicket to the southern hoarding is about ninety-two yards.

At the time she was injured the plaintiff was on the highway. An accident of this kind does not happen in the ordinary course of things if proper care is C exercised, and it seems to me that the defendants are called on to explain it. Whether that be so or not, evidence was given on behalf of the plaintiff by a Mr. Brownson, who lives at 11, Beckenham Road, and said that on some five or six occasions cricket balls had struck his house or had fallen in his garden, that is to say, they had been hit over the hoarding. He was speaking of the last year or two before the accident. On behalf of the defendants, Mr. Newbold, captain D of the home side on Aug. 9, 1947, said he remembered hits into Beckenham Road, " but I should say I have never seen it hit into Beckenham Road during a match more than half a dozen times in all the years I have been to the ground—28." He described the offending hit as quite the biggest he had seen on the ground. Mr. Milsom, one of the defendants, thought the hit was the best he had ever seen on the ground. Mr. Bolton, another of the defendants, recollected E balls having been struck into Beckenham Road from six to ten times in a period of 33 years, and he appeared to indicate that it might have been when they were practising at that end. On this evidence it is clear that the defendants knew that there was a risk that any day a ball might be hit over the northern hoarding and into Beckenham Road. Such a hit involved danger to anyone on the road. That is obvious. In such circumstances there was a duty on those responsible— F the occupiers—to take reasonable care to avoid or prevent injury or damage to anyone on the highway. Clearly they ought to have considered how this could be done. They are not justified in sitting down and doing nothing until someone is injured. I am unable to find from the evidence that there was ever any consideration given to the matter from the time the hoarding was erected in 1910 or 1911. If they had considered it, they might have decided to raise the G height of the hoarding at the northern end. That would have reduced the risk of a hit into Beckenham Road though it might not have been sufficient to prevent this one carrying into the road. They might have decided on a change in the position of the wickets longitudinally. If they had placed them at equal distances north and south a hit over the northern hoarding would have had an additional carry of twenty-one feet. This would have added to the safety of H those using Beckenham Road, and, incidentally, the plaintiff would not have been hit on the head if it had been done. It is most undesirable that a high standard should be applied in a case of this kind. If the defendants had considered the matter and decided that the risks were very small and that they need not do very much, there might have been something to be said for them. So far as the evidence shows, they did nothing. That being so, they were failing in their duty and the burden ought to fall on them and not on a person injured on the highway.

In dealing with the question of negligence, OLIVER, J., said ([1949] 1 All E.R. 238) :

> " On the evidence before me I cannot find the defendants were negligent. In my opinion, this ground is quite large enough for all practical purposes of safety, particularly having regard to the height of the fence above the pitch. In thirty-eight years' experience no one has ever been injured before. Therefore, I acquit the defendants of negligence."

He had already said that the distance from the striker was about ninety yards which, as I have pointed out, was an error. I do not know that he would have taken another view if he had had the correct measurement, though he might have done so. With respect to the learned judge, I do not think he applied the proper test. The ground may have been quite large enough for all practical purposes of safety, but with the wickets as pitched a ball was driven into Beckenham Road now and then, and the defendants were aware of this. In those circumstances, they had a duty to take reasonable care, a duty to consider how the risk to anyone in Beckenham Road could be reduced, and, further, a duty to take reasonable steps to reduce a danger which could be foreseen. They failed to carry out their duty in any one of these respects. It is true to say that the plaintiff was injured through a big hit, but I cannot see from the evidence given that it was of so exceptional a nature that one like it could not be anticipated. There was, indeed, little evidence of an expert character on this head, or as to the lay-out of a cricket ground. In my view, the defendants failed to exercise the care which the circumstances demanded and they are responsible in damages for negligence.

I would allow the appeal and order that judgment be entered for the plaintiff for the sum provisionally assessed.

JENKINS, L.J. : In the afternoon of Aug. 9, 1947, the plaintiff, a Miss Bessie Stone, was standing on the pavement just outside the front garden of her house 10, Beckenham Road, Cheetham Hill, Manchester, when she was struck on the head by a cricket ball and injured. It is not in dispute that the offending ball came from the adjacent ground of the Cheetham Cricket Club, having been hit out of the ground by one of the batsmen of a visiting team in the course of a match against the Cheetham Club's 2nd XI. It is further not in dispute that the members of the Cheetham Cricket Club—an unincorporated association—are the occupiers of the ground in question, use it as a cricket ground, and organise games of cricket on it. In these circumstances the plaintiff sued three individuals—Messrs. Bolton, Milsom and Thompson—on behalf of themselves and all other members of the Cheetham Cricket Club for damages in respect of the injuries caused to her by the blow from the ball. The batsman whose stroke was the direct cause of the mishap was not sued, and, accordingly, we are not concerned with any claim the plaintiff may have against him. The plaintiff's claim against the club is put on the alternative grounds of nuisance and negligence, the nuisance being alleged to consist of the striking of the ball into Beckenham Road, and the negligence being alleged to consist of pitching the cricket pitch too near the Beckenham Road, failing to erect a hoarding or fence of sufficient height to prevent balls being struck into the road, and failing to ensure that cricket balls would not be struck into the road.

It appears from the evidence that the Cheetham Club's cricket ground has been occupied and used as such for a matter of ninety years. It originally included the site or part of the site of what is now Beckenham Road which was constructed in or about the year 1910. In or about that year the club gave up some yards of the northern end of the ground for Beckenham Road, receiving in exchange some additional ground to the south. The practice of the club before 1910 seems to have been to pitch the wickets north and south opposite the pavilion, which was on the west side of the ground, and to move them laterally east or west as the state of the ground might demand. This practice seems to have been continued after the alterations made in the northern and southern boundaries in 1910, with the result that the wicket at the Beckenham Road end is some forty feet nearer to the northern boundary than the other wicket is to the southern boundary, this difference roughly representing the shortening of the northern boundary effected by the alterations. According to a plan which was in evidence, the southern wicket (from which the ball was struck) was on the material date about seventy-five yards from the fence separating the ground from Beckenham Road and some ninety-eight yards from the point in Beckenham Road where the plaintiff was struck. Beckenham Road runs parallel with the northern boundary of the ground from its north-west corner to a point roughly due north of the wickets as pitched on the date in question, and thence turns in a north-easterly direction. The plaintiff's house is the second on the left after this turn, which accounts for the distance of some twenty yards between the northern fence of the ground and her front gate. The northern fence of the ground, which seems to have remained in all material respects the same since the boundary was moved in 1910, is a board fence six feet eleven inches high set on a bank which gives an additional height of some ten feet above the level of the pitch, the combined effective height of bank and fence being thus some seventeen feet.

A Mr. Brownson, who gave evidence for the plaintiff and lives at 11 Beckenham Road on the opposite side from the plaintiff, said that balls had been hit into his back yard or against the side of his house on several occasions during the 1946 and 1947 seasons. He put the number of occasions at perhaps five or six, but was obviously not prepared to commit himself to any exact number of occasions or to any precise dates. The back of Mr. Brownson's premises is some fifteen or twenty yards nearer the wicket from which the ball was struck than the spot on which the plaintiff was standing when she was hit. The plaintiff herself said in evidence that she had lived at 10 Beckenham Road for twelve years and that the occasion on which she was hit was the first time she had seen a ball struck out of the ground. On the defendants' side evidence was given by a Mr. Newbold, the captain of the Cheetham 2nd XI in the match of Aug. 9, 1947, to the effect that the hit in question was quite the biggest hit he had ever seen on the ground during his twenty-eight years' membership of the club. He could not say by how much it cleared the fence. He remembered previous occasions on which the ball had been hit into the Beckenham Road, but estimated that he had never seen it hit into the Beckenham Road during a match more than half a dozen times in all his twenty-eight years' membership of the club. The defendant, Milsom, a member of the club of over thirty years' standing, thought the hit in question was the best hit he had ever seen on the ground, and that it cleared the fence at the Beckenham Road end by "many, many feet." The defendant, Bolton, who had been a member of the club for thirty-three years, put the number of times the ball had been hit out of the ground in that period at six to ten times, "probably not ten," but may have intended to include in this estimate balls hit from practice nets placed nearer the Beckenham Road boundary than the regular pitch. There appear to have been no previous complaints to the club about balls being hit out of the ground, though Mr. Brownson said he had complained "to the man who fetched the ball" when hit into his premises. On these facts the learned judge rejected the plaintiff's claim both as to nuisance and as to negligence and dismissed the action, but for the assistance of this court, in the event of an appeal, he assessed the damages at £104 19*s.* 6*d.*

With the learned judge's reasoning and conclusion on the issue of nuisance I agree. I do not think a single isolated act causing direct damage such as the striking of a person on the highway by a cricket ball hit from adjacent premises can properly be brought under the head of nuisance on a highway. The gist of such a nuisance as it seems to me is the causing or permitting of a state of affairs from which damage is likely to result. If damage does, in fact, result to some individual on the highway, the person causing or permitting the state of affairs is liable because the state of affairs from which the damage flowed was due to his act or omission. It follows, in my view, that the plaintiff could only succeed in nuisance on the footing that the playing of cricket on the Cheetham Club's ground amounted to a nuisance which resulted in damage to herself in the shape of the blow she received from the errant ball. A claim in this form, although not pleaded, was argued before us, and also, apparently, before the learned judge. I am satisfied that it cannot succeed on the facts, which clearly establish that balls have been hit out of the ground only on rare occasions, and, accordingly, that the use of the ground for cricket with the fences as they are, and pitch sited as it is, cannot in itself be said to constitute a continuing source of danger to the neighbourhood or the public. *Castle* v. *St. Augustine's Links, Ltd.* (1), in which golf balls were shown to have been repeatedly sliced into the highway by players hitting from the adjacent tee of a hole running parallel with the road, was rightly distinguished by the learned judge.

If I am wrong in my view that the isolated act of hitting the ball which struck and injured the plaintiff cannot rightly be brought under the head of nuisance, I do not think the members of the Cheetham Club can be held to have caused or permitted the batsman concerned to make the particular hit constituting the nuisance so as to make them liable under this head.

On the issue of negligence the learned judge said ([1949] 1 All E.R. 238):

> " On the evidence before me I cannot find the defendants were negligent. In my opinion, this ground is quite large enough for all practical purposes of safety, particularly having regard to the height of the fence above the pitch. In thirty-eight years' experience no one has ever been injured before. Therefore, I acquit the defendants of negligence."

He also considered the applicability of the doctrine of *Rylands* v. *Fletcher* (2), and held, in my view quite rightly, that this doctrine had no application. He further accepted an argument for the defendants to the effect that, inasmuch as the cricket ground was in existence at the time Beckenham Road was dedicated as a public highway, the dedication took effect subject to any risks arising from the presence of the ground and its user for playing cricket. This argument was abandoned by the defendants before us, and I need, therefore, say no more about it.

Reverting to the issue of negligence, I find myself unable to accept the learned judge's conclusion on this aspect of the case. To support the claim in negligence it must be shown: (*a*) that the defendants were under a duty (absolute or qualified) to prevent balls being hit out of their ground to the danger of persons on the adjacent highway, and (*b*) that the hitting out of the ground of the ball which struck the plaintiff involved a breach of that duty. That the defendants, being the occupiers of the ground, and using it as they did for the purpose of playing cricket matches organised by them, were under some duty to prevent balls being hit out of the ground to the danger of persons in Beckenham Road, I have no doubt. It is less easy to define the precise extent of the duty. To hold the defendants under an unqualified duty to prevent balls being hit into the road in any circumstances would, I think, be to place an unreasonably heavy burden on them. The playing of cricket is, after all, a perfectly legitimate use of land, and if on the facts of the case the distance of the wicket from the Beckenham Road boundary and the height of the fence on that side of the ground were such as to make the hitting of a ball into the Beckenham Road an occurrence which could not reasonably have been foreseen, then I think it would probably have been right to absolve the defendants from liability for the hit by which the plaintiff was injured. Legitimate as the playing of cricket may be, however, a cricket ball hit out of the ground into a public highway is obviously capable of doing serious harm to anyone in the highway who may happen to be in its course, and I see no justification for holding the defendants entitled to subject people in Beckenham Road to any reasonably foreseeable risk of injury in this way. Accordingly, I am of opinion that the defendants were under a duty to prevent balls being hit into Beckenham Road so far as there was any reasonably foreseeable risk of this happening.

The case as regards negligence, therefore, seems to me to resolve itself into
A the question whether, with the wickets sited as they were, and the fence at the Beckenham Road end as it was, on Aug. 9, 1947, the hitting into Beckenham Road of the ball which struck and injured the plaintiff was the realisation of a reasonably foreseeable risk, or was in the nature of an unprecedented occurrence which the defendants could not reasonably have foreseen. On the evidence this question seems to me to admit of only one answer. Balls had been hit into
B Beckenham Road before. It is true this had happened only at rare intervals, perhaps not more than six times in thirty seasons. It was known, however, from practical experience, to be an actual possibility in the conditions in which matches were customarily played on the ground from about 1910 onwards, that is to say, with the wickets sited substantially as they were, and the fence at the Beckenham Road end, I gather, exactly as it was as regards height and
C position on Aug. 9, 1947. What had happened several times before could, as it seems to me, reasonably be expected to happen again sooner or later. It was not likely to happen often, but it was certainly likely to happen again in time. When or how often it would happen again no one could tell, as this would depend on the strength of the batsmen playing on the ground (including visitors about whose capacity the defendants might know nothing) and the efficiency
D or otherwise of the bowlers. In my opinion, therefore, the hitting out of the ground of the ball which struck and injured the plaintiff was a realisation of a reasonably foreseeable risk, which, because it could reasonably be foreseen, the defendants were under a duty to prevent. The defendants had, in fact, done nothing since the re-arrangement of the ground on the making of Beckenham Road in or about 1910, whether by heightening the fence (*e.g.*, by means
E of a screen of wire netting on poles) or by altering the position of the pitch, to guard against the known possibility of balls being hit into Beckenham Road. It follows that, if I have rightly defined the extent of the defendants' duty in this matter, the hitting out of the ground of the ball which injured the plaintiff did involve a breach of that duty for the consequences of which the defendants must be held liable to the plaintiff in damages.

F I should add that, I attach some importance to the onus of proof. The case is, I think, one to which the doctrine of *res ipsa loquitur* can be fairly applied : *Byrne* v. *Boadle* (3). The plaintiff is struck and injured by a cricket ball hit out of a ground occupied and controlled by the defendants. Surely that circumstance in itself suffices to place on the defendants the burden, at least, of showing either that the event was one which they could not reasonably have foreseen
G as a consequence of their use of the ground for cricket, or that the event was one which they had taken all reasonably practicable steps to prevent. This burden the defendants have, as it seems to me, wholly failed to discharge. The hitting of a ball into the road *was* a reasonably foreseeable event, and no steps at all had been taken to prevent it beyond the erection and subsequent maintenance in its original form of the fence put up in or about 1910, which had
H been shown by experience to be inadequate.

We were, in effect, invited to hold that inasmuch as the hitting of a ball into Beckenham Road was a rarity, and the odds were against anyone in Beckenham Road being struck on one of the rare occasions when this did happen, the risk of anyone being injured in this way was so remote that the defendants were under no obligation to take any further precautions at all, but were entitled to subject people in Beckenham Road (whether cricket enthusiasts or not) to this remote risk, so to speak in the interests of the national pastime. I see no justification for placing cricketers in this privileged position. It was further, in effect, argued that the carry of some 98 yards achieved by the ball which hit the plaintiff, was so exceptionally long as to make at all events the particular hit in question, as distinct from the ordinary run of occasional hits into the road, an unforeseeable occurrence. I am by no means satisfied that this was the case, and, in the absence of more definite and authoritative evidence as to the distance a cricket ball can be hit, I decline to assume in the defendants' favour that it was. Even if it was the case, I do not think this circumstance would assist the defendants. The material point, in my view, is that the hitting of the ball far and high enough to go out of the ground into Beckenham Road *was* an event which could reasonably be foreseen. Once the ball was out of the ground the mischief was done so far as the defendants could do anything to prevent it. I do not see how their liability for any resulting damage can be made to depend on any nicely calculated less or more of distance outside the ground to which the ball might happen to fly or bound before striking the injured party. It was also, I think, suggested that no possible precaution would have arrested the flight of this particular ball, so high did it pass over the fence. This seems to me an irrelevant consideration. If cricket cannot be played on a given ground without foreseeable risk of injury to persons outside it, then it is always possible in the last resort to stop using that ground for cricket. The plaintiff in this case might, I apprehend, quite possibly have been killed. I ask myself whether in that event the defendants would have claimed the right to go on as before because such a thing was unlikely to happen again for several years, though it might happen again on any day on which one of the teams in the match included a strong hitter. No doubt, as a practical matter, the defendants might decide that the double chance of a ball being hit into the road and finding a human target there, was so remote that, rather than going to expense in the way of a wire screen or the like, or, worse still, abandoning the ground, *they* would run the risk of such an occurrence and meet any ensuing claim for damages if and when it arose. However, I fail to see on what principle they can be entitled to require people in Beckenham Road to accept the risk, and if hit by a ball put up with the possibly very serious harm done to them as *damnum sine injuria*, unless able to identify, trace, and successfully sue the particular batsman who made the hit. For these reasons I am of opinion that the plaintiff is entitled to succeed on her claim in negligence, and I would allow the appeal with judgment for the plaintiff in the sum of £104 19*s.* 6*d.*, damages as assessed by the learned judge, and costs here and below.

SOMERVELL, L.J. : The plaintiff was struck and injured by a cricket ball while standing on the highway outside her house 10, Beckenham Road. The ball was hit by a batsman playing in a match on the Cheetham cricket ground, which is adjacent. The striker of the ball is not sued. The claim is made against the defendants as members of the Cheetham Cricket Club and occupiers of the ground. The learned judge dismissed the claim, and the plaintiff appeals. I will read the second paragraph of OLIVER, J.'s, judgment ([1949] 1 All E.R. 237) :

> "The club has been in existence, and matches have been regularly played on this gound, since about 1864. Beckenham Road was constructed and built up in 1910. For the purpose of this work the contractors arranged with the club that a small strip of land at the Beckenham Road end of the ground should be exchanged for a strip at the other end. The match pitches have always been and still are, kept along a line opposite the pavilion, *i.e.*, along the mid-line of the original ground. The effect of the exchange in 1910 is that in the case of a straight drive—the hit in the case before me—Beckenham Road for some years has been a few yards nearer the batsmen than the opposite end."

The learned judge refers to the dimensions of the ground and admittedly makes a mistake in stating that the distance from the striker to the fence above which the ball went was ninety yards. It was in fact about seventy-five yards, the top of the fence being seventeen feet above the pitch. I do not myself get much assistance from the dimensions.

The plaintiff had lived in Beckenham Road for twelve years and had never herself seen a ball come over from the ground into the road. A Mr. Brownson was called on her behalf who lives on the other side of Beckenham Road, the side adjacent to the cricket field. He gave evidence that on several occasions in the years 1946 and 1947 cricket balls were struck into the back yard, or on to the side of his house. He seemed more definite about the back yard than the side of the house. We are not deciding in this case whether on Mr. Brownson's evidence the defendants would be liable if damage was done by a ball driven into his back yard, which is definitely nearer to the pitch than was the plaintiff. The evidence as to balls going into Beckenham Road came from the defendants' witnesses. Mr. Newbold, a defendant, had been a member of the club for twenty-eight years. He said that in that period he had seen a ball hit into the road perhaps half a dozen times. "It requires a terrific hit." The hit which caused the damage he described as the biggest hit he had ever seen on the ground. Mr. Bolton, also a defendant, had been a member of the club for thirty-five years and of the committee for a number of years. He said in his thirty-five years there had been, perhaps, six to ten occasions when a ball had been struck into the road. It is not clear whether this included a short period when the practice nets were at that end of the ground. I will assume in the plaintiff's favour that he was speaking of matches. There had been no previous accident and no complaint to his knowledge. The evidence of these witnesses was accepted by the learned judge.

The case for the plaintiff before us was put, first, on the ground of public nuisance to a highway. This is, of course, an indictable misdemeanour. This is pleaded as follows:

> "Further the plaintiff will contend that the striking of the said cricket ball into the said road was and constituted a nuisance for the consequences of which to the plaintiff the defendants are in law responsible."

I do not think that the striking of a cricket ball by an individual batsman, whether he was, as here, a visitor or whether he had been one of the joint occupiers, could be an indictable misdemeanour by all the occupiers. If the plaintiff is to succeed on this ground it must be put, as counsel for the plaintiff put it, in the alternative, namely, that the organising and carrying on of a game on property adjacent to a highway, so that the public right of passage is rendered dangerous, is a public nuisance. The question, therefore, as it seems to me, is whether the fact that once every three or four years a very exceptional hit takes a ball into this highway constitutes a public nuisance. As the tort relied on is an indictable offence it is unfortunate that it was not pleaded in the only way in which, in my opinion, it can be put. I have derived assistance from the reasoning of SANKEY, J., in the somewhat analogous case of *Castle* v. *St. Augustine's Links, Ltd.* (1). In that case the plaintiff on a highway was injured by a sliced golf ball driven from a tee. SANKEY, J., found that the tee and lay-out of the hole constituted a public nuisance for which the club was responsible. He found that the hole was so laid out that balls were frequently landed in the highway and that the directors knew or ought to have known this. He found that the highway was much frequented by motors and taxicabs and that on previous occasions balls had struck vehicles passing along the highway. If counsel for the plaintiff is right, it would have been sufficient if on very rare occasions an altogether exceptional shot had reached the highway. SANKEY, J., was, of course, dealing with the facts of that case and with golf, not cricket, but, in considering the number of occasions and the amount of traffic on the road—in other words the degree of risk—he was, I think, applying the law correctly in dealing with this class of problem, namely, games near highways. Applying this test, namely, one of degree, to the question whether the lay-out of this cricket field was such as to render the highway dangerous in a way that amounted to a public nuisance, I think that it was not. There is a curious absence of authority on cases of this kind. We were referred to the Scottish case, *Ward* v. *Abraham* (4), but I do not think that that decision helps in the present case. A

There remains the question whether the plaintiff has established that her injuries were due to the negligence of all the occupiers of this cricket ground. I conceive myself entitled to take judicial notice of the fact that games, notably cricket, are part of ordinary life, and that available fields will often and necessarily be adjacent to highways. Counsel for the plaintiff invited us to say that occupiers of a field or ground where games were played were negligent if, in B any foreseeable circumstances, however exceptional, a ball might reach any highway. This would, I think, be unreasonable, and the fact that the occupiers could insure their liability is irrelevant. Whether a man is or is not a tortfeasor cannot depend on whether others are willing to insure his liability. The steps that a reasonable occupier would take depend on the circumstances. If the field is in the heart of a city surrounded by roads on which there is constant C traffic it may well be that the reasonable occupier would have to see that in no foreseeable circumstances could a ball reach a highway. For a village playing field adjacent to a little frequented highway the duty would be less. I think this is a borderline case. On the one hand, it can be said that there was no evidence that the defendants, knowing that on very exceptional occasions a ball was hit out into the road, directed their minds to the question whether D any reasonable steps could be taken to prevent this ever happening. On the other hand, the plaintiff had to establish that, if reasonable steps had been taken, this accident would not have occurred. The case is not wholly satisfactory in that it was in the main pleaded and argued on the basis that the fact that this ball came into the road—and, after the defendants' evidence, that on rare occasions other balls had entered the road—was sufficient to establish liability. E I think this is not enough. I have referred to Mr. Newbold's evidence that this was the biggest hit he had ever seen on the ground. Mr. Milsom agreed with this and said that it cleared the fence by many, many feet. Comment was made on the fact that the pitch was nearer to the northern boundary than to the southern boundary, but there was no cross-examination on the lines that this showed a failure to take due care. There was, as I have said, this fence seventeen F feet above the pitch at the Beckenham Road end and no evidence as to the bank, if any, or fence at the other end of the ground. The case is difficult, partly because the real issue does not seem to me to have been clearly raised either in the pleadings or cross-examination. This may have been because the plaintiff's advisers thought they could not succeed except on the case as they put it.

On the whole, I have come to the conclusion that the appeal fails. Counsel G for the plaintiff criticised the sentence in the judgment in which the learned judge said that, in his opinion, this ground is quite large enough for all practical purposes of safety. I agree this goes beyond what is necessary to decide this case. The question is whether the plaintiff has shown that the damage which she suffered was due to the failure of the defendants to take due and reasonable care. On the evidence as a whole and as accepted by the learned judge, I think H she has failed to establish this. The principle of *Rylands* v. *Fletcher* (2) has, in my opinion, no application, and this point, though taken, was not seriously argued. I, therefore, would dismiss the appeal. *Appeal allowed with costs.*

Solicitors : *L. Bingham & Co.*, agents for *Linder, Myers & Pariser*, Manchester (for the plaintiff) ; *Hall, Brydon, Harvey & Egerton*, agents for *Hall, Brydon & Chapman*, Manchester (for the defendants).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

STANDINGFORD *v.* PROBERT.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ.), November 4, 1949.]

A *Rent Restriction—Alternative accommodation—"Suitable to the needs of the tenant and his family"—"Family"—Inclusion of married sons and their wives living with tenant—Lodger—More than one house as alternative accommodation—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (*c.* 32), *s.* 3 (3).

B By s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, it is provided: "(1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply . . . shall be made or given unless the court considers it reasonable to make such an order . . . and . . . (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order . . . takes effect . . . (3) . . . accommodation shall be deemed to be suitable if it consists . . . (*a*) of a dwelling-house to which the principal Acts apply . . . C and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and either—(i) similar as regards rental and extent to the accommodation afforded by dwelling-houses provided in the neighbourhood by any housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family; or (ii) otherwise reasonably D suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character."

The landlord claimed possession of a dwelling-house to which the Rent Acts applied and offered accommodation in other houses to the tenant as alternative accommodation. With the tenant, a widow, were living her two married sons and their respective wives, a married daughter who was separated from her husband, and a lodger.

E HELD: section 3 (3) laid down the conditions which must be satisfied if the provisions as to alternative accommodation in sub-s. (1) were to be fulfilled and did not merely afford a guide as to what normally would be suitable; the word "family" within the meaning of s. 3 (3) included, in addition to the daughter, the tenant's sons and their wives; and, in the circumstances, the alternative accommodation offered was not suitable.

F *Dictum of* WRIGHT, J., in *Price* v. *Gould* (1930) (143 L.T. 334), *applied.*

Quaere (i) whether the lodger should be included in the term "family."

(ii) whether the court was bound by *Sheehan* v. *Cutler* ([1946] K.B. 339) to hold that in no case could two dwelling-houses constitute suitable alternative accommodation within the meaning of s. 3 (3).

G [AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401, and 1948 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. *7226-7255*, and Supplements.]

Cases referred to:

(1) *Price* v. *Gould*, (1930), 143 L.T. 333; 94 J.P. 210; Digest Supp.

H (2) *Brock* v. *Wollams*, [1949] 1 All E.R. 715; [1949] 2 K.B. 388.

(3) *Snow* v. *Teed*, (1870), L.R. 9 Eq. 622; 34 L.J.Ch. 420; *sub nom.*, *Sum* v. *Teed*, 23 L.T. 303; 44 Digest 888, *7455*.

(4) *Sheehan* v. *Cutler*, [1946] K.B. 339; 115 L.J.K.B. 337; 174 L.T. 411; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour DEPUTY JUDGE DE FERRARS, sitting at Windsor County Court, dated July 13, 1949, granting to the landlord possession of a dwelling-house to which the Rent Acts applied.

The Court of Appeal, allowing the appeal, held that two married sons and their wives, who were living with the tenant, were to be regarded as members of the tenant's family within the meaning of s. 3 (3) of the Rent and Mortgage Interest (Restrictions) Act, 1933, and that in the circumstances the alternative accommodation offered by the landlord was unsuitable. The facts appear in the judgment of Cohen, L.J.

R. G. Dow for the tenant. A
Comyn for the landlord.

SIR RAYMOND EVERSHED, M.R. : I will ask Cohen, L.J., to deliver the first judgment.

COHEN, L.J. : This is an appeal from an order of the deputy county court judge sitting at Windsor in which he granted possession of a house, 12, Westcroft, Slough, to the landlord. B The landlord bought the house after Dec. 6, 1937, the material date for the purposes of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, sched. II, so that he could only succeed if he could bring himself within the terms of s. 3 (1) of the Act of 1933, the material parts of which provide : C

> "No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply . . . shall be made or given unless the court considers it reasonable to make such an order . . . and . . . (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order . . . takes effect."

Sub-section (2) provides : D

> "A certificate of the housing authority for the area in which the said dwelling-house is situated, certifying that the authority will provide suitable alternative accommodation for the tenant by a date specified in the certificate, shall be conclusive evidence that suitable alternative accommodation will be available for him by that date." E

Sub-section (3) is in these terms, so far as material :

> "Where no such certificate as aforesaid is produced to the court, accommodation shall be deemed to be suitable if it consists . . . (*a*) of a dwelling-house to which the principal Acts apply . . . and is, in the opinion of the court, reasonably suitable to the needs of the tenant and his family as F regards proximity to place of work, and either—(i) similar as regards rental and extent to the accommodation afforded by dwelling-houses provided in the neighbourhood by any housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family ; or (ii) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards G extent and character."

Those were the provisions which the learned judge had to construe, and the two questions which he had to consider were (i) whether suitable alternative accommodation had been provided, and (ii) whether, if that was established, it was reasonable or not to make an order.

The facts may be considered under two main headings. First, as to the families H of the respective parties. The tenant, Mrs. Probert, had living with her at 12 Westcroft, which she had occupied since 1937, two married sons and their wives, a married daughter whose husband had deserted her, and a lodger. The first son, Reginald, had married before the war. During the war he was away on war work, but he kept on his room in his mother's house, paying rent for it. His wife spent part of her time there. After the war was over they came back to live with the tenant, but then wen taway for a time, finally returning in June, 1948, and they have been living with her ever since. They paid rent throughout. The second son, Francis, was away in the army during the war. There is authority that absence in the services is, for the purposes of s. 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to be disregarded in considering whether a person is a member of a family residing at the premises in question. He was invalided out of the army in 1946. He married and brought A his wife to live with his mother, and they have been living there ever since. He has to occupy a separate room because he is tubercular. The landlord was living in 76, Northcroft, Slough. He had living with him his wife and two little children, both girls, aged four and three years. One of those children was an invalid, and had to be carried up and down stairs, which was a great burden on the landlord's wife.

B As to the accommodation, at 12, Westcroft there were three bedrooms, two living rooms, a kitchenette and a bathroom. The three bedrooms were occupied as follows. The big room upstairs was occupied by the tenant and her daughter, Elsie, and Francis's wife. Reginald and his wife occupied one of the sitting rooms, which was converted into a bedroom. The other bedrooms were occupied, the better one by Francis, and the small bedroom by the lodger. 76, Northcroft, on C the other hand, had only two bedrooms and one living room, a kitchenette and a bathroom. It cannot be disputed that, if the alternative accommodation had to provide for the whole of the occupants of Westcroft, Northcroft was obviously not suitable alternative accommodation.

The landlord had bought Westcroft in 1948. He gave the tenant notice to quit, which expired on Apr. 11, 1949, when these proceedings were commenced. D The first question that arose for the learned county court judge's consideration was whether or not all the occupants of Westcroft were persons who were within the description, " the tenant and his family." Counsel for the landlord submitted that s. 3 (3) does not lay down conditions which have to be satisfied in order that the accommodation should be suitable, but merely affords a guide as to what would normally be suitable. I do not know whether that point was or E was not taken before the learned judge. If it was, he did not find it necessary to consider it. I will deal with it later in my judgment and will now turn to the judgment of the learned judge which reads as follows :

> " In this case the question of hardship is irrelevant. I hold that the [tenant's] family for the purposes of s. 3 comprises the defendant and her separated daughter, Elsie, the two married sons and their wives being F excluded for that purpose. I hold that the accommodation offered at 76, Northcroft is alternative accommodation within the meaning of the Rent Acts sufficient for the defendant's family so constituted, and I further hold the same to be sufficient alternative accommodation within that section should it be that the defendant's family also includes the lodger Rennell."

G

If he was right in those conclusions, I think it plain that there was evidence on which he could find it was reasonable to make the order that he made. The first question to be considered, however, is whether he was right in excluding the two married sons and their wives from the description, " the tenant and his family." There is no reported decision on s. 3 (3) as to the meaning of those H words, but the question of the meaning of " family " has been considered in connection with s. 12 (1) (*g*) of the Act of 1920 which is a definition section and states :

> " . . . the expression ' tenant ' includes the widow of a tenant . . . who was residing with him at the time of his death, or, where a tenant . . . leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

In that connection it has been held that blood relations, at any rate as distant as nephews and nieces, and adopted children are within the meaning of the section, provided, of course, they satisfy the conditions of residence. It is true that we are now considering a different section, but I think there are some observations which are made in the course of the judgments which have dealt with s. 12 (1) (*g*) which are of assistance to us in reaching a conclusion as to the meaning of the word " family " in s. 3 (3) of the Act of 1933.

The first case to which I would refer is *Price* v. *Gould* (1). That case was cited by Bucknill, L.J., in *Brock* v. *Wollams* (2), and the passage ([1949] 1 All E.R. 717) to which I wish to refer is sufficiently set out in that case. Bucknill, L.J., cites Wright, J., as saying (143 L.T. 334) :

> " ' It has been said in a number of equity cases, relating principally to wills or to settlements under powers of appointment, that the word " family " is a popular, loose, and flexible expression, and not a technical term. It has been laid down that the primary meaning of the word " family " is children, but that primary meaning is clearly susceptible of wider interpretation, because the cases decide that the exact scope of the word must depend on the context and the other provisions of the will or deed in view of the surrounding circumstances. Thus, in *Snow* v. *Teed* (3), it was held that the word " family " could be extended beyond not merely children but even beyond the statutory next-of-kin.' Wright, J., went on to say (*ibid.*) that : ' I hold that in the section now under consideration [s. 12 (1) (*g*)] the word " family " includes brothers and sisters of the deceased living with her at the time of her death. I think that that meaning is required by the ordinary acceptation of the word in this connection, and that the legislature has used the word " family " to introduce a flexible and wide term.' "

I was a member of the court which decided *Brock* v. *Wollams* (2) and I said this ([1949] 1 All E.R. 718) :

> " Counsel for the landlords submitted that there were only two possible meanings of the word ' family ' in s. 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920—the first ' relations by blood or marriage ' and the second ' household,' including all living on the premises, relatives, servants and lodgers. He excluded, and, I think, rightly, the second sense. I do not think it can have been the intention of the legislature to protect servants and lodgers, but I am not prepared to hold that the two meanings suggested by counsel for the landlords are exhaustive. I think that there is a third meaning. I respectfully agree with what was said by Wright, J., in *Price* v. *Gould* (1) in the passage which my Lord has already read. I think the question the learned county court judge should have asked himself was : Would an ordinary man, addressing his mind to the question whether Mrs. Wollams was a member of the family or not, have answered ' Yes ' or ' No ' ? "

I think that is a fair test to apply when considering the meaning of the words, " the tenant and his family ", in s. 3 (3) for the purposes with which we are now concerned. Obviously, having regard to the subject-matter, no member of the family who is not permanently residing—I will use that expression for the moment, though it is not entirely accurate—with the tenant would fall within the meaning of the word " family," but, subject to fulfilling the conditions of residence, I think that the proper question to ask oneself is : If an ordinary man was told that the tenant had living with her the relations of whom we know, would he or would he not say : " Those are the members of her family " ? If he would—and I think he would—I see no reason why they should not be treated as " family " for the purposes of s. 3 (3).

I said, " permanently residing." By that I do not mean, as counsel for the landlord asked us to say, that they intended to live there for the rest of their lives. I think a fair test would be this. Supposing anybody said to a married son : "Have you made your home with your mother or are you just staying with her temporarily ?", would he or would he not reply : "I am making my home with her and I have no present intention of making any change" ? If he would answer in that way, as I think the sons plainly would in this case, then it seems to me that the only proper course in the absence of other relevant circumstances is to treat them and their wives as members of the family. Counsel for the landlord asked us to say that this was a question of fact, and so in part it is, but I am satisfied that the learned county court judge did not direct himself properly in applying his mind to this question. I think it is plain from the form of his judgment that he accepted counsel's argument, which I do not accept, that once the sons are married they must be treated as having set up a separate family and must be excluded from the expression "family" when we are considering the application of this section.

For these reasons I think the learned judge was wrong. It is plain from his judgment that, had he given what I consider to be the correct answer to the question, he would have refused to make the order for possession. Counsel for the landlord, however, asks us to take a different view and to say that, even on this view, the landlord offered adequate alternative accommodation because, in addition to 76, Northcroft, he had also offered two rooms and a bathroom in 12, Westcroft, which the landlord would have been taking over. I very much doubt whether it is open to us to accept that argument because of the decision of this court in *Sheehan* v. *Cutler* (4), where the court had to consider the meaning of "suitable alternative accommodation available for the tenant," within the meaning of the Act of 1933. The facts in that case were not identical with those of the present matter, but in the course of his judgment MORTON, L.J., said ([1946] K.B. 343) :

> "It seems to me that in this sub-section the legislature is regarding the tenant and his family as one unit and is providing that that unit is to be accommodated in one dwelling-house under sub-cl. (*a*) or in premises to be let as one separate dwelling on terms which answer the description given in sub-cl. (*b*). The provisions which follow, and in particular the provisions of sub-cl. (ii) in reference to 'the needs of the tenant and his family' in regard to the extent and character of the accommodation, point in the same direction."

I appreciate that there is much force in what counsel for the landlord said as to the disadvantages of applying that ruling literally in a case where there are, so to speak, two sub-families in the one family living in the premises. In such a case it would obviously be convenient—as on the facts of the present case it would have been convenient—if the landlord had been in a position to offer a separate flat to Reginald and his wife. I do not, however, think it is necessary for us to decide whether we are bound by the decision in *Sheehan* v. *Cutler* (4) to hold that in no case can two dwelling-houses constitute a separate dwelling-house within the meaning of s. 3 (3) since I think that, even if it were possible to treat two dwelling-houses as complying with the obligation to provide suitable alternative accommodation, on the facts of this case these two rooms, having regard to the family and the illness of one of the sons, could not possibly constitute adequate alternative accommodation.

What I have said would, I think, be enough to dispose of this case, but there are two matters to which I think I should refer. The first is the question of the lodger. The learned judge seems to have thought that the lodger could be treated as a member of the family. I do not think it is necessary to reach a conclusion whether he was right. It may well be that the question whether or not a lodger should be included in "the family" may depend on all the circumstances of the particular case. The other point with which I want to deal is the argument adduced to us by counsel for the landlord that s. 3 was not exhaustive, but merely indicative, and that it was open to the learned judge to make an order for possession even though the conditions laid down in sub-s. (3) were not complied with. He relied, in support of this argument, on the language of sub-s. (2), which provides that the certificate of the housing authority is conclusive on the question whether suitable alternative accommodation will be available for the tenant. I think counsel was right in saying that, if that certificate was given, the only way in which the court could pay any attention to other members of the family would be under the provisions as to reasonableness. However, I am not by any means satisfied that the housing authority would ignore sub-s. (3) in considering the question whether they should or should not give the certificate which the tenant sought to obtain. Be that as it may, I am unable to read sub-s. (3) in the limited sense in which counsel asks us to read it. I think it has always been treated in this court as laying down the conditions which must be satisfied if the provisions as to alternative accommodation in sub-s. (1) are to be fulfilled, and I gather that hitherto nobody has even sought to argue the point which counsel has boldly undertaken to argue in the present case. In my view, the assumption which the parties made in the earlier cases was well founded. For these reasons I would allow the appeal.

ASQUITH, L.J. : I agree, and would only add a few words. On the main point counsel relied strongly on the fact that, on marrying, a son becomes the head of a new family. It does not follow that on marrying he ceases to be a member of the original family. Nothing short of that will avail the landlord. This seems to me no more to follow from counsel's premise, than it follows from the fact that a man on marrying becomes his wife's husband that he ceases to be his mother's son. One can be a member of two families simultaneously. That is a circumstance which I think is fatal to counsel's main argument, and I agree that the appeal should be allowed.

SIR RAYMOND EVERSHED, M.R. : I also agree. Although we are differing from the learned county court judge's opinion, I should, I think, be guilty of mere repetition if I traversed again the arguments and matters fully dealt with by my brethren, with whose judgments I find myself in entire agreement. As regards the question whether, on the footing that the family here does include the sons, it might have been a sufficient provision on the landlord's part to have offered accommodation not all under one roof or forming part of one physical unit, I am inclined to think, as COHEN, L.J., has said, that the matter may be governed by the decision of this court in *Sheehan* v. *Cutler* (4) though I would like to leave open the possibility that in some cases it might be held that such a requirement was not always and for all purposes sensible or necessary. However that may be, on the facts in this case, as COHEN, L.J., has pointed out, once the view is taken that the unit (to use the phrase of MORTON, L.J., in *Sheehan* v. *Cutler* (4)) comprehends here all the children, and, in the case of two of them, their wives, it seems to me inevitably to follow from the learned judge's own reasoning in his judgment that he would not have held, as we do not hold, that the accommodation offered here was suitable. I agree, therefore, that the appeal should be allowed, with the result that the order made is discharged and no order is made for possession.

Appeal allowed, with costs ; costs in the county court to be on Scale A.

Solicitors : *Amery-Parkes & Co.*, agents for *P. J. Willmett*, Slough (for the tenant) ; *W. T. Donovan* (for the landlord).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. v. MURPHY.

[Court of Criminal Appeal (Lord Goddard, C.J., Hilbery and Lynskey, JJ.), October 31, 1949.]

Criminal Law—Sentence—Corrective training—Preventive detention—Previous convictions—Conviction in Northern Ireland—Convictions in Scotland and abroad—Criminal Justice Act, 1948 (*c.* 58), *s.* 21 (1) (2) ; *s.* 23 (1).

In the notice of intention to prove three previous convictions served on the appellant under the Criminal Justice Act, 1948, s. 23 (1), a conviction in Northern Ireland was included. Quarter sessions held that this conviction could not be taken into account and imposed a sentence of imprisonment instead of one of preventive detention under s. 21 (2).

Held : a conviction in Northern Ireland could not be a previous conviction within s. 21 (2), and, therefore, the appellant could not have been sentenced to preventive detention.

Per curiam : A conviction in Northern Ireland is not a previous conviction for the purpose of founding a sentence of corrective training under s. 21 (1). Convictions in any of the dominions or colonies, in a foreign country, or before a court martial, are not " previous convictions " within either s. 21 (1) or s. 21 (2). A previous conviction in Scotland on an indictment can, however, be proved : see s. 80 (2) of the Act.

Appeal against a conviction of garage breaking and a sentence of four years imprisonment imposed by the recorder of Cambridge.

In pronouncing sentence the recorder stated that he was unable to take into account a previous conviction of the appellant in Northern Ireland so as to enable him to inflict a sentence of preventive detention under the Criminal Justice Act, 1948, s. 21 (2). The Court of Criminal Appeal affirmed the recorder's statement of the law with regard to convictions in Northern Ireland, and made observations regarding convictions in Scotland, abroad, and before courts martial.

Donald C. Bain for the appellant.
Anthony Hawke and *E. Garth Moore* for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant appeals against his conviction at Cambridge Quarter Sessions of garage breaking and against the sentence which was passed on him. He has at least twenty previous convictions, and he would, therefore, have been a proper subject for preventive detention if his previous convictions could be taken into account under the provisions of the Criminal Justice Act, 1948, s. 21 (2). In the notice served on him under s. 23 (1) one of the convictions set out was in Northern Ireland, and the recorder of Cambridge came to the conclusion that he could not deal with the appellant as a proper subject for preventive detention because the court was not entitled to take into account such a conviction. The recorder, accordingly, sentenced the appellant to four years' imprisonment. If he could have given preventive detention, no doubt he would have given a longer sentence. There is nothing in the appeal against conviction, and in the circumstances, the sentence of four years' imprisonment cannot be considered excessive for a man of the appellant's character. Therefore, the appeal fails.

The court gave leave to appeal because the recorder not only said that he could not take into account a conviction in Northern Ireland as one of the convictions which would qualify a man for preventive detention, or, for that matter, corrective training, but he also, *per incuriam*, said that the same would apply to a conviction in Scotland. In saying that, the recorder had not in his mind the Criminal Justice Act, 1948, s. 80 (2), which provides :

" . . . and any such reference to a previous conviction or sentence shall be

> construed as a reference to a previous conviction by a court in any part of Great Britain and to a previous sentence passed by any such court."

Northern Ireland is not part of Great Britain. It is part of the United Kingdom which consists of Great Britain and Northern Ireland. The combined kingdoms of England and Scotland were designated as Great Britain in the Union with Scotland Act, 1706, art. I, and ever since the two kingdoms of England and Scotland have been known by that name. The United Kingdom was first brought A into being when the Act of Union with Ireland was passed in 1800.

It, therefore, appears that for the purpose of the previous convictions which must be proved under s. 21 (2) of the Act of 1948 a conviction in Northern Ireland does not fall within the sub-section. The court has no doubt that a conviction and sentence in Scotland can be proved because s. 80 (2) obviously means that a conviction in Scotland should be provable in England. On the B other hand, for this purpose a conviction in Northern Ireland cannot be proved any more than a conviction in South Africa or one of the other dominions or colonies or a foreign country can be proved. It is also worth mentioning, because I know the point has been raised, that a conviction before a court martial cannot be proved for this purpose.

Appeal dismissed. C

Solicitors: *Registrar of the Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

Applied. Solle *v.* Butcher. *post* p. 1107.

D

WELCH v. NAGY.

[Court of Appeal (Bucknill, Cohen and Asquith, L.JJ.), October 12, 13, 14, 17, 18, November 2, 1949.] E

Rent Restriction—Furnished letting—Purchase of furniture by tenant—Effect on tenancy—Conversion into unfurnished letting—Estoppel—Conduct of tenant leading to belief letting was unfurnished.

In July, 1939, a house was let to the tenant by J. who then owned the freehold. The house contained furniture provided by J. of such amount that a substantial portion of the whole rent was attributable to its user, and, F accordingly, the house was outside the protection of the Rent Restrictions Acts. In July, 1940, the tenant bought all this furniture (except six pieces) from J. who, on Aug. 27, 1940, sold the freehold and in the same transaction fraudulently purported to sell to the new landlord the furniture which had already been sold to the tenant. Under the original agreement with J. the tenancy was for a year from Nov. 1, 1939, with an option G to renew for a further year in October, 1940, and the tenant exercised this option against the new landlord. The tenant at no time indicated to the landlord that he claimed the furniture, and by asking in a letter dated Oct. 25, 1940, for an extension of his tenancy of the "house, furnished" confirmed in the landlord's mind the belief that he, and not the tenant, owned the furniture. On Nov. 1, 1941, the landlord granted the tenant H a new lease of the dwelling-house, under the impression that it was a furnished letting, whereas the tenant then believed that it was an unfurnished letting, the house being at the material time within the ambit of the Rent Restrictions Acts by reason of its rateable value. In September, 1948, the landlord issued a plaint in the county court asking for a declaration that the tenancy was a furnished tenancy and that the furniture in the premises was identical with that purchased by him from J.

Per curiam: if during the currency of a lease of a furnished house the tenant buys all the furniture, the effect is not, while that lease is still on foot, to convert the tenancy into an unfurnished one for the purposes of the Rent Restrictions Acts, and, therefore, the tenant was not protected by the Acts in respect of his tenancy up to Oct. 31, 1941.

Joswiak v. *Hierowski* ([1948] 2 All E.R. 9), and *Bowness* v. *O'Dwyer* ([1948] 2 All E.R. 181), *applied.*

Held: (i) the new lease granted from Nov. 1, 1941, was made at a time when the tenant owned the furniture he was purporting to rent from the landlord and that tenancy was in existence when the plaint was issued; it was not possible for the parties, by describing, whether by accident or design, an unfurnished letting as a furnished letting, to confer on the court a jurisdiction which it did not possess, *viz.*, a jurisdiction to make an order for possession unfettered by the Rent Restrictions Acts; and, therefore, the letting was an unfurnished letting which was protected by the Acts.

(ii) in the circumstances the tenant was not estopped from asserting or proving the true fact that the letting was protected by the Acts.

Stone (J. & F.) Lighting and Radio, Ltd. v. *Levitt* ([1946] 2 All E.R. 653), *applied.*

[As to Lettings with the Use of Furniture, see HALSBURY, Hailsham Edn., Vol. 20, pp. 314, 315, para. 370; and for Cases, see DIGEST, Vol. 31, pp. 500, 501, Nos. *7078-7084* and 2nd Supplement.]

Cases referred to:

(1) *Rentit, Ltd.* v. *Oaten*, (1938), L.J.N.C.C.R. 137.
(2) *Jozwiak* v. *Hierowski*, [1948] 2 All E.R. 9; [1948] L.J.R. 1643; 2nd Digest Supp.
(3) *Bowness* v. *O'Dwyer*, [1948] 2 All E.R. 181; [1948] 2 K.B. 219; [1948] L.J.R. 1774; 2nd Digest Supp.
(4) *Stone (J. & F.) Lighting and Radio, Ltd.* v. *Levitt*, [1946] 2 All E.R. 653; [1947] A.C. 209; [1947] L.J.R. 65; 170 L.T. 1; 2nd Digest Supp.
(5) *Maritime Electric Co., Ltd.* v. *General Dairies, Ltd.*, [1937] 1 All E.R. 748; [1937] A.C. 610; 106 L.J.P.C. 81; 156 L.T. 444; Digest Supp.
(6) *Anctil* v. *Manufacturer's Life Insurance Co.*, [1899] A.C. 604; 68 L.J.C.P. 123; 81 L.T. 279; 29 Digest 350, *2835*.
(7) *Re A Bankruptcy Notice*, [1924] 2 Ch. 76; 93 L.J.Ch. 497; *sub nom. Re A Bankruptcy Notice (No. 62 of* 1924), *Ex parte Petitioning Creditors* v. *Debtor*, 131 L.T. 307; Digest Supp.
(8) *Barton* v. *Fincham*, [1921] 2 K.B. 291; 90 L.J.K.B. 451; 124 L.T. 495; 85 J.P. 145; 31 Digest 579, *7280*.
(9) *Brown* v. *Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 2nd Digest Supp.

Appeal by the tenant from an order of His Honour Judge Blagden made at Chesham County Court on Mar. 1, 1949, whereby he granted to the landlord a declaration that the tenancy held by the tenant of Manor Lodge, Chesham, was a furnished tenancy and that the furniture comprised the articles described in a list of furniture purchased by the landlord from the former freeholder. The Court of Appeal now allowed the appeal of the tenant and refused the declaration and ordered the landlord to pay the costs of the appeal. The facts appear in the headnote.

The tenant appeared in person.

Heathcote-Williams, K.C., and *Stephen-Murray* for the landlord.

Cur. adv. vult.

Nov. 2. The following judgments were read.

BUCKNILL, L.J., stated the facts, held that the county court judge had found on sufficient evidence that the tenant had purchased the furniture before the purported sale to the landlord, and continued : As regards the substance of the appeal the tenant argued : (i) The judge was wrong in holding that the tenant was estopped from now asserting his own title to the furniture and from disputing the proposition that it formed a substantial part of that for which he paid rent. (ii) The doctrine of estoppel does not apply in a case such as this where a statutory duty is cast on the court to ascertain whether the provisions of the Rent Restrictions Acts apply to any particular dwelling. (iii) Even if the tenant's letter of Oct. 25, 1940, referring to the " dwelling-house, furnished," amounted to an estoppel as regards the furniture, such estoppel was not operative at the time when the plaint was issued, because during the preceding two years the tenant had asserted that the furniture belonged to him. (iv) The estoppel, if any, created in October, 1940, did not apply in 1941 when a new tenancy agreement was entered into, and there was then no reference by the tenant to the house being taken furnished. (v) The value of the furniture when the tenancy was granted was such that the judge was wrong in holding in effect that the amount of rent fairly attributable to its use formed a substantial part of the rent : see Rent and Mortgage Interest Restrictions Act, 1923, s. 10 (1).

The first question, as I see it, is whether the doctrine of estoppel applies to the present case. To answer this question, I think, one must first answer the question : Did the tenant offer to rent Manor Lodge furnished with the intention (actual or presumptive) and with the result of inducing the landlord on the faith of that statement to alter his position to his detriment ? The judge has held, and I think it is a finding of fact, that " the landlord shaped his whole subsequent course, including his commencement of this action, in reliance on, *inter alia*, the second letter " [*i.e.*, the letter of Oct. 25, 1940, exercising the option to renew the tenancy of the house.] There is evidence to support that finding, and I do not think it can be disturbed in this court.

Then comes the question : What was the intention (actual or presumptive) of the tenant in making this statement ? Having regard to the judge's finding that the tenant had bought the furniture from Jacobson [the original landlord] before Jacobson purported to sell it to the present landlord, I think it is clear that when he wrote the letter in October, 1940, he never intended to assert that the furniture in the house belonged to Jacobson. There is no evidence, or no clear evidence, that by that time the landlord had told the tenant that he had bought the furniture, and no finding to that effect by the judge, but, as the judge pointed out in his judgment, " the effect of a document is not that which the writer inintends, but that which the document reasonably conveys to the recipient." I think that these words " house, furnished," must be taken to mean that the furniture in the house belonged, not to the tenant, but to the landlord. I do not agree with the conclusion of the judge that the tenant should be taken to have intended to admit, regard being had to the value of the furniture to him, that the amount of rent fairly attributable to its use formed a substantial portion of the whole rent. There is nothing to show that the tenant intended to make any such admission, and I do not think that the use of the word " furnished " should be taken as carrying such a meaning. I think, therefore, that in any case the learned judge extended the doctrine of estoppel too far, and that the tenant was not estopped from asserting that the furniture did not bring the case within the Rent and Mortgage Interest Restrictions Act, 1923, s. 10.

I agree with the judgment of Asquith, L.J., which I have had the opportunity of reading, as to the effect of the Rent Restrictions Acts on the doctrine of estoppel, to the effect that a tenant could not, by representing himself as tenant under a fully furnished tenancy when the house was in fact let unfurnished (because the only furniture in it was his own), confer on the court an unfettered jurisdiction to make orders for possession. In my opinion, therefore, the judgment should be amended by striking out that part of it which contains the declaration as claimed by the landlord. The result of this will be that the tenant will not be precluded from asserting in any future proceedings by the landlord or his successors in title for an increase of rent beyond the statutory rent or for possession that the furniture in the house when the tenancy agreement was made in 1941, or when the option was exercised in 1940, belonged to him, and that in any case it was not such as to satisfy the test of "substantial" within s. 10 of the Act of 1923. I think that to that extent the appeal should be allowed.

A **COHEN, L.J.**: I have had the opportunity of reading the judgment which my Lord has just delivered and the judgment which ASQUITH, L.J., is about to deliver. I agree with the reasons they give for allowing this appeal to the extent they indicate, and I have nothing to add of my own.

ASQUITH, L.J.: I agree that the appeal should be allowed and the declaration asked for refused. I had some difficulty in interpreting the B county court judge's findings of fact. On careful examination I think they resolve themselves into the following: (i) When the tenant first entered under a "furnished" tenancy in July, 1939, the house contained certain furniture. This furniture was provided by the then landlord, Mrs. Jacobson, though owned by her husband. Its amount was such that a substantial proportion of the whole rent was attributable to its user, and the house was, accordingly, outside the C protection of the Rent Restrictions Acts. (ii) In or about July, 1940, the present landlord bought all this furniture (except six pieces) from Jacobson. (iii) Later, on Aug. 27, 1940, Jacobson (fraudulently) purported to sell this same furniture to the landlord to whom on the same date he sold the house. (iv) This furniture was the furniture inventoried in what has been called the "Catesby list."

D The judge accepted the tenant's evidence to the extent that he claimed to have bought certain furniture from Jacobson before Jacobson purported to sell the same furniture to the landlord. He rejected the tenant's evidence so far as the tenant said the furniture in question was an assortment entirely distinct from that in the Catesby list—inferior in quantity, quality, and value—and was the furniture contained in an inventory compiled by the tenant himself shortly E after he entered and produced by him at the trial, notwithstanding that the tenant's evidence on this point was positive, precise and circumstantial. However this may be, it cannot, I think, be suggested of any one of these findings that there was no evidence to support it. They must be accepted, and, if they are, it follows that in July, 1940, when the tenant bought the furniture, his tenancy became a *de facto* unfurnished tenancy since the only furniture the F house contained was his own. Did it then and there become an unfurnished tenancy *de jure*, so as to attract the protection of the Rent Restrictions Acts? This is a difficult question. If the tenant's purchase of the furniture did not alter the character *de jure* of the current tenancy to that of an unfurnished letting, then the tenancy retained, till it terminated, its original character in law of a "substantially furnished" letting. If, however, immediately on the tenant's G purchase of the furniture (or, indeed, at any subsequent time before the plaint), his tenancy ceased in law to be a substantially furnished, and became an unfurnished, one, then the landlord can succeed, if at all, only by establishing an estoppel. It is, therefore, a crucial question what effect in law, if any, is to be attributed to the sale of the furniture to the tenant. In my view, if during the currency of a single lease, which is originally a lease of a substantially furnished H house, the tenant buys all the furniture, the effect is not, while that lease is still on foot, to convert the tenancy into an unfurnished one for the purposes of the Rent Restrictions Acts.

There is no direct authority for this, but it would seem to be a corollary of the principle on which this court proceeded in *Jozwiak* v. *Hierowski* (2) and *Bowness* v. *O'Dwyer* (3). The problem raised in the first of these cases was whether a rise during the tenancy in the amount of rent, the amount of furniture remaining constant, or an increase in the amount of furniture, the rent remaining constant, could alter the character of the tenancy from substantially furnished to unsubstantially furnished, and *vice versa.* The Court of Appeal held it could not, and that the relevant time for ascertaining whether the amount of rent attributable to the use of the furniture was " substantial " was, and remained throughout the tenancy, the time when the tenancy started. (I say " the tenancy " for the court in that case did not accept the contention that there were a succession of tenancies). By parity of reasoning if, as was the case here, the tenancy started as a substantially furnished one, it retained that character so long as it lasted, notwithstanding the sale of the furniture during its currency, and the important question is how long it did last. If it did not last till the plaint was issued and the lease then on foot was a different one, the question will be whether the tenant was estopped from denying that the lease on foot at the time of the plaint was one of a substantially furnished house. The judge has held that he was so estopped. Indeed, he holds that the estoppel originated and operated before the lease which was on foot at the time of the plaint was entered into, and continued operative thereafter.

The original tenancy agreement was oral, was made in July, 1939, and was for a furnished letting. On Oct. 4, 1939, the lessor, Mrs. Jacobson, wrote to the tenant's sister a letter which has been called " the first letter," beginning :

> " I let you herewith my furnished dwelling-house Manor Lodge, for a year beginning Nov. 1, 1939, and ending Oct. 31, 1940 . . . After the expiration of the above-mentioned year you have an option for a further year, under the same conditions."

This proposal was accepted in terms by a letter of Oct. 7 from the tenant's sister acting as her brother's agent, or possibly for her brother and herself. On Aug. 27, 1940, the landlord buys the freehold (and purports to buy the furniture) from the Jacobsons. On Oct. 25, 1940, when the first year is about to expire, the tenant, by letter of that date (which has been christened " the second letter "), exercises his option to extend the tenancy for another year till Nov. 1, 1941, " on the same conditions." The letter refers to the house as " the above-mentioned dwelling-house (comma) furnished (comma) with garden." When this additional year is about to expire—on Oct. 30, 1941—the defendant writes to the landlord :

> " Confirming our agreement to the continuation of our tenancy for the duration of the war under the same conditions as up to the present."

One of the conditions of the original agreement had been that the letting was a furnished one, the amount of the furniture being " substantial." This agreement " for the duration of the war ", though void for uncertainty when made, was validated *ex post facto* by the Validation of Wartime Leases Act, 1944, which, while extending the term of such leases to ten years subject to a month's notice, incorporates in the statutory lease all the terms of the invalid contractual lease other than those relating to the duration of the term : see s. 3 (3). Pausing there, I think it is probable that the original tenancy of July, 1939, endured till Oct. 30, 1941, through the exercise of the option to extend for one year. However that may be, on any view the agreement of Oct. 30, 1941, is a new tenancy distinct from any earlier one. Although it speaks of " continuing " the old tenancy for the duration of the war, it does not derive from any option or other provision contained in the original agreement.

The position, therefore, is that the lease under which the tenant held at the time of the plaint (and through its statutory prolongation holds today) was not the original lease, and that this lease was made at a time when the tenant himself owned the furniture he was purporting to rent from the landlord. In 1946 the tenant at last claims the furniture as his property, which, on the facts found by the judge, it had been since July, 1940. In these circumstances the question is whether the tenant can say : " From Oct. 31, 1941, on, at least, my tenancy has been an unfurnished one, and, since the rateable value was under £100 per annum, has been within the protection of the Rent Restrictions Acts," or whether he is precluded by estoppel from saying this. The landlord claims, and the judge has held, that he is estopped from doing so. The suggested estoppel is based on the following circumstances. The landlord, when, on Aug. 27, 1940, he purported to buy the furniture from Jacobson, had, of course, no idea that Jacobson had already sold it to the tenant. The tenant as clearly did know this, but so acted, it is said, as to induce or confirm in the landlord's mind the belief that the furniture was not his, the tenant's, but the landlord's, and the landlord changed his position on the faith of that belief. The following acts or omissions of the tenant are relied on as constituting a representation inducing or confirming that belief: (i) At some time later than Aug. 9, 1940, but before Aug. 27, the landlord and his wife had gone over to view Manor Lodge and in the presence of the tenant had checked the furniture on the premises with a list of some sort (it was, in fact, the Catesby list). The tenant saw this going on, but did not inform the landlord that it was not the landlord's but his, the tenant's, furniture. (ii) In the "second letter" (Oct. 25, 1940) the tenant purports to exercise his option "and rent the above-mentioned dwelling-house, furnished, with garden, under the same conditions as fixed up to the present—for a further year, till Nov. 1, 1941." This, it is said, is a representation that the furniture in the house (which the landlord and his wife had inspected in August and must have observed to be "substantial") was not the property of the tenant and was the property of the landlord. (iii) Later, when this extension expired, and the tenant made the agreement contained in the letter of Oct. 30, 1941, for a new tenancy "for the duration of the war," he said it was to be "under the same conditions" as previously, namely, it was to be a "furnished" lease. This, it is said, further reinforced the belief which the tenant's previous letter had entrenched in the landlord's mind, a belief of which the tenant did nothing to disabuse him till 1946 at the earliest. Meanwhile it was said that the landlord had acted on this representation to his detriment, *inter alia*, by not suing Jacobson before Jacobson evanesced some time in the autumn of 1940.

The Rent Restrictions Acts compel the courts to treat an unfurnished lease of a dwelling-house within the statutory limits of rateable value in a certain way. They are not to permit more than the standard rent and permitted increases to be charged, nor (except under certain conditions laid down in the Acts) have they jurisdiction to make orders for possession. The court must take these points even if the parties do not raise them, as they go to jurisdiction. The court's power, on the other hand, to make orders for possession in the case of leases of "substantially" furnished houses is left unfettered by the Rent Restrictions Acts. In my view, the parties cannot, by describing (whether by accident or design) what is, in fact, an unfurnished tenancy as a furnished or substantially furnished one, alter the fact that the furniture is actually the tenant's and that such a tenancy cannot be a furnished or substantially furnished one. To treat the tenant as estopped from denying that the tenancy is furnished when it is, in fact, unfurnished is to confer on the courts by the act of one of the parties a jurisdiction (namely, an untrammelled power to make orders for possession of premises in fact unfurnished) which Parliament has said the courts shall not have.

In *Stone (J. & F.) Lighting and Radio, Ltd.* v. *Levitt* (4) the court dealt with a counterclaim with which, having regard to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (7), (which excludes from the protection of the Acts houses let at less than two-thirds of their rateable value) it had no jurisdiction to deal. It was held that no estoppel by matter of record could arise between the parties. LORD THANKERTON said ([1946] 2 All E.R. 655):

> " . . . it is idle to suggest that either estoppel or *res judicata* can give the court a jurisdiction under the Rent Restrictions Acts which the statute says it is not to have."

These words seem closely in point. A similar principle was applied by the Privy Council in *Maritime Electric Company, Ltd.* v. *General Dairies, Ltd.* (5), where a statutory company which by mistake had demanded and been paid by a customer over a considerable period only one-tenth of the proper charge for services supplied was held not estopped from claiming the balance : compare also *Anctil* v. *Manufacturer's Life Insurance Company* (6) and *Re A Bankruptcy Notice* (7). Just as, in general, parties are not competent to contract out of the protection of the Acts (see *Barton* v. *Fincham* (8) and *Brown* v. *Draper* (9)) where the true facts attract that protection, so here the tenant cannot, in my view, be estopped from proving the true facts where those facts attract that protection.

By the somewhat artificial rule (based on convenience) laid down in *Jozwiak* v. *Hierowski* (2), when a transfer, or change in the quantity, of the furniture rented takes place during the currency of a lease, regard is had, not to the position at the time of the transfer or change, but to the position at the beginning of the tenancy. When a new tenancy supervenes, I see no reason why the court should not have regard to the actual position as to ownership of the furniture, and, if this is such that a furnished lease (let alone a substantially furnished one) is impossible, the court must give effect to the rights which the statutes confer on a tenant under an unfurnished lease. Apart from this general principle I doubt whether in the present case the representation relied on is either unambiguous or a representation of pure fact. It is a representation that the lease is furnished, which may mean furnished to some extent or furnished " substantially " within the Rent and Mortgage Interest Restrictions Act, 1923, s. 10. If it means the latter, it may well be a representation of mixed fact and law, the question what is a substantially furnished lease having been widely canvassed in the courts and forming the subject of decisions by the House of Lords.

In these circumstances I am of opinion that the appeal should be allowed, and the first limb of the declaration refused. I have assumed throughout that the declaration asked for is that the tenancy is not only a furnished tenancy but a substantially furnished one within s. 10 of the 1923 Act. A declaration that it is a furnished tenancy to some unspecified extent would be of no value to a landlord, and would in any case, on the view I take (namely, that this was a tenancy furnished to no extent), equally have to be refused. The second limb of the declaration runs as follows : " and that in particular the furniture comprised in such tenancy is that set out in the so-called Catesby list." This limb should, in my view, also be refused because such tenancy must mean the furnished tenancy referred to in the first limb of the declaration, and there was, according to my view, no such furnished tenancy and no estoppel precluding the tenant from saying so. On the other hand, the judge has found (and there was evidence on which he could find) that the furniture in the house was that in the Catesby list, and was the tenant's property. For these reasons I agree that the appeal should be allowed to the extent specified.

Appeal allowed with costs. No order as to costs below.

Solicitors : *Spiro & Steele* for the landlord.

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

BACON *v.* GRIMSBY CORPORATION.

[COURT OF APPEAL (Bucknill, Somervell and Denning, L.JJ.), November 3, 1949.]

Housing—House unfit for human habitation—Notice to execute works—Duty of public authority to consider "estimated cost of the works necessary"—Detailed estimates of cost of works not before local authority before notice issued—Value of house—Whether value to ground lessee or freehold value to be considered in determining whether estimated expense of repairs reasonable—Housing Act, 1936 (*c.* 51), *s.* 9 (1), *s.* 9 (3).

By the Housing Act, 1936, s. 9 (1): "Where a local authority . . . are satisfied that any house which is occupied, or is of a type suitable for occupation, by persons of the working classes is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon the person having control of the house a notice requiring him . . . to execute the works specified in the notice . . ." By s. 9 (3): "In determining for the purposes of this Part of this Act whether a house can be rendered fit for human habitation at a reasonable expense, regard shall be had to the estimated cost of the works necessary to render it so fit and the value which it is estimated that the house will have when the works are completed."

Notices under s. 9 (1) of the Act of 1936 were served by the local authority on the agent of the ground lessees of nine houses, which were let on weekly tenancies, at a rent of about 10*s.* a week each, to tenants protected by the Rent Restrictions Acts. Two of the ground leases had twelve years to run, and the other seven had 21 years to run. In issuing the notices the local authority acted on a report of their sanitary inspector who had stated that the repairs could be done at a reasonable cost, but they did not have before them any detailed estimates showing the cost of the individual items of repair necessary. In some of the cases the estimated cost of the works, though reasonable in regard to the freehold value of the house, was not reasonable in regard to the ground lessees' interest therein. It was contended (*inter alia*) on behalf of the ground lessees (*a*) that the notices were bad in that the local authority, before issuing them, did not have before them for consideration detailed estimates of the costs of the works, and (*b*) that, in determining whether the expense of the works was reasonable within s. 9 (3) of the Act, the value of the house to the ground lessee, and not its freehold value, should be considered.

HELD: (i) consideration by the local authority of the detailed items of the estimated cost of the works required was not a condition precedent to the issue of a notice under s. 9 (1) of the Act of 1936.

Cohen v. *West Ham Corporation* ([1933] Ch. 814), *applied.*

(ii) in determining, under s. 9 (3) of the Act, whether a house could be rendered fit for human habitation at a reasonable expense, regard was to be had, not to its value to the ground lessee, but to its freehold value, on the basis that it was occupied by a tenant entitled to the benefit of the Rent Restrictions Acts.

[FOR THE HOUSING ACT, 1936, s. 9, see HALSBURY'S STATUTES, Vol. 29, p. 572.]

Case referred to:

(1) *Cohen* v. *West Ham Corpn.*, [1933] Ch. 814; 102 L.J.Ch. 305; 149 L.T. 271; 97 J.P. 155; Digest Supp.

APPEALS by the agent of the ground lessees from orders of His Honour JUDGE SHOVE, at Grimsby County Court, dated May 26, 1949, whereby he dismissed the agent's appeals under the Housing Act, 1936, s. 15 (1), from notices issued by the local authority, under s. 9 (1) of the Act, requiring the execution of specified works to the nine houses, which were the subject-matter of the appeals, to render them fit for human habitation. It was contended by the agent that the notices were bad in that detailed estimates of the costs of the works required were not before the local authority before they issued the notices. The county court judge held (*a*) that the notices were good, and (*b*) that, in determining whether the expense of the necessary repairs was reasonable, within the meaning of s. 9 (3), regard should be had to the freehold value of each house, and not to its value to the ground lessee. The agent's appeals from the orders of the county court judge were now dismissed by the Court of Appeal. The facts appear in the judgment of SOMERVELL, L.J. A

Lamb, K.C., and *Sells* for the agent of the ground lessees.
Melford Stevenson, K.C., and *Scarman* for the local authority. B

BUCKNILL, L.J. : SOMERVELL, L.J., will deliver the first judgment in this case.

SOMERVELL, L.J. : These are nine appeals from a judgment of His Honour JUDGE SHOVE, sitting at Grimsby County Court. He delivered one judgment and, although in certain respects there is, as will emerge, at any rate C one point which arises in respect of three of the cases and not of the others, in the main the questions raised affect all nine cases in the same way. They are appeals by Mr. Bacon, the agent of the two ground lessees of the nine houses to which these appeals relate, against notices, served on behalf of Grimsby Corporation under s. 9 (1) of the Housing Act, 1936, in respect of repairs which those notices required to be done. It is agreed that the agent was the proper D person to serve, in that, although the nine houses fell into two groups concerning two ground lessees, the agent was the person in control of both sets of properties. Section 9 (1) is in these terms :

> " Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any house which is occupied, or is of a type suitable for E occupation, by persons of the working classes is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon the person having control of the house a notice requiring him, within such reasonable time, not being less than 21 days, as may be specified in the notice, to F execute the works specified in the notice and stating that, in the opinion of the authority, those works will render the house fit for human habitation."

Section 9 (3) provides :

> " In determining for the purposes of this Part of this Act whether a house can be rendered fit for human habitation at a reasonable expense, regard shall be had to the estimated cost of the works necessary to render G it so fit and the value which it is estimated that the house will have when the works are completed."

Section 11 deals with a different and more drastic power which the local authority may have to consider in certain cases where houses are unfit for human habitation. Section 11 (1) provides : H

> " Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any house which is occupied, or is of a type suitable for occupation, by persons of the working classes, is unfit for human habitation and is not capable at a reasonable expense of being rendered so fit, they shall serve upon the person having control of the house, upon any other person who is an owner thereof, and, so far as it is reasonably practicable to

> ascertain such persons, upon every mortgagee thereof, notice of the time (being some time not less than 21 days after the service of the notice) and place at which the condition of the house and any offer with respect to the carrying out of works, or the future user of the house, which he may wish to submit will be considered by them, and every person upon whom such a notice is served shall be entitled to be heard when the matter is so taken into consideration."

That may result in the local authority changing their mind or it may result in a demolition order. Section 13 deals with the position when a demolition order is made. Section 15 provides for appeals. By section 15 (1) :

> " Any person aggrieved by (*a*) a notice under this Part of this Act requiring the execution of works . . . may, within 21 days after the date of the service of the notice, demand or order . . . as the case may be, appeal to the county court . . ."

We are concerned with seven houses in Charlton Street and two houses in Ayscough Street, the ground lessees of the two sets of properties being in each case a Mr. Ricketts. In the case of the Ayscough Street property there was a ground lease of 75 years, with twelve years to run, and in respect of the Charlton Street property there was a ground lease of 99 years, with 21 years to run. All of the houses were let on weekly tenancies at about 10*s*. a week.

The learned judge decided that these notices were proper notices under the Act. From that decision there is an appeal by the agent to this court, and the notice of appeal sets out with clearness the points which we have to consider. The first ground of this appeal is that

> " . . . the learned judge was in error when he held that no point was taken by the appellant that the respondents had failed to make proper inquiries before sanctioning the service of the notice which was the subject-matter of this appeal, and that, having regard to the fact that the respondents' expert witness gave evidence that he had laid no estimate of the cost of carrying out the repairs set out in the said notice before the respondents, the said notice was bad in law and cannot be enforced."

That contention arises in this way. Evidence was called on behalf of the local authority and Mr. Parkinson, a sanitary inspector who had reported in respect of these houses to the sanitary sub-committee (who in turn reported to the health committee and then to the full council), gave evidence to this effect, which I read from the judge's note :

> " I made a report on each of these houses . . . I did not give estimates to the committee. All that I did was to make general report that those repairs could be done at a reasonable cost."

The first point that we have to consider is the contention of counsel for the agent of the ground lessees that the failure to submit to the housing committee of the local authority estimates (by which must be meant detailed estimates, showing the cost of the individual items of repairs necessary to these houses) makes these notices bad. Counsel for the agent says that under s. 9 of the Act of 1936 the local authority have to address their minds to the question, as set out in sub-s. (3), whether the expense is reasonable, regard being had :

> " . . . to the estimated cost of the works necessary to render it so fit and the value which it is estimated that the house will have when the works are completed."

He then asks : How can one have regard to the estimated cost of the works unless one has an estimate before one ? Before referring to a decision of this court, which, I think, is of assistance on, and possibly covers, this point, I wish to state that, in my opinion, s. 9 (3) does not refer back to s. 9 (1). The estimated cost of the works and the estimated value of the house when they are completed form the criterion which has to be applied when the question whether the house can be rendered fit for human habitation at a reasonable expense has to be determined. In considering whether regard to the estimated cost of the works is a condition precedent to the notices under s. 9 (1), I am also struck by the difference of wording in s. 9 (1) and in s. 11 (1). Under s. 11 (1), which deals with demolition orders, the local authority have to be satisfied that the house A

> "... is unfit for human habitation and is not capable at a reasonable expense of being rendered so fit."

It seems to me that a lesser burden is placed on the local authority by the words of s. 9 (1):

> "... unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit ..." B

The general point, as it seems to me, came before this court, though in somewhat different circumstances, in *Cohen* v. *West Ham Corporation* (1). In that case notices were served under the Housing Act, 1930, s. 17, which was the equivalent of, and for all present purposes identical with, s. 9 of the Act of 1936. No appeal was entered against them (as was done in this case), 21 days (the time C for appeal) elapsed, and there was a provision in the Act that on the expiration of 21 days the notices were to become final and conclusive as to any matters which could have been raised on such an appeal. In that case the minute showing what had happened before the local authority was before the court, and it is recited in these terms:

> "On Apr. 1, 1932, the council's medical officer of health made a report D to their housing committee, cl. (*d*) of which was: 'Under s. 17 of the Housing Act, 1930, I report the following houses as being in certain respects unfit for human habitation and capable at a reasonable cost of being rendered fit ...' The committee reported that, having considered the representation contained in cl. (*d*), they recommended that notices under s. 17 of the Housing Act, 1930, be served upon the landlords, requiring them, E within reasonable time, not being less than 21 days, to execute such works as would render the houses fit for human habitation. At a meeting held on Apr. 26, 1932, the council resolved that the committee's report be received and adopted and its recommendations carried into effect."

On that the notices were served. The point was taken that the council had not F directed their minds to the matters to which they had to direct their minds under s. 17. What I may call the main basis of the argument in that case was different from the argument in the present case. It was said in that case that they had merely, as it were, rubber-stamped the report of their officer, and there was no evidence that they had themselves directed their minds to the matter at issue. The point there was not, therefore, the same point as is being raised G in the present case, but there are observations which, I think, are of assistance. I think that it is quite clear, both from the judgment of LORD HANWORTH, M.R., and also from the judgment of LAWRENCE, L.J., first that that minute was taken as recording what happened and as meaning that neither the committee nor the full body had before them what we have called in this case an estimate, but what is referred to by LORD HANWORTH, M.R. ([1933] Ch. 833) as "a schedule H of dilapidations." After referring to the word "regard" in s. 17 (4) of the Act of 1930 (the forerunner of s. 9 (3) in the Act of 1936), LORD HANWORTH, M.R., said (*ibid.*):

> "That word 'regard' is intended to be a loose and indefinite term, and I think it enables the local authority to take into account not merely an accurate estimate made by a surveyor or an estate agent with a schedule of dilapidations, but to take into account what would probably be the cost

> of the outlay required, and to consider whether, after that outlay had been incurred, it would be possible to let the house and get a return for the total expenditure upon the premises. I am, therefore, of opinion that what has been done here is abundantly sufficient to justify the notices being served under s. 17, and not under s. 19, which is to apply where it is not possible to repair the house within the limits that I have specified."

A LAWRENCE, L.J., said (*ibid.*, 834) :

> " . . . the phrase that ' regard shall be had ' to the estimated cost and the estimated value of the property, does not imply that the council is bound to have a certificate from a surveyor and valuer before it can come to the requisite conclusion."

B To succeed on this point, I think that counsel for the agent has to satisfy us that, as a matter of necessary implication, one must imply into s. 9 (1) of the Act of 1936 a provision to the effect that the consideration of the detailed items of estimate is a condition precedent to the issue of a notice under that section. I find no words in the sub-section which would justify that, and, indeed, I think that the form of words used makes it impossible to imply what would be a C drastic provision and one which, I think, in fairness to local authorities, it would be quite wrong to imply unless the context made it absolutely necessary. In coming to that conclusion, I think that I am following the decision on the point argued in the *Cohen* case (1), although, as I have said, the argument was somewhat different.

The second point taken in the notice of appeal is that

D

> " . . . the learned judge was in error when he ascertained whether the said house could be rendered fit for human habitation at a reasonable expenditure by reference to its freehold value and that he should have done so by reference to its value to the appellant, that is to say, its leasehold value."

The words of s. 9 (3) are these :

E

> " . . . regard shall be had to the estimated cost of the works necessary to render it so fit and the value which it is estimated that the house will have when the works are completed."

I would have said that the words " value of the house " there point, *prima facie*, to an objective standard, though I agree that the word " value " is one which F has to be construed according to its context and in certain contexts may well be construed as meaning a value to a particular person, although that is not expressly so stated, but I do not myself think that it is possible to construe it in that way in this case. Counsel for the agent of the ground lessees submits that in a case where the ground lease has only two years to run the house may be of very little value to the ground lessee and it may be a hardship if he is G called on to spend £30, £40 or £50 on a cottage in which his interest is so slight. I can well see that. On the other hand, unless the Act has provided that his interest is to be considered, he will have to suffer the hardship which Parliament has imposed in such cases as that. It may well have been thought that in a case of that kind—at any rate, in the vast majority of cases—there would be another factor which, if one is considering fairness, it would be relevant to consider, H namely, that under nearly all leases the lessee has at the end of the lease to deliver up the house in good condition. We are dealing with a house which is thought to be worth repairing at the time in question. It would be unlikely that, under the terms of the lease, the lessee would not have to do repairs such as are being contemplated in this class of case, *viz.*, repairs necessary to make the house fit for human habitation. Therefore, in all cases where those considerations apply, it is not some new burden, such as would never otherwise fall on him, which is being put on the lessee, but a burden which in the normal case, if he did not do the repairs now, would fall on him later, in that either he would have to undertake the repairs before the conclusion of his lease or pay a sum in respect of his failure to do so.

What chiefly influences my mind in rejecting this second ground in the notice of appeal is that, in my opinion, if in this class of case it had been intended that the local authority, in so far as they have to consider it, and the courts, when they have to deal with the matter, should have regard to the value to the particular lessee and how much of his term is still to run and, possibly, the covenants in his lease, that would have been made plain on the face of s. 9 (3), whereas the sub-section merely uses the words I have quoted. I have come to the conclusion that the learned judge was right in taking, as he did, the freehold value, on the basis that these houses contained, as they did, tenants who had the right to claim the benefit of the Rent Restrictions Acts. I, therefore, think that on that point the learned judge was right.

There was then taken a third point, which arises in respect of three only of these houses. In the main the learned judge accepted with regard to the costs of these repairs the evidence of Mr. Maslin and Mr. Newton, who were called on behalf of the agent for the ground lessees. Mr. Maslin gave certain figures in regard to what, in his view, was the value to the two ground lessees respectively of the outstanding periods of their leases. He brought out the present value at £41 in respect of the Charlton Street houses, and at £22 10*s*. in respect of the Ayscough Street houses. He said that, on the basis of that being the value which has to be considered, he thought that £25 per house, as an overall figure for the houses, was the limit which it would have been reasonable to expend, and, in the face of that evidence, in so far as the figures fell below £25, they are not challenged in this court. In three cases, however, the judge has found as " reasonable," within s. 9 (3) of the Act, figures above £25, and in one case as much as £64. I do not think that what the learned judge said in regard to this point can be challenged in this court. Accepting Mr. Maslin's evidence, he put £25 as a reasonable figure, on the basis that the value of the house when the works were completed would be not more than £41, but, on the learned judge's view and on the view which I think is right, that is not the proper value of the house. The proper value on the freehold basis, with the rent restricted tenants, is £70 or £80, and, therefore, as I see it, there would have to be a substantial increase in Mr. Maslin's figure, having regard to the basis on which he put it forward. If you double the figure, you are in the neighbourhood of £50.

The learned judge put the matter in this way and, with respect, I think that this is right. Taking the case of the £64, he said :

> " It is true that after the expenditure on repairs a landlord could not obtain any higher rent than the lessees are receiving now, but, as I have pointed out, that rent will probably no longer be obtainable unless the repairs are executed. Is, then, the expenditure of even as much as £64 reasonable in order to secure the continuance of an annual return of £8 or £9 or rather more ? Looking at the position in that way, it seems to me impossible to say that such expenditure is not a reasonable proposition."

I think that the learned judge was entitled and, indeed, bound to consider what is really a most important matter in applying s. 9 (3), namely, the fact that, if these repairs were not carried out, the house might be demolished and disappear altogether as a rent producing asset. Counsel for the agent suggested that the learned judge had not considered the loss of interest on the £64 or the interest that would have to be paid in order to raise the money. I cannot accept that. I think that he did. He was considering the expenditure of £64. Obviously, if you are to expend £64, you have to borrow it, unless you already have it, or, if you already have it, you will lose what it might otherwise earn. In my view, the learned judge directed his mind to the proper matters, having regard to all those three items, and there are no grounds on which his decision can be challenged in this court. For these reasons, I think that the appeals should be dismissed.

BUCKNILL, L.J.: I agree.

DENNING, L.J.: I agree. In the county court it was suggested that
A the local authority were influenced by extraneous considerations in serving the notices. If that suggestion had been made good, the notices would, no doubt, be bad, but it was not made good. It was quite plain that the local authority were not influenced by extraneous considerations. Next it was said that the local authority had not considered matters which they ought to have considered, and that on that account the notices were bad. That is the main point which has
B been brought before us. It is said that they ought to have had before them estimates of the cost of the works and estimates of the value of the houses. That depends on the construction of the Act. In my opinion, once the local authority are satisfied that a house is in any respect unfit for human habitation, they must serve on the person having control of the house either a notice requiring him to repair it (a repairs notice) or a notice preliminary to a demolition order (a demo-
C lition notice). Of those two alternatives, they can only serve a demolition notice if they are also satisfied that the house is not worth the cost of the repairs. Unless they are so satisfied, they must serve a repairs notice. In determining which of the two notices they should serve, they must consider whether the repaired value of the house will justify the cost of the repairs, but they need not have precise estimates before them. Take, for instance, the houses in this case.
D In one of the houses all that was necessary was to remedy a broken water closet pan and seat; in another to repair the wash-house boiler and flue; in yet another to put in a new kitchen range because the other had become worn out. Those were plainly cases where a repairs notice, and not a demolition notice, should be served. It would be quite wrong to serve a demolition notice and pull down houses when work of such a comparatively small amount would make
E them fit. Cases might arise, of course, where it would be desirable to have figures showing the estimated cost of the work and the value of the house, but the local authority are the people who determine whether figures are necessary. The absence of figures does not mean that they did not do their duty. It seems to me that there is no evidence that they did not consider matters which they ought to have considered, and on that point the appeal fails. On the remaining
F points it seems to me plain that the value of the house to be considered is the freehold value. The question is whether the house is worth the cost of the repairs. Is it worth spending the money on it? The application of this test to the individual houses is a question of fact, with which we should not interfere. I agree that the appeals fail and should be dismissed.

Appeals dismissed with costs.

G Solicitors: *Godfrey Warr & Co.*, agents for *John Barkers*, Grimsby (for the agent of the lessees); *Hyde, Mahon & Pascall*, agents for *L. W. Heeler*, Town Clerk, Grimsby (for the corporation).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

PHILCO RADIO AND TELEVISION CORPORATION OF GREAT BRITAIN, LTD. *v.* J. SPURLING, LTD. AND OTHERS.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), November 8, 1949.]

Negligence—Dangerous article—Inflammable material—Delivery by defendants to plaintiffs by mistake—Explosion caused by cigarette of plaintiffs' employee —Novus actus interveniens—Liability of defendants.

Five packing cases containing dangerously inflammable celluloid film scrap were delivered in error by the defendants to the plaintiffs' premises. No warning of their dangerous contents was given, but the plaintiffs' foreman recognised the material as inflammable and dangerous when some of it was taken out of one of the cases. He warned the workmen in charge of the cases not to smoke near them, instructed them to replace the scrap and remove the cases to the yard, and arranged with the defendants to deliver the cases to their proper destination 150 yards away. Before the cases were moved a typist employed by the plaintiffs approached the scrap while holding a lighted cigarette, and it exploded causing serious damage.

HELD : it was the duty of the defendants not to deliver this inflammable material without warning in such circumstances that damage might result from some mischievous or foolish act of a person on the plaintiffs' premises ; the onus was on the defendants to prove that the damage was caused, not by their negligence, but by a *novus actus interveniens* ; in the absence of evidence that the typist deliberately set the scrap alight, they had not discharged that onus ; and the plaintiffs were entitled to succeed.

Per TUCKER, L.J. : Assuming that there was evidence that what the typist did was not merely accidental, she did not appreciate the nature of the substance which she was igniting and did not intend to do any damage, and her behaviour was not such a conscious act of volition as would relieve the defendants of liability for their negligence.

Dominion Natural Gas Co., Ltd. v. *Collins & Perkins* ([1909] A.C. 640), *applied.*

Decision of JONES, J. ([1949] 2 All E.R. 129), *affirmed.*

[AS TO EFFECTIVE CAUSE OF INJURY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 590-596, paras. 843-845 ; and FOR CASES, see DIGEST, Vol. 36, pp. 24-34, Nos. *118-205.*]

Cases referred to :

(1) *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins,* [1909] A.C. 640 ; 79 L.J.P.C. 13 ; 101 L.T. 359 ; 36 Digest 28, *142.*

(2) *Dixon* v. *Bell,* (1816), 5 M. & S. 198 ; 1 Stark. 287 ; 36 Digest 57, *354.*

(3) *Thomas* v. *Winchester,* (1852), 6 N.Y.R. 397.

(4) *Parry* v. *Smith,* (1879), 4 C.P.D. 325 ; 48 L.J.Q.B. 731 ; 41 L.T. 93 ; 43 J.P. 801 ; 36 Digest 57, *356.*

(5) *Weld-Blundell* v. *Stephens,* [1920] A.C. 956 ; 89 L.J.K.B. 705 ; 123 L.T. 593 ; 36 Digest 126, *837.*

(6) *Elkins* v. *M'Kean,* (1875), 79 Penn. Rep. 493.

(7) *Scott* v. *Shepherd,* (1773), 2 Wm. Bl. 892 ; 3 Wils. 403 ; 36 Digest 17, *78.*

(8) *Jones* v. *Boyce,* (1816), 1 Stark. 493 ; 36 Digest 17, *79.*

(9) *Clark* v. *Chambers,* (1878), 3 Q.B.D. 327 ; 47 L.J.Q.B. 427 ; 38 L.T. 454 ; 42 J.P. 438 ; 36 Digest 22, *103.*

(10) *The Sisters,* (1876), 1 P.D. 117 ; 45 L.J.P. 39 ; 34 L.T. 338 ; 41 Digest 769, *6233.*

(11) *Halestrap* v. *Gregory,* [1895] 1 Q.B. 561 ; 64 L.J.Q.B. 415 ; 72 L.T. 292 ; 2 Digest 253, *346.*

(12) *Scott's Trustees* v. *Moss,* (1889), 17 R. (Ct. of Sess.) 32 ; 27 Sc.L.R. 30 ; 36 Digest 123, *814* XIV.

(13) *R.* v. *Moore*, (1832), 3 B. & Ad. 184 ; 1 L.J.M.C. 30 ; 36 Digest 240, *787*.
(14) *Illidge* v. *Goodwin*, (1831), 5 C. & P. 190 ; 36 Digest 33, *188*.
(15) *Lynch* v. *Nurdin*, (1841), 1 Q.B. 29 ; Arn. & H. 158 ; 4 Per. & Dav. 672 ; 10 L.J.Q.B. 73 ; 5 J.P. 319 ; 36 Digest 24, *118*.
(16) *Haynes* v. *Harwood*, [1935] 1 K.B. 146 ; 104 L.J.K.B. 63 ; 152 L.T. 121 ; Digest Supp.
A (17) *Hadley* v. *Baxendale*, (1854), 9 Exch. 341 ; 23 L.J.Ex. 179 ; 23 L.T.O.S. 69 ; 8 Digest 138, *910*.

APPEAL by the defendants from a judgment of JONES, J., dated May 17, 1949, and reported [1949] 2 All E.R. 129, awarding damages to the plaintiffs for negligence.

A carter employed by the defendants by mistake delivered five packing cases
B to the premises of the plaintiffs who were wireless manufacturers. The cases contained highly inflammable celluloid film scrap, but no indication of the character of their contents was given. Two of the plaintiffs' employees started to unpack the cases when the plaintiffs' foreman, recognising the nature of the material, warned the men not to smoke, instructed them to put back the scrap taken out, and communicated with the defendants, asking them to have the
C cases removed. In the meantime, a Mrs. Brady, a typist in the plaintiffs' office, approached the cases with a lighted cigarette and an explosion occurred causing serious damage. The defendants admitted that they had been negligent in delivering the cases to the wrong address, but they alleged that the proximate cause of the accident was Mrs. Brady's act, which, they alleged, was deliberate, in applying a lighted cigarette to the material and that the chain of causation
D was broken by her conscious act. The Court of Appeal now dismissed the appeal.

Glynn-Jones, K.C., and *Ryder Richardson* for the plaintiffs.
Aiken Watson, K.C., and *Colin Duncan* for the defendants.

TUCKER, L.J. : This is an appeal from a judgment of JONES, J., in which he decided the issue of liability in favour of the plaintiffs, leaving the amount of
E damages to be assessed. [HIS LORDSHIP recited the facts, reviewed the evidence, and continued :] The learned judge said ([1949] 2 All E.R. 131) :

> " I am not in possession of full information as to exactly what happened here, but the inference I draw with regard to [Mrs. Brady] is that she had no intention of doing any damage. I cannot conceive that she should have
> F desired to injure the premises of her employers, and that in that sense she was unconscious rather than conscious of doing anything that was negligent. I cannot believe that she meant more than to perpetrate a joke. The conclusion I draw is that there cannot have been very much of this material outside the case when [Mrs. Brady] came along and that probably all she meant to do was to make a small and innocuous bonfire of some of the
> G material which she probably took to be ordinary packing. Taking that view of the facts and drawing those conclusions from them and from what evidence there is, I hold that this behaviour on her part was not such a conscious act of volition as to relieve the defendants from liability for their admitted negligence."

It is not in dispute that the defendants were negligent in delivering this
H highly inflammable material at the wrong address without any kind of warning or indication of its contents or its dangerous nature. The defendants say, however, that the damage which took place to the plaintiffs' premises was not a natural and probable result of their negligence, but that it was due to a *novus actus interveniens* on the part of the typist, namely, her act of conscious volition in intentionally setting light to this material. Counsel for the plaintiffs, on the other hand, says that the onus is on the defendants to escape liability for their negligence and to show that what occurred was due to an act of conscious volition on

the part of Mrs. Brady, and that they have failed to discharge that onus. Counsel says that if it was necessary, to discharge that onus, that Mrs. Brady's evidence should be given, it was for the defendants to call her, and not for the plaintiffs. Counsel further says that in any event what is proved here, taken at its worst against the plaintiffs does not amount to an act of conscious volition within the language used by LORD DUNEDIN in *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins* (1), which was referred to by JONES, J., in his judgment. The facts of A that case were these. The appellants had installed a gas apparatus and were supplying natural gas in certain machine shops under an agreement with a railway company. The appellants installed inside the blacksmith's shop of the railway company a regulator for the purpose of controlling the pressure of the natural gas, which regulator, it was contended, should have been placed outside the building, and a pipe should have been connected from the brass safety B valve attached to the regulator to the outside of the building, to permit the gas which might proceed from the safety valve to escape to the outside atmosphere. The jury found that that contention was made out, and that the appellants were guilty of negligence. It was, however, contended on behalf of the defendants that some of the workmen of the railway company had tampered with the safety valve, and that the escape which took place must have been due to improper C practices on the part of the railway company's servants, for which they were not responsible. LORD DUNEDIN, dealing with that matter, said ([1909] A.C. 645):

> "The machine itself was examined, and it was found that there was an accumulation of dirt which prevented the portcullis door closing tight. It was also proved that the railway company's servants had inserted a tap valve D with a controlling cock in the pipe just before it enters the regulator, *i.e.*, on the high-pressure side; also that some workers of the railway company, annoyed by the noise which it made, had put a punch on top of the safety valve and hammered it."

That is what the learned and noble Lord was referring to later, when (*ibid.*, 647), he used the expression "the tampering with the machines by the railway com- E pany's workmen." After having found that there was negligence by the appellants, LORD DUNEDIN, delivering the judgment of the Privy Council, said (*ibid.*, 646):

> "What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of F articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or instal such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had G intermeddled with the matter. A loaded gun will not go off unless someone pulls the trigger, a poison is innocuous unless someone takes it, gas will not explode unless it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (2), *Thomas* v. *Winchester* (3) and *Parry* v. *Smith* (4) are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious H act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

Counsel for the plaintiffs says that the learned lord is obviously contrasting a conscious act of volition with an intentional act of intermeddling. In each of the cases which he cited there was an intentional act of a third party which amounted to intermeddling, but in all those cases the acts were held to be of a nature which the defendants should or could have contemplated as reasonably likely to follow. Counsel says that one must attach to the words "a conscious act of another volition" some meaning other than the mere intentional doing of some act, and he argues that the key to the problem is to be found in the last sentence of the passage which I have read, where LORD DUNEDIN says: "For against such conscious act of volition no precaution can really avail." He quotes as examples the case of the man who, knowing that a gun is A loaded, deliberately fires it at somebody with the intention of killing him, or the man who, knowing that the substance in question is poisonous, deliberately administers it to somebody else. Against acts of that kind no precaution will avail. On the other hand, says counsel, an act which is careless and mischievous and done by a person without intending to produce the consequences which in fact follow, is not a *novus actus interveniens* within the meaning of the language B used by LORD DUNEDIN.

In this connection counsel for the plaintiffs also relies on a passage in the speech of LORD SUMNER in *Weld-Blundell* v. *Stephens* (5). LORD SUMNER said ([1920] A.C. 984):

> "Again, between the negligence of a defendant and the infliction of hurt or C loss on a plaintiff, the action of human beings may intervene in a great variety of ways, the action of children or other irresponsible creatures, of persons in a state of excusable ignorance acting without any intention to injure others (*Elkins* v. *M'Kean* (6)); of persons in a state of excusable alarm produced by the wrongful acts of the defendant (*Scott* v. *Shepherd* (7); *Jones* v. *Boyce* (8)); of persons acting in the exercise or the defence of their D rights and without intention to injure others (*Clark* v. *Chambers* (9); *The Sisters* (10); *Halestrap* v. *Gregory* (11)); of persons acting as the defendant meant them to act or acting as the defendant must have foreseen that they would act, in consequence of things done by him for his own purposes or in a state of indifference as to the result to others (*Scott's Trustees* v. *Moss* (12); *R.* v. *Moore* (13)) . . . Equally we may lay aside the cases where E dangerous things, or things capable of being dangerous if left exposed to the interference of others, have been treated as imposing special duties of care on those who are responsible for their being left where strangers can make them a source of danger to persons brought into contact with them. Such cases are *Illidge* v. *Goodwin* (14) and *Lynch* v. *Nurdin* (15)."

LORD SUMNER continues (*ibid.*, 986):

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> "In general (apart from special contracts and relations and the maxim *respondeat superior*), even though A. is in fault, he is not responsible for injury to C. which B., a stranger to him, deliberately chooses to do."

I think that that is probably the foundation for the use of the word "deliberately" in the admissions which were sought to be obtained from the plaintiffs, G and I think that "deliberately" there means the same thing as LORD DUNEDIN meant when he talked about a conscious act of volition.

That being the law, the question is how it is to be applied to the facts in the present case. I think that these questions of causation and of *novus actus interveniens* are always difficult, and this is certainly a case which is on the borderline. The conclusion which I have reached is that it was the duty of the defendants H not to deliver this dangerous, inflammable material without warning, in such circumstances that damage might result from some mischievous or foolish act of some person on the plaintiffs' premises. Those foolish or mischievous acts might be accidental or they might be intentional. It was not established that Mrs. Brady knew or appreciated the nature or qualities of this particular substance. That it would burn is, on the evidence, established. Wood shavings and paper will also burn, but, none the less, the consequences of their burning are very different from setting light to a high explosive or petrol or any substance of that kind. In my view, there was no evidence to show that this lady knew and appreciated the nature of this substance and the results which would almost inevitably follow from setting light to it. Therefore, although I will assume that there was sufficient evidence that what she did was not merely accidental, I think the learned judge, although some criticism can, perhaps, be directed to some of his language, came to the right conclusion, namely, that the behaviour on her part was not such a conscious act of volition as to relieve the defendants of the liability which arose from their admitted negligence. He was there seeking to apply the language of Lord Dunedin to the facts proved before him, and, applying the proper test, in my view he came to the right decision. For those reasons I think that this appeal fails.

SINGLETON, L.J. : It was conceded that the defendants were negligent, but the answer to the plaintiffs' claim was contained in the defence as follows :

> " Further or alternatively the said explosion and conflagration (if any, which is not admitted) were caused by the deliberate act of the said Brady, the servant or agent of the plaintiffs, in placing the glowing end of a cigarette against the said scrap."

That plea raises an issue which has been before the courts on many occasions. The case on which both learned counsel placed most reliance was *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins* (1). It becomes clear if one reads that authority that in such a case the onus is on the defendants to show that there was a new act intervening which relieves them from responsibility. It was held in the Privy Council ([1909] A.C. 640) :

> " that the initial negligence having been found against the appellants in respect of an easy and reasonable precaution which they were bound to have taken, they were liable unless they could show that the true cause of the accident was the act of a subsequent conscious volition, *e.g.*, the tampering with the machine by third parties."

In that case it was put forward by the appellants (the defendants) that the cause of the accident was that certain workmen had tampered with the machine. Lord Dunedin, in the judgment, said this ([1909] A.C. 647) :

> " That being so, have the defendants been able to show affirmatively that the true cause of the accident was the conscious act of another volition, *i.e.*, the tampering with the machines by the railway company's workmen."

I read the opinion of Lord Dunedin, and, in particular, that passage, as saying that, if there was proved to have been a conscious act of another volition, the tampering with the machines by the railway company's workmen, then the defendants would have been freed from responsibility if it was proved that that tampering was the cause of the accident. In the same way, in the present case, counsel for the defendants set out to show that the cause of the accident which gave rise to this claim was not negligence on the part of the defendants, but was the conscious act of Mrs. Brady in applying a lighted cigarette to material the nature of which she could at least see and which was, indeed, highly inflammable. It was for counsel for the defendants in those circumstances, to prove that case.

Having listened to the argument and looked at the authorities to which we have been referred, I should have said that, if it was shown that Mrs. Brady intentionally or deliberately and knowingly put her cigarette to this material, intending to make only a little fire, and this damage resulted from that act, there was a new cause intervening, and that the damage flowed not from any negligence on the part of the defendants, but from the act of Mrs. Brady. Counsel for the plaintiffs submitted that this was the sort of thing that anyone might do, and that the defendants ought to have contemplated it as likely to happen if they were negligent. He relied on two passages from the judgment of Greer, L.J., in *Haynes* v. *Harwood* (16). In the first passage ([1935] 1 K.B. 153) the learned lord justice said :

> “The next point involves a consideration of the maxim ‘*novus actus interveniens*,’ but before dealing with the authorities I wish to point out that it is not true to say that where a plaintiff has suffered damage occasioned by a combination of the wrongful act of a defendant and some further conscious act by an intervening person, that of itself prevents the court coming to a conclusion in the plaintiff’s favour if the accident was the natural and probable consequence of the wrongful act. That seems to me to be the necessary result of the decided cases which are accepted as authorities.”

In the second passage (*ibid.*, 156), GREER, L.J., said :

> “If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. The whole question is whether or not, to use the words of the leading case, *Hadley* v. *Baxendale* (17), the accident can be said to be ‘the natural and probable result’ of the breach of duty. If it is the very thing which ought to be anticipated by a man leaving his horses, or one of the things likely to arise as a consequence of his wrongful act, it is no defence ; it is only a step in the way of proving that the damage is the result of the wrongful act.”

I can appreciate that people supplying dangerous goods ought to contemplate that others may be careless, but I fail to see that defendants in a case such as this ought to have in mind that a grown woman should go into the place where these things were, smoking, and then should deliberately put a lighted cigarette to material of this kind. I do not think that that is something which anyone ought to anticipate as being likely to happen. Therefore, if I were satisfied that there was proof of an intentional setting fire to this material by Mrs. Brady I should be of opinion that the defendants’ appeal ought to succeed.

A difficulty which arises is to ascertain precisely what the learned judge has found. I refer to two paragraphs towards the end of his judgment. This is the first ([1949] 2 All E.R. 131) :

> “ . . . the inference I draw with regard to [Mrs. Brady] is that she had no intention of doing any damage. I cannot conceive that she should have desired to injure the premises of her employers, and that in that sense she was unconscious rather than conscious of doing anything that was negligent. I cannot believe that she meant more than to perpetrate a joke.”

Whether the learned judge means “ to perpetrate a joke ” when she said something or whether he means more than that, I am not sure, but from that passage it seems to me that he was not finding that she was doing anything in the nature of a conscious act, because he finds that she had no intention of doing any damage. Later the learned judge says (*ibid.*) :

> “ The conclusion I draw is that there cannot have been very much of this material outside the case when [Mrs. Brady] came along and that probably all she meant to do was to make a small and innocuous bonfire of some of the material which she probably took to be ordinary packing. Taking that view of the facts and drawing those conclusions from them and from what evidence there is, I hold that this behaviour on her part was not such a conscious act of volition as to relieve the defendants from liability from their admitted negligence.”

When the learned judge said that probably all she meant to do was to make a small innocuous bonfire, I am not sure that that is a finding that she did so intentionally. It may be that she was doing something like that, the learned judge is saying, and no more than that, but, if he has found that there was an intentional act on her part in the making of a bonfire, I am not sure that there was any evidence on which he could so find. The onus is on the defendants. They must show that Mrs. Brady intentionally caused a fire. As the evidence stands I cannot find that that is proved. I agree that the appeal must be dismissed.

JENKINS, L.J. : I also agree that this appeal fails. The question, to adapt the passage ([1935] 1 K.B. 153) in the judgment of GREER, L.J., in *Haynes* v. *Harwood* (16), is whether, notwithstanding that the immediate cause of the conflagration was some act of Mrs. Brady, nevertheless the conflagration was, notwithstanding that intervening act, the natural and probable consequence of the defendants' wrongful act in negligently misdelivering five cases of this inflammable scrap to the plaintiffs' premises. That their act in so doing was wrongful is not in dispute, and that they must be responsible for the natural and probable consequences of their negligence is also admitted. The question is how far, in the circumstances of the case, the chain of causation can fairly be said to carry their liability.

A negligent carrier who does an act of this sort, that is to say, who delivers to a factory crates of inflammable material which are not consigned to that factory and not expected there and about which the persons in the factory know nothing must be taken to assume the possibility of someone setting the material alight by mistake. There might be two kinds of mistake. First, it might be unintentionally ignited by cigarette-ends, matches, or something of that sort thrown down by somebody not knowing the inflammable nature of the material. Secondly, it might be intentionally ignited by somebody who was doing, as far as he knew, a reasonable and proper thing, having selected for the purpose a place appropriate for the burning of material not of an exceptionally inflammable character. Those possibilities, I think, the negligent carrier must be assumed to foresee or to be able to foresee. This not being a case in which the inflammable material was deposited in a place frequented by children or pyromaniacs, I do not think that the possibility of some mischievous person deliberately setting light to the material for the purpose of seeing what kind of a fire it would make can be regarded as a reasonable and probable consequence of what was done. Therefore, if I were satisfied that it was established on the evidence that what Mrs. Brady did here was intentionally to set fire to the scrap to see what sort of blaze it would make, I should not be disposed to hold the defendants responsible for the consequent conflagration.

It has been said that the devil himself knoweth not what is in the mind of man, and it is to be noted that, in the passage ([1909] A.C. 646) from the judgment of the Privy Council in *Dominion Natural Gas Co., Ltd.* v. *Collins and Perkins* (1) referred to by the learned judge, LORD DUNEDIN, after saying that "if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable," goes on to say, "for against such conscious act of volition no precaution can really avail." If one is to assume in a case of this kind the possibility of somebody deliberately indulging in the making of bonfires inside a factory, that is a type of conduct against which no precaution can really avail. The packages might be labelled, in letters a foot high, "Inflammable. Danger. Keep away from lights," but that might make the prospective pyrotechnic display even more attractive to anyone who wanted to see what kind of a flare could be produced. Therefore, if I was satisfied that Mrs. Brady had deliberately set the scrap alight out of mischief, I should be disposed to hold the defendants absolved, without going meticulously into the precise state of her knowledge as to the inflammability of celluloid. On that view of the facts Mrs. Brady meant to produce a conflagration and, if she meant to produce one, for my part it seems irrelevant that the conflagration she did produce may have exceeded her wildest expectations. On the evidence, however, I am not satisfied that it is made out that she did intentionally set fire to the scrap. There is really no evidence except her observation: "What a lovely bonfire that would make!" or words to that effect. Nobody else there was able to see what happened. The learned judge, making bricks without straw, drew certain conclusions, which have already been read, about the state of Mrs. Brady's mind and her intentions in the matter, and he was able to infer that probably all she meant to do was to make a small and innocuous bonfire of some of the material, which she probably took as ordinary packing. That may be right or wrong, but it is not, as far as I can see, based on anything in the evidence. It does suggest that the learned judge was of opinion that Mrs. A Brady intended to make some sort of a bonfire, although not a very ambitious one. If there was evidence to support that view, I should be disposed to find in favour of the defendants, but, I cannot find that the evidence justifies the learned judge's conclusion about Mrs. Brady's intentions. That being so, it follows that his decision in favour of the plaintiffs was right. For these reasons I agree that the appeal should be dismissed.

B *Appeal dismissed with costs.*

Solicitors : *Gardiner & Co.* (for the plaintiffs) ; *Stafford Clark & Co.* (for the defendants).

[*Reported by* C. St.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

C

INLAND REVENUE COMMISSIONERS *v.* COCK, RUSSELL & CO., LTD.

D [KING'S BENCH DIVISION (Croom-Johnson, J.), November 3, 1949.]

Excess Profits Tax—Profits of trade—Stock in trade—Valuation—Cost or market value—Need to value all items on same basis.

A company carrying on the business of wine and spirit merchants purchased certain pipes of port as part of their trading stock. At the end E of their accounting year the pipes had fallen in market value to a figure below their cost. In valuing their trading stock for the purpose of computing their profits for the year for assessment to excess profits tax, the company brought these pipes in at the market value, but valued the rest of their stock at cost which was less than the market value.

HELD : profits for income tax purposes (and, consequently, for excess F profits tax : see Finance (No. 2) Act, 1939, s. 14 (1) and sched. VII) were to be computed as a business man employing sound principles of commercial accountancy would compute them, subject only to any statutory modifications of such principles ; the evidence had shown that it was in accordance with those principles to value each item of stock at cost or market price, whichever was the lower ; no statutory modification of that G practice existed ; and, therefore, the method of valuation adopted by the company was right.

Dicta of LORD CLYDE (Lord President) and LORD SANDS in *Whimster & Co.* v. *Inland Revenue Comrs.* (1926) (12 Tax Cas. 823, 826, 827) and *dictum of* LORD SANDS in *Edward Collins & Sons, Ltd.* v. *Inland Revenue Comrs.* (1924) (12 Tax Cas. 784), *applied.*

H [AS TO COMPUTATION OF PROFIT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 117-130, paras. 221-244 ; and FOR CASES, see DIGEST Supp.]

Cases referred to :

(1) *Whimster & Co.* v. *Inland Revenue Comrs.*, 1926 S.C. 20 ; 12 Tax Cas. 813 ; Digest Supp.

(2) *Collins (Edward) & Sons, Ltd.* v. *Inland Revenue Comrs.*, 1925 S.C. 151; 12 Tax Cas. 773 ; Digest Supp.

(3) *Young (J.H.) & Co.* v. *Inland Revenue Comrs.*, 1926 S.C. 827 ; 12 Tax Cas. 827 ; Digest Supp.

(4) *Absalom* v. *Talbot*, [1944] 1 All E.R. 642 ; [1944] A.C. 204 ; 113 L.J.Ch. 369 ; 171 L.T. 53 ; 2nd Digest Supp.

CASE STATED by the General Commissioners of Income Tax for the City of London.

The commissioners had found as a fact that the company had adopted the A
correct basis of valuation of trading stock, and CROOM-JOHNSON, J., in dismissing the Crown's appeal, found no reason to disturb the commissioners' finding.

Grant, K.C., and *R. P. Hills* for the Crown.
Donovan, K.C., and *Coen* for the company.

CROOM-JOHNSON, J. : This case raises a short, but important, point B
relating to the assessment of the profits of a company for excess profits tax. By s. 14 (1) of the Finance (No. 2) Act, 1939, profits for the purposes of excess profits tax are to be computed on income tax principles, and r. 3 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, has to be borne in mind.

Early in 1945 the company bought five pipes of port at £810 per pipe in bond. C
When the company came to make up its accounts for the year ended Dec. 31, 1945, it was found that three of the five pipes had been sold, and the remaining two pipes had been transferred to London and were kept in bond there. Being, as I assume, in bond to the order of the company, they became a part of the company's stock in trade. In October and November, 1945, and in January, 1946, the price of port began to fall. There were no recorded sales in December, 1945, and, D
therefore, nothing by which the market could be tested. For the purpose of its profit and loss account for the accounting year ended Dec. 31, 1945, the company valued the two pipes of port in hand at their market value as at Dec. 31, 1945. The rest of the company's stock in trade was valued for the purposes of the account at cost which was very much less than the market value of it on Dec. 31, 1945. The Inland Revenue Commissioners took the point that the company E
were not entitled to value part of their stock in trade by one method, namely, by reference to the cost, and another part of it by another method, namely, by reference to the value, but that they must be consistent and apply the same measuring rod to all their stock in trade and were not entitled to go through the stock in trade item by item and look to see what in truth was the position. Accordingly, an assessment to excess profits tax was made on the company on F
the basis that the two pipes of port which had been affected by a rapidly and continuously falling market should be put into the accounts at cost. There was an appeal against that assessment, and the only point taken was that which I have mentioned—that the profit must be ascertained for income tax purposes on cost price all round, the fall in value of this particular stock being, not a realised actual loss, but only an anticipated loss. The General Commissioners, G
having had a great deal of professional evidence about the matter, accepted the evidence and came to the conclusion that the method of valuation which had been adopted by the company was in accordance with the practice of the trade, and that the company was justified in valuing each item of stock at the cost or market value, whichever was the lower, and they allowed the appeal. On those facts this Case has been stated, and the same points have been argued before me. H

It is admitted that, unless it can be established that the General Commissioners have applied some wrong principle in reaching their conclusion, it was a conclusion of fact, and that this appeal would fail. I have listened to a careful argument to see whether it is established that there is anything in the Income Tax Acts or the rules which disentitles the commissioners to find as they did. There is nothing relevant to this topic in the rules which govern assessments under sched. D, or in the sections of the Act itself. There are no decided authorities which are precisely in point. Counsel for the Crown has admitted that the principle which is contended for by the company has hitherto been applied as a matter of practice in assessing profits and gains, but he says that the time has come when the Inland Revenue Commissioners must ascertain what is the strict legal position, and if that establishes that the practice is wrong, the practice must go.

A Has the Crown succeeded in establishing that the principle contended for by the company is wrong, it being established that the principle is not merely sound and right from the point of view of commercial accountancy, but that it is the principle which is used in commercial circles ? In seeking to establish that the practice of adopting this principle is wrong after so many years, counsel for the Crown have taken on themselves a heavy burden. It has long been recognised B that the right method of assessing profits and gains is to take into account the value of the stock in trade at the beginning and end of the accounting period, and that the ordinary principles of commercial accounting should be applied so long as they do not conflict with any express provision of the relevant statutes. In *Whimster & Co.* v. *Inland Revenue Comrs.* (1), the LORD PRESIDENT (Clyde) says (12 Tax Cas. 823) :

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> " For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock in trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower ; although there is nothing about this in the taxing statutes."

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In the same case, LORD SANDS says (*ibid.*, 826) :

> " Where a trader sits down to ascertain from his books his profits or losses for the year, it is not enough that he should set on one side the money he has paid out, other than capital outlay, and on the other the money he has received in respect of the year's business plus the price he paid for commodities now in his possession." E

Later LORD SANDS said (*ibid.*, 827) :

> " Though the losses are not realised in the year, they are losses incurred by the conduct of the business during the year, in respect that it was during the year and in the conduct of the business that the contracts are entered F into. The consideration of how it would be prudent for a trader to act does not solve the question here presented to us as one of revenue law. Under this law the profits are the profits realised in the course of the year. What seems an exception is recognised where a trader purchased and still holds goods or stocks which have fallen in value. No loss has been realised. Loss may not occur. Nevertheless, at the close of the year he is permitted to G treat these goods or stocks as of their market value. This exception to the general rule has never, however, been extended to the case of probable or indeed apparently inevitable loss to be incurred in the execution of future contracts entered into during the year in question, and the authorities are against it."

That was a case dealing with a ship.

H In *Collins (Edward) & Sons, Ltd.* v. *Inland Revenue Comrs.* (2), there are other observations on the subject by LORD SANDS. This case is an authority for the proposition that an anticipated loss cannot be brought into computation for the purpose of finding out the profits and gains in a particular year, but the court there was dealing, not with stock in trade, but with contracts for the supply of future goods which had not been delivered, which were not in the possession of the taxpayer, and which might or might not have produced a loss if and when they were delivered under the contracts for future delivery, although the goods in question had been appropriated to the particular contract by the persons who were going to supply them. The principle that the court applied in that case is intelligible and concluded, and I must follow it. LORD SANDS, in his judgment, said (12 Tax Cas. 784) :

> " It is common ground in this case that if the goods here in question had been taken into stock and had, at the end of the accounting period, fallen in value, allowance for this loss would have been made in estimating the profits of the year, although the loss was not a realised one in money, and its ultimate amount might be uncertain. The distinction may not be very clear between such a case and the present one where the merchant came under obligation to take delivery of goods which have fallen in value below the price which he is bound to pay for them. But, be that as it may, a distinction is well recognised and no deduction is allowed in ascertaining the profits of the year in respect of unprofitable contracts which have been entered into during the tax year but have not been executed by way of payment or receipt of goods or otherwise during this year."

It seems to me that those two cases, and a third case, *J. H. Young & Co.* v. *Inland Revenue Comrs.* (3), furnish no answer to the particular point which falls for determination here, namely, has the same principle to be applied to all the stock in trade in finding out its value, or can the persons who are going to be assessed estimate the value item by item to find out what the result may be ? During the argument I indicated several illustrations of unjust results which might follow from applying the general flat rate method for which the Crown contends. There is no authority which has been called to my attention which indicates that there is any legal principle which is applicable to the present case other than the general principle regarding the application of ordinary commercial principles. In *Absalom* v. *Talbot* (4), LORD PORTER said ([1944] 1 All E.R. 650) :

> " What has to be ascertained are the profits and gains of the business, or, as the wording originally stood, the balance of profits and gains—a difference in language which does not affect the meaning of the provision. In order to ascertain that balance one has to determine what sums are to be credited and what debited in the annual accounts. No directions are given in the Income Tax Acts as to how those profits are to be ascertained and in default of direction they must, I think, be arrived at on ordinary commercial principles, subject to such provisions of the Income Tax Acts as require a departure from such ordinary principles."

In these circumstances, it is impossible for me to say that the General Commissioners have failed to have regard to any principle of law which is applicable or that they have misdirected themselves. On the contrary, they appear to have directed themselves accurately and properly. They have accepted the evidence which was before them which was all one way. Profits for income tax purposes are to be computed as a business man, employing sound principles of commercial accountancy, would compute them, subject only to any statutory modification of such principles. I cannot imagine anything which is more clearly a question of fact than what is the value of stock in trade at a particular time and I can see nothing to indicate that the General Commissioners have gone wrong in deciding this matter. There is no justification for a departure now from what admittedly has been the long continued practice of the Inland Revenue Commissioners and their officials. The result is that this appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Solicitor for Inland Revenue* (for the Crown) ; *Gouldens* (for the company).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Re GILLETT'S WILL TRUSTS.
BARCLAYS BANK, LTD. *v.* GILLETT.

[CHANCERY DIVISION (Roxburgh, J.), October 21, 26, November 4, 1949.]

Will—Future defeasible gift—Inclusion of intermediate income.
Will—Legacy—Payment—Fund for payment—Undisposed of property—No implied intention to exclude.

A testator, who died on Dec. 24, 1942, by his will, after bequeathing numerous pecuniary legacies, gave all his residuary real estate to his wife for her life and directed that thereafter the trustees were to sell the same and that the proceeds should form part of his residuary trust funds. The testator gave all his residuary personal estate to his trustees on trust to sell the same and after paying the funeral and testamentary expenses, debts, and duties to invest the balance of the proceeds of the said sale (called his "residuary trust funds") and stand possessed thereof and the income arising therefrom on trust to raise and pay the following annuities as from the date of his death : (i) to his wife, an annuity of £3,000 during her life ; (ii) to his sister E., an annuity of £300 during her life ; (iii) to his sister M., an annuity of £50 during her life ; (iv) to his sister M.G., an annuity of £300 during her life ; (v) to his sister S., an annuity of £300 to be paid to her, if living, until the death of the survivor of the above-named four annuitants, and on the death of such survivor he directed his trustees to purchase for S. an annuity of £300 during the remainder of her life. Power was given to the trustees to utilise and employ capital or income or both for the purpose of paying the said annuities. The will continued : "And as to any balance remaining of my residuary trust funds after the provision and payment of all the aforesaid annuities my trustees shall stand possessed thereof In trust for or all or such one more . . . of my brothers sister nephews nieces great nephews and great nieces" as his wife should by deed or will appoint. In default of and subject to such appointment, the testator directed that the said balance should be held in trust on the death of the survivor of the first named four annuitants, subject to the provision for S.'s annuity in certain shares for various named persons. The testator made no express disposition of income of the residuary trust funds not required to answer the annuities until the death of the survivor of the four first-named annuitants. On June 17, 1947, the testator's widow died without having exercised her power of appointment. Two of the said annuitants were still living at the date of the issue of the summons, and a large fund of surplus income had arisen.

HELD : (i) the rule that a contingent gift carries with it the gift of the intermediate income could not be extended in order that the deferred defeasible gift of capital on the death of the last of the four first-named annuitants to die might be construed as including the surplus income, and the said surplus income was undisposed of, and must devolve as on the testator's intestacy.

Dictum of JENKINS, J., in *Re Oliver* ([1947] 2 All E.R. 166), *applied.*

Dictum of KAY, J., in *Re Lindo* (1888) (59 L.T. 463), *not applied.*

(ii) as there was no express intention to the contrary and as, especially since it was clear that the testator did not intend to leave property undisposed of, no such contrary intention could be implied, the legacies ought primarily to be paid out of the undisposed of property.

[AS TO DISTRIBUTION OF THE RESIDUE AND INCOME THEREFROM, see HALSBURY, Hailsham Edn., Vol. 14, pp. 366-375, paras. 685-703 ; and FOR CASES, see DIGEST, Vol. 23, pp. 411, 412, Nos. *4813-4817*, pp. 457-459, Nos. *5306-5326*.]

Cases referred to :

(1) *Re Oliver*, [1947] 2 All E.R. 162 ; [1947] L.J.R. 1400 ; 177 L.T. 308 ; 2nd Digest Supp.

(2) *Weatherall* v. *Thornburgh*, (1878), 8 Ch.D. 261 ; 47 L.J.Ch. 658 ; 39 L.T. 9 ; 37 Digest 146, *724*.

(3) *Re Lindo*, (1888), 59 L.T. 462 ; 44 Digest 757, *6160*.

(4) *Bective* v. *Hodgson*, (1864), 10 H.L.Cas. 656 ; 3 New Rep. 654 ; 33 L.J.Ch. 601 ; 10 L.T. 202 ; 44 Digest 741, *5982*.

(5) *Re Blake*, [1938] 2 All E.R. 362 ; 107 L.J.Ch. 173 ; *sub nom. Berry* v. *Geen*, [1938] A.C. 575 ; 159 L.T. 122 ; Digest Supp.

ADJOURNED SUMMONS to determine, *inter alia*, in what manner and for whose benefit surplus income arising from the residuary trust funds of Joseph Ashby Gillett, deceased, should be applied ; and, if the surplus income were undisposed of by the will of the testator, whether it ought to be applied in or towards discharge of the pecuniary legacies bequeathed by the said will. ROXBURGH, J., held that the surplus income was undisposed of by the will, and that it ought to be applied in payment of the legacies if and so far as it was sufficient for the purpose. The relevant part of the will is set out fully in the judgment.

Droop for the plaintiffs.

Wilfrid Hunt, *Rawlence* and *Lindner*, for the first, second and third defendants respectively, all of whom were interested under the will.

Rink for the fourth and fifth defendants, interested under any intestacy.

Cur. adv. vult.

Nov. 4. **ROXBURGH, J.,** read the following judgment. The will of Joseph Ashby Gillett, who died on Dec. 24, 1942, contained the following dispositions :

> " I give and devise to my wife Sarah Beatrice Gillett all the remainder of my real estate for her life she keeping the same properly insured against loss or damage by fire and after her death I give and devise the same to my trustees upon trust to sell call in and convert the same into money and the net proceeds of sale shall fall into and form part of my residuary trust funds. And I declare that my said wife shall at any time after my death have the option of purchasing all or any part of my real estate referred to in the last preceding clause hereof from my trustees at the same value as the property was valued for purposes of probate at the date of my death. I give devise and bequeath unto my said trustees all the remainder of my personal estate Upon trust to sell call in and convert into money the same or such part thereof as does not consist of money and out of the proceeds thereof and out of my ready money to pay my funeral and testamentary expenses and debts and all the duties due to the government and the expenses of proving this my will and invest the balance of the said monies (hereinafter called ' my residuary trust funds ') with power to vary such investments as are hereinafter authorised by me and to stand possessed thereof and the income arising therefrom Upon trust as follows :—To raise and pay the following annuities as from the date of my death, namely :—To my wife the said Sarah Beatrice Gillett an annuity of £3,000 during her life. To my sister Elizabeth Rachel Gillett an annuity of £300 during her life. To my sister Mary Catherine Gillett an annuity of £50 during her life. To my sister Margaret Gillett an annuity of £300 during her life. I give to my sister Sarah Mabel Warner an annuity of £300 to be paid to her, if living, until the death of the survivor of the above-named four annuitants and on the death of such survivor I direct my trustees to purchase for the said Sarah Mabel Warner if living an annuity of £300 during the remainder of her life. And I declare that in order to meet the said annuities my trustees shall in their absolute and uncontrolled discretion have power to utilise and employ capital or income or both for the purpose of paying

> the said annuities or any of them or for purchasing the said annuity for the said Sarah Mabel Warner as aforesaid. And as to any balance remaining of my residuary trust funds after the provision and payment of all the aforesaid annuities my trustees shall stand possessed thereof In trust for all or such one or more exclusively of the others or other of my brothers sister nephews nieces great nephews and great nieces at such time and if more than one in such shares and with such gifts over and such provisions for maintenance advancement and benefit as my wife shall by deed revocable or irrevocable or by will or codicil from time to time or at any time appoint and in default of and subject to any such appointment In trust on the the decease of the survivor of the above first named four annuitants and the provision of the annuity for the said Sarah Mabel Warner as follows :—As to one equal sixth part thereof for my brother Edward Gillett absolutely but if he shall not then be living for his children in equal shares absolutely and if there shall be only one child the whole to be in trust for such one child. As to one other equal sixth part thereof for my sister Richenda Gillett for her own use absolutely but if she shall not then be living for her children in equal shares absolutely and if there shall be only one child the whole to be in trust for such one child. As to one equal twelfth part thereof In trust for my brother Henry Tregelles Gillett for his own use absolutely but if he shall not then be living for his children in equal shares and if there shall be only one child the whole to be in trust for such one child. As to one other equal twelfth share thereof In trust for my nephew John Bernard Gillett and Cora Gillett or the survivor of them but if they neither shall be then living In trust for their adopted child David G. Gillett for his own use absolutely And as to the remaining one equal half part thereof In trust for the following in equal shares, namely :—Francis Gillett, Joseph Adlington Gillett, Gertrude Margaret Dobrashian, Theodore Henry Dobrashian, Agnes Grace Corder, Richenda Winifred Minchin, James Cooper Gillett, Agnes Wolff, Esther Curtis, Roger Gillett, Arnold Gillett, Daphne Gillett and Mario Dobrashian for their own respective uses and benefits absolutely. But I declare that if any of them shall not then be living and shall leave a husband or wife then such husband or wife shall take such share which his wife or her husband would have taken if living, but if such husband or wife is also dead then his or her children shall take his or her share equally between them and if there shall be only one child the whole shall be paid to such one child."

The testator made no express disposition of income not required to answer the annuities until the death of the survivor of the four named annuitants beyond giving to his widow a life interest in his residuary real estate. She died on June 17, 1947, without exercising her power of appointment. Two of the four named annuitants are still living. I am asked to determine the destination of a large fund of surplus income which has arisen and will arise between the death of the widow and the death of the survivor of the four named annuitants. I can quickly dispose of two of the claimants.

The first defendant, Charles William Gillett, who is an object of the power of appointment, by his counsel contended that the trusts declared in default of appointment do not wholly exhaust the property subject to the power, and that, accordingly, I ought to imply a gift in favour of the objects of the power of so much of the property as is not expressly disposed of in default of appointment. This I decline to do in the absence of any authority for so doing. The second defendant, Joseph Adlington Gillett, who would be entitled to a share of residue if the survivor of the four named annuitants were now dead, asks for immediate payment to himself, though whatever gift is made in his favour is deferred and defeasible. To this I cannot accede.

The real question is whether the income in question ought to be accumulated until the expiration of 21 years from the testator's death or until the survivor of the four named annuitants dies (whichever event first happens) for the benefit of those who become entitled to receive the residuary trust fund under the deferred defeasible vested gift, or whether it ought to be paid as it becomes available to the persons entitled on an intestacy. In *Re Oliver* (1), JENKINS, J., said ([1947] 2 All E.R. 166) :

> " The question, in substance, is whether the accumulations made during the period of 21 years are undisposed of by the will, or whether they pass under cl. 7 so as to become divisible between the settled shares of the two daughters. I think it is right to begin one's consideration of that question by remembering what I think is well settled, namely, that a gift expressly limited to take effect on a future date does not carry the intermediate income, and the gift in cl. 7 is a vested gift limited to take effect at a future date, as opposed to an immediate gift on a contingent event. If authority is needed for the proposition that a gift of that character does not carry the intermediate income, it is to be found in the authorities cited to me, the first of which was *Weatherall* v. *Thornburgh* (2)."

Counsel for the third defendant submits (i) that that pronouncement is against the weight of authority ; (ii) alternatively, that it is to be confined to an indefeasible future interest, and should not extend to a defeasible future interest, which ought to be treated as belonging to the same category as a contingent interest.

It is true that the industry of counsel, which has been very considerable, has not disclosed any prior statement in terms of the proposition which JENKINS, J., treats as settled. JARMAN ON WILLS, 7th ed., p. 1006, indeed, states a contrary proposition without qualification. He says :

> " A residuary bequest which is deferred or contingent in its terms carries the income which accrues before it vests in possession."

Of the cases referred to by JARMAN, the only one which appears to relate to a deferred or future gift is *Re Lindo* (3). That case, however, did relate to such a gift, though it was also contingent, and KAY, J., said (59 L.T. 463) : " a future gift of residue carries with it previous income not expressly disposed of." *Re Lindo* (3) was not cited to JENKINS, J. I must, therefore, examine the position anew.

Counsel for the third defendant naturally enough lays great emphasis on a well-known passage in the speech of LORD WESTBURY, L.C., in *Bective* v. *Hodgson* (4). He said (10 H.L. Cas. 665) :

> " Consequently, if by a will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must, during the period which the law allows for accumulation, be accumulated and added to the principal."

If, says counsel, that is the true principle, why should it apply to a contingent gift but not to a deferred gift ? I should find this question difficult to answer but for the subsequent course of authority. In many reported cases when (either by the operation of statute or under the terms of the will itself) a trust for accumulation has stopped at the end of 21 years and before a deferred gift was timed to take effect an intestacy as to intermediate income has resulted. The two most important of them [*Weatherall* v. *Thornburgh* (2) and *Re Blake* (5)] are, in fact, cited by JENKINS, J., and form the basis of his pronouncement. The testator left a gap, and yet intermediate income was not added to the deferred residuary gift. Accordingly, the principle laid down in *Bective* v. *Hodgson* (4) was not applicable to them. After carefully studying the speech of LORD MAUGHAM, L.C., in *Re Blake* (5), I am convinced that I ought to accept the proposition laid down by JENKINS, J., even if by so doing I refuse to follow KAY, J., and I will give my reasons for this conviction.

It may be straining language and logic to treat a contingent gift as an immediate gift to take effect only on a certain event, and this is not the way in which the rule is stated in *Bective* v. *Hodgson* (4). However this may be, it would be impossible (in the absence of a special context) to construe a gift timed to A take effect on the happening of an event which must happen sooner or later as a gift of anything before that time, because such a construction is excluded by necessary implication, and, accordingly, a deferred or future gift could not carry intermediate income unless there were a rule of law that intermediate income not otherwise disposed of passed with the principal as accessory thereto. *Re Blake* (5) shows that no such rule is applicable to future or deferred gifts which are B indefeasible. Counsel for the third defendant, however, points out that no case cited to me deals with defeasible future gifts, and he contends that they are so similar to contingent interests that I ought to classify them with contingent interests and not with future interests. It is to be observed, however, that there are important differences between them. A contingent gift fails if the contingency does not happen ; a defeasible gift becomes absolute if the condition C of defeasance does not happen. I cannot see on what principle of logic or construction the introduction of a clause of defeasance could make a gift carry intermediate income which otherwise would not do so. Nor am I quite sure why the rule of law applicable to contingent gifts was deemed to be inapplicable to future indefeasible gifts. In these circumstances I feel unable to extend into this new field of defeasible future gifts a rule of law which, though applicable D to contingent gifts, is not applicable to indefeasible future gifts. It is, indeed, strange to find a new field in this area of legal territory. The Law of Property Act, 1925, s. 175, clearly does not cover this case. This omission is, in my judgment, not inadvertent but intentional. Undoubtedly, words may be found in a will which would be apt to attach intermediate income to a future gift whether defeasible or indefeasible, and counsel for the third defendant submitted that E apt words are to be found in this case. The gift is of any balance remaining of the residuary trust fund after providing for annuities out of capital or income or both, and at one time I was inclined to hold that such a gift extended to the balance of a mixed fund of capital and past income not required to answer the annuities, but counsel for the fourth and fifth defendants has convinced me that, as the residuary trust fund is expressly defined in such a manner as to exclude F income, I must construe the balance of that fund as meaning so much of the capital thereof as has not been required to answer the annuities. Such a construction cannot aid the third defendant. Accordingly, in my judgment, there is an intestacy as to the income in question.

[There followed argument on the second question raised by the summons.]

ROXBURGH, J. : The point which I now have to decide is whether the G legacies bequeathed by the will ought to fall on the income to which the judgment which I have just given relates, in the first instance, if and in so far as it is sufficient for the purpose. Counsel for the fourth and fifth defendants submits that they should not. He concedes, I think, that they must unless I can find a contrary intention in the will. He concedes, and, indeed, it is obvious, that there is no express contrary intention in the will, but he submits that I ought H to imply a contrary intention. His first submission is that the fact that the testator has disposed of the whole, or probably the whole, income of the residue for an undefined period shows that he did not want the legacies to be paid out of income other than possibly any surplus income available in the first year from his death. His alternative submission is that where a testator has made express dispositions which make it legally impossible to retain a fund out of the undisposed of interest, he must be taken to be varying the order of the application of assets set out in the Administration of Estates Act, 1925, sched. I, pt. II. I must confess that it seems to me that the answer to both these submissions is the same. If anything is clear, I think it is that the testator was not consciously leaving property undisposed of. In those circumstances, I think it is difficult to imply from anything that he has said what he would have said if he had been aware that some property was undisposed of. The legacies have, in fact, been paid, and the necessary adjustments will have to be made, but, in my judgment, the legacies ought to be paid out of the property undisposed of, if and so far as it is sufficient for the purpose.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the whole fund in due course of administration.

Solicitors : *Cunliffe & Airy*, agents for *Alpin, Hunt & Co.*, Banbury (for all parties).

[*Reported by* H. McL. Morrison, Esq., *Barrister-at-Law.*]

Re HART'S WILL TRUSTS. PUBLIC TRUSTEE *v.* BARCLAYS BANK, LTD. AND OTHERS.

[Chancery Division (Danckwerts, J.), November 2, 1949.]

Perpetuities—Limitation by reference to "the statutes for the distribution of" personal estate of intestates—Administration of Estates Act, 1925 (*c.* 23), *s.* 47 (1).

By his will, dated July 16, 1923, a testator, who died on Apr. 8, 1927, gave his real and residuary personal estate to his trustees on trust to sell and to pay the income of the trust premises for the time being representing his residuary estate (called "the trust fund") to his wife C. during her life. Subject thereto, by cl. 13 he directed his trustees to appropriate two equal sixth parts of the trust fund (which he called "the Reith portion") between and to such of his stepchildren A. and S. as should survive him, and if both survived him (as happened) and then one should die "and the trusts declared by cl. 15 hereof concerning the property appropriated to such stepchild so dying shall fail then provided I die without leaving issue the whole of the Reith portion shall be appropriated to the surviving stepchild." Subject thereto, and to the intent that the Reith portion, subject to the trusts for the stepchildren, their spouses and issue therein declared, should sink into the trust fund, by cl. 14 the trustees were directed to appropriate the trust fund equally between and to such of the testator's children as should survive him or die in his lifetime leaving issue him surviving "and so that if the trusts declared by cl. 15 hereof concerning any property appropriated to any child of mine shall fail then subject to the trusts powers and provisions in such clause declared and contained . . . such property shall fall back into the trust fund and be held on the same trusts that would have been applicable thereto if the child to whom the premises shall have been appropriated had died in my lifetime without ever having been married." Clause 15 provided that the property appropriated to any child or stepchild should be retained by the trustees on certain discretionary trusts (in effect those in the Trustee Act, 1925, s. 33 (1)), and declared that the objects of the discretionary trusts were the beneficiary and the wife, if any, of the beneficiary, and the testator's children and remoter issue for the time being in existence, and the said stepchildren and any issue of theirs for the time being in existence. Clause 15 also contained a power in a beneficiary to appoint a life interest to a spouse, and, finally, subject as thereinbefore declared, a power in a beneficiary to appoint by deed or will to his issue, and, subject thereto, the trust property was directed to be held "in trust for all or any of the children or child of the beneficiary who shall be living at my decease or born afterwards and who being male attain the age of 21 years or being female attain that age or marry." Clause 16 provided: "In the event of the failure or determination of the trusts hereinbefore A declared and subject to the trusts powers and provisions hereinbefore declared and contained and to every or any exercise of such powers and to any statutory provisions which may be applicable my trustees shall hold the trust fund and the income thereof in trust for the persons or person who would at the time of the failure or determination of all the prior trusts hereinbefore declared and contained have been entitled to my personal B estate under the statutes for the distribution of the personal estate of intestates if I had died at the time of such failure or determination intestate such persons if more than one to take as tenants in common the shares in which they would have taken under the same statutes." Having regard to the Administration of Estates Act, 1925, s. 50 (1), the reference in cl. 16 to statutory distribution was to be construed as referring to s. 47 (1) of that C Act which provides that the residuary estate shall be held: "... (i) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of 21 years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of 21 years or marry under that age of any child of the intestate who predeceases the intestate, such issue D to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking." The testator was survived by (besides his stepchildren A. and S.) his wife C., and a sister, who, apart from C., was his sole next of kin at the date of his death. E He had no issue of his own. On June 1, 1948, C. died.

HELD: (i) on the true construction of the will, cl. 16 was intended to take effect on the total failure of all the trusts declared in respect of the trust fund, including both those in respect of the four-sixths and of the Reith portion, but, having regard to s. 47, the clause could designate a person to succeed to the fund who would not have a vested interest within F the perpetuity period, and it was, therefore, void.

(ii) there was clearly a hiatus in the will in that the testator had neglected to provide for the disposition of the four-sixths share of the trust fund in the event, which had happened, of cl. 14 and cl. 15, so far as they depended on his having children or issue, not taking effect, and it was proper in these circumstances to imply a clause to carry over the four-sixths share as an G an addition to the Reith portion.

Re Hudson, (1882) (20 Ch.D. 406), *applied.*

[AS TO DUPLICATION OF CROSS-LIMITATIONS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 437, 438, para. 484; and FOR CASES, see DIGEST, Vol. 44, pp. 1286, 1287, Nos. *11139-11149*.]

H Case referred to:

(1) *Re Hudson*, (1882), 20 Ch.D. 406; 51 L.J.Ch. 455; 46 L.T. 93; 44 Digest 1286, *11140*.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Cyril Ernest Hart, deceased, and in the events which had happened, the ultimate trust of the testator's residuary estate contained in cl. 16 of the will failed by reason of the rule against perpetuities, and whether a cross-limitation ought to be implied in order to dispose of a share of the residuary estate the trusts of which had failed, or whether the said share was undisposed of and passed to the next of kin. Danckwerts, J., held that the ultimate trust was void for perpetuity, and that a cross-limitation should be implied. The relevant parts of the will and the facts are set out in the judgment.

H. A. Rose for the plaintiff, the Public Trustee.

Droop for the first, second and third defendants, executors of the will of the testator's widow, and the stepchildren.

E. I. Goulding for the fourth defendant, the executor of the will of the testator's sister, interested on intestacy.

Elles for the fifth and sixth defendants, infant children of the fourth defendant and interested in the capital.

DANCKWERTS, J. : This case concerns a will which has been, it appears, drafted with some care, but at the same time I cannot help feeling that the future possibilities have been overlooked by the testator or his draftsman in the events which have happened. The date of the will was July 16, 1923. The testator, Cyril Ernest Hart, died on Apr. 8, 1927. On June 1, 1948, the testator's widow died, and her executors are the defendants, Barclays Bank Ltd., and the testator's two stepchildren, Sylvia Lucy Robertson Riall and Major Anthony John Reith. Their name is, or was, Reith, and this is material in regard to the dispositions in the will. The testator had one sister only, a Mrs. Evelyn Julie Kann, who survived the testator and died on Jan. 13, 1948, having had three children, two of whom died in the testator's lifetime without issue, the other being a son, Leonard Eustace Kann, who is fourth defendant to these proceedings. He was appointed by her sole executor and beneficiary under her will. The last two defendants, Jane Kann and Michael Edward Victor Kann, are the infant children of the fourth defendant, Leonard Eustace Kann. It would appear that at the date of the testator's death his next of kin, subject to the interests of his widow, would have been his only sister. The testator had no children or issue of his own.

I now turn to the provisions of the will. The plaintiff, the Public Trustee, was not an executor of the will, but in the events which have happened he is at the present time the sole trustee of the will. Passing over the bequests of various legacies and other clauses, in cl. 7 there is the usual devise and bequest of all the testator's real and personal property, and in cl. 8 a trust for sale with certain administrative provisions following. Clause 11 gives power to the trustees to keep up certain periodical payments, which is material because those payments are allowed to be made

> " out of the income of the said trust premises for the time being constituting or representing my residuary estate (hereinafter called ' the trust fund ') ".

There we find the definition of the trust fund which is mentioned afterwards in the will. By cl. 12 the testator directed that, subject to the provisions of cl. 11, his trustees should pay the income of the trust fund to his wife, Caroline, during her life without power of anticipation during coverture. Under cl. 13 of his will the testator proceeds to direct certain provisional appropriations of his residuary estate under the name of the trust fund :

> " My trustees shall appropriate two equal sixth parts of the trust fund (hereinafter called ' the Reith portion ') between and to such of my stepchildren Anthony John Robertson Reith and Sylvia Lucy Reith as shall survive me or die in my lifetime leaving issue me surviving in such manner that the share appropriated to either stepchild shall be equal to that appropriated to the other and if there shall be only one such stepchild the whole of the Reith portion shall be appropriated to such stepchild and if both such stepchildren survive me and then one dies and the trusts declared by cl. 15

> hereof concerning the property appropriated to such stepchild so dying shall fail then provided I die without leaving issue the whole of the Reith portion shall be appropriated to the surviving stepchild."

Clause 14 provides :

> "Subject as aforesaid and to the intent that the Reith portion and every part thereof shall (subject to the trusts powers and provisions hereby A declared and contained of and concerning the same in favour of my said stepchildren their respective spouses children and remoter issue and others) sink into the trust fund and be subject to this present direction for appropriation my trustees shall appropriate the trust fund between and to such of my children as shall survive me or die in my lifetime leaving issue me surviving in such manner that the share appropriated to any child of mine B shall be equal to that appropriated to every other child of mine and if there shall be only one such child of mine the whole of the trust fund shall be appropriated to such child of mine and so that if the trusts declared by cl. 15 hereof concerning any property appropriated to any child of mine shall fail then subject to the trusts powers and provisions in such clause declared and contained and to the powers by law vested in my trustees concerning C the same and to every or any exercise of such respective powers such property shall fall back into the trust fund and be held on the same trusts that would have been applicable thereto if the child to whom the premises shall have been appropriated had died in my lifetime without ever having been married."

D Clause 15 provides that the property appropriated to any child or stepchild shall "be retained and held by my trustees upon the following trusts . . ." Then follow trusts which are similar to those found in the Trustee Act, 1925, s. 33, and, in sub-cl. (iii), a declaration that :

> "The objects of the foregoing discretionary trust are the beneficiary and the wife if any of the beneficiary and my children and remoter issue E for the time being in existence and my said stepchildren and any issue of theirs for the time being in existence whether minors or adults and the person or persons in whose company or under whose care or control or by or with whom the beneficiary may from time to time be residing travelling or employed and such other person or persons as the beneficiary with the previous consent in writing of my trustees shall from time to time in writing F declare to be an object or objects of such discretionary trust and I request but do not require my trustees to treat the beneficiary and the issue of the beneficiary as the primary objects of the foregoing discretionary trust."

It is a very wide clause which I have seen before in wills, and which seems to be possibly open to attack. Paragraph (*e*) of cl. 15 of the will contains a power in a beneficiary, prior to or in contemplation of marriage, to appoint a subsequent G life interest to a spouse. By para. (*f*) there is a declaration :

> "subject as hereinbefore declared the said trust property shall be held in trust for all or any to the exclusion of the others or other of the children and remoter issue of the beneficiary if more than one in such shares and in such manner in all respects as the beneficiary shall by deed revocable H or irrevocable or by will or codicil appoint and in default of and subject to any such appointment in trust for all or any of the children or child of the beneficiary who shall be living at my decease or born afterwards and who being male attain the age of 21 years or being female attain that age or marry."

There are certain provisions in the proviso, a hotchpot clause and another provision which do not seem to me to be very material. There is a power of advancement again in para (*g*).

Clause 16, on which the present question turns, provides :

> " In the event of the failure or determination of the trusts hereinbefore declared and subject to the trusts powers and provisions hereinbefore declared and contained and to every or any exercise of such powers and to any statutory provisions which may be applicable my trustees shall hold the trust fund and the income thereof in trust for the persons or person who would at the time of the failure or determination of all the prior trusts hereinbefore declared and contained have been entitled to my personal estate under the statutes for the distribution of the personal estate of intestates if I had died at the time of such failure or determination intestate such persons if more than one to take as tenants in common the shares in which they would have taken under the same statutes."

The death of the testator was after Dec. 31, 1925, and, accordingly, by reason of the Administration of Estates Act, 1925, s. 50, the reference to statutory distribution is in effect a reference to the provisions of that Act. That section provides :

> " (1) References to any Statutes of Distribution in an instrument *inter vivos* made or in a will coming into operation after the commencement of this Act, shall be construed as references to this Part of this Act ; and references in such an instrument or will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of this Part of this Act."

Section 47 of the Act indicates the persons who would take beneficially on an intestacy, and provides :

> " (1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely :—(i) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of 21 years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of 21 years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking."

Sub-section (3) of the same section provides :

> " Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate."

The effect of that seems to be that, instead of the persons who are ascertained finally under these provisions taking vested interests as they would under the old statutory distribution, they take interests which are contingent in either case on attaining the age of 21 years or marrying under that age.

The question, first of all, is, what is the event on which cl. 16 is to take effect ? Does it mean a total failure of the trusts, *i.e.*, the trusts of both the two-sixths Reith portion and the trusts of the four-sixths which were directed to be held on trust for the testator's issue, or do they simply take effect, possibly more than once, on the failure which has occurred as regards the four-sixths and, not yet, possibly, as regards the two-sixths, for, of course, the Reith portion may become vested under the provisions applicable to that part. In my view, it is plain that "failure or determination of all the prior trusts hereinbefore declared," means total failure of the trusts declared regarding the trust fund, *i.e.*, the ultimate residuary estate. Although it is true that the clause refers to "the persons or person who would at the time of the failure or determination of all the prior trusts" take under the statutes of distribution, and so on and refers to the "failure of trusts . . . hereinbefore declared," yet the trustees are to hold the trust fund on the trusts declared by this clause. In my view, therefore, it is plain that it is the trusts of the trust fund which are referred to, and the clause refers to a fund to be ascertained once and for all on the total failure of all the trusts declared in respect of the trust fund, both those of the four-sixths and those of the two-sixths.

Having reached that conclusion, the question is what is the effect of the operation of this clause having regard to s. 50 and s. 47 of the Administration of Estates Act, 1925 ? It is contended by counsel for the stepchildren that the trust fails under the rule against perpetuities, and must fail under that rule because you might have a person ascertained who would still have a contingent interest at the longest time allowed by the rule against perpetuities, *i.e.*, one who still had to fulfil the provisions of the statute by either attaining 21 years or marrying. It seems to me that that is so, and, therefore, as a person might be designated under the testator's will to succeed in this event who would not be ascertained and have a vested interest within the time allowed by the rule against perpetuities, the provisions of this clause are void and fail. It was argued on behalf of the infant defendants that I was entitled to apply s. 47 and s. 50 by ascertaining the class of persons without importing into it the conditions required by s. 47 of attaining 21 or marrying, but, in my opinion, those conditions are part of the qualifications of persons who are to take, and you cannot divorce those qualifications from the persons who are to be ascertained under conditions which form part of their description. That argument, therefore, in my view, fails.

[There followed argument on a further question raised by the summons.]

DANCKWERTS, J. : As I said in giving judgment on the previous question, this testator, though he provided for the event of his having children or issue, never had any child, and, consequently, all the provisions contained in cl. 14 and cl. 15 of his will providing for the event of his having children or issue never took effect as regards four-sixths of the trust fund formed by his residuary estate. The other two-sixths were to be held on trust for his two stepchildren, and in the case of the two stepchildren there were provisions for accruer in the event of failure and also for the fund falling into the trust fund and going to the children, if there should be any, on failure of the trust of the shares appropriated to the stepchildren, but the testator has failed to provide in his will for the event of failure of the trusts relating to children and their issue and possible accruer to the shares of the stepchildren. The question which I have now to decide is whether, in those circumstances, I can imply a limitation which will have the effect of adding the four-sixths to the part of the fund which is to be held on trust for the testator's stepchildren.

Counsel for the stepchildren has called my attention to the statement of the principle and the rules laid down by KAY, J., in *Re Hudson* (1). He says (20 Ch.D. 415), having referred to various authorities :

> "I deduce from these authorities the following rules :—1. Cross executory limitations in the case of personal estate like cross remainders of real estate, are only implied to fill up a hiatus in the limitations, which seems from the context to have been unintentional. 2. They cannot be implied—as of course

> cross remainders could not—to divest an interest given by the will. 3. The existence of other cross-limitations between different persons does not prevent the implication. 4. But where such express cross-limitations are in favour of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention."

KAY, J., gives instances in which a gap occurs, and says under 4 (*c*) : A

> "And generally where, there being such a gift over, the preceding limitations do not provide for every event except that contemplated by the gift over, but leave some gap which would occasion an intestacy as to part of the estate."

Counsel for those interested on intestacy called my attention to a passage in B which the learned judge says (*ibid.*, 416) :

> "Where there is an ambiguity it is proper to look at the consequences of either construction. It is hardly possible to believe that it was intended that any part of the income should go to the legal personal representatives of deceased grandchildren or remoter issue."

In the present case there is a final gift over which, in the events which have C happened, I have held offends against the rule against perpetuities, but which, none the less, is to be found in the will. There is plainly a hiatus in the provisions of this will. If I imply a cross-limitation it clearly will not divest any interest given by the will because there are no express provisions in the will dealing with the particular events which have happened. The existence of other cross-limitations makes no difference, as there are no express cross-limitations which D would provide an inference that I should not imply cross-limitations in the present case, but, says counsel for those interested on intestacy, with some force, in the present case it is more likely that the testator would have preferred that the property should go to his sister and her descendants or persons claiming through her rather than to stepchildren who were no relations of his. Also, he says, if you look at the will you can see that the testator knew perfectly well E how to provide for a cross-limitation if he meant it to operate, and he refers me to the express provisions in that respect in cl. 13 and cl. 14. That is perfectly true, but it is rather difficult to speculate as to what the testator would have preferred in any particular circumstances. On the whole, it seems to me that this is a case which comes within the rule as laid down by KAY, J., and applied in a number of authorities, and I ought, therefore, to imply some clause in the will F which does not involve, as counsel for the stepchildren pointed out, any alteration of the will, but merely the writing into the will of something which one would expect to be there. Accordingly, I think I ought to imply a clause to carry over the four-sixths, in the events which have happened, as an addition to the two-sixths which are to be held on trust for the stepchildren of the testator.

Order accordingly. Costs of all parties as between solicitor and client out of the G *trust fund.*

Solicitors : *Wordsworth & Co.* (for the plaintiff and the fourth, fifth and sixth defendants) ; *Ager & Ager* (for the first three defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re BRADSHAW. BRADSHAW *v.* BRADSHAW.

[CHANCERY DIVISION (Danckwerts, J.), October 27, November 3, 1949.]

Administration—Lunatic—Distribution of estate—Lunatic entitled, on father's death in 1906, *to undivided share in freehold estates—Freeholds unsold and held by trustees on statutory trusts—Nature of lunatic's interest at date of her death—" Beneficial interest in real estate "—Administration of Estates Act,* A 1925 (*c.* 23), *s.* 51 (2).

By the Administration of Estates Act, 1925, s. 51 (2) : " The foregoing provisions of this Part of this Act " (*i.e.*, pt. IV, dealing with distribution of residuary estate) " do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of B full age at the commencement of this Act . . . was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case."

C By his will, dated Jan. 22, 1853, W.B., who died in 1855, devised certain freehold estates on trust for his son, T.B., for life, and, on the death of T.B. (in the events which happened) on trust for the children of T.B. equally. T.B. died in 1906 leaving five children, one of whom was C.B., who was born in 1877 and died a spinster and intestate on Sept. 2, 1948. In 1912 C.B. became of unsound mind and in 1935 a receiver was appointed of D her property and had not been discharged at the date of her death. The freeholds were still unsold and under the Law of Property Act, 1925, s. 39 and sched. I, pt. IV, para. 1, were vested in the trustees of W.B.'s will on the statutory trusts for sale set out in s. 35 of that Act. The question to be determined was whether, at the date of her death, C.B.'s interest in the property devised by the will of W.B. was a " beneficial interest in real E estate " within the meaning of s. 51 (2) of the Administration of Estates Act, 1925.

HELD : " beneficial interest in real estate " in s. 51 (2) of the Administration of Estates Act, 1925, was confined to such interest as would under the general law in force before the commencement of the Act have devolved in accordance with the law applicable to freehold land ; the interest to which C.B. was entitled at the date of her death in the property devised by the will F of her grandfather was an interest in the proceeds of a trust for sale, and was not an interest which, under the general law in force before Jan. 1, 1926, could have devolved in accordance with the law applicable to freehold land ; and, therefore, it was not a " beneficial interest in real estate " within the meaning of s. 51 (2).

Re Donkin ([1947] 2 All E.R. 690), *followed.*

G [AS TO DISTRIBUTION OF ESTATE OF LUNATIC, see HALSBURY, Hailsham Edn., Vol. 10, pp. 592, 593, para. 856.]

Cases referred to :

(1) *Re Mellish,* cited in, [1929] 2 K.B. at p. 82, *n.* ; Digest Supp.

(2) *Re Kempthorne,* [1930] 1 Ch. 268 ; 99 L.J.Ch. 177 ; 142 L.T. 111 ; Digest H Supp.

(3) *Re Fuller's Contract,* [1933] Ch. 652 ; 102 L.J.Ch. 255 ; 149 L.T. 237 ; Digest Supp.

(4) *Re Donkin,* [1947] 2 All E.R. 690 ; [1948] Ch. 74 ; [1948] L.J.R. 409 ; 2nd Digest Supp.

ADJOURNED SUMMONS to determine the nature of the interest of the intestate, Constance Mary Bradshaw, who died a spinster on Sept. 2, 1948, in freehold properties to which she and her brothers became entitled in undivided shares on the death of their father in 1906 and which were now held by trustees on statutory trusts under the Law of Property Act, 1925, s. 39 and sched. I, pt. IV, para. 1. The intestate was of unsound mind from before Jan. 1, 1926, until her death, and the question was whether her interest in the properties at the date of her death was a "beneficial interest in real estate" within the meaning of the Administration of Estates Act, 1925, s. 51 (2). Danckwerts, J., held that it was not. The facts appear in the judgment. A

N. S. S. Warren for the plaintiff, A. E. Bradshaw, an administrator.

Droop for the first defendant, H. R. E. Bradshaw, heir at law of the intestate.

Wigan for the second defendant, J. S. Bradshaw, a niece of the intestate.

Cur. adv. vult.

Nov. 3. **DANCKWERTS, J.,** read the following judgment. Constance B Mary Bradshaw died on Sept. 2, 1948, intestate and a spinster. She became of unsound mind in 1912. On July 22, 1935, a receiver was appointed in respect of her property and he had not been discharged at the date of her death. She was born on Dec. 26, 1877, and, therefore, on Jan. 1, 1926, she was 48, *i.e.*, over the age of 21 years. On Mar. 19, 1949, letters of administration in respect of her estate were granted to the plaintiff, Arthur Ernest Bradshaw, and the first C defendant, Hengist Richard Edward Bradshaw. A question arises under the Administration of Estates Act, 1925, s. 51 (2), in the following circumstances. The intestate, Constance Mary Bradshaw, was the daughter of Thomas Bradshaw, who died on Nov. 30, 1906, and the grand-daughter of William Bradshaw, who died on July 12, 1855. By his will, dated Jan. 22, 1853, William Bradshaw devised certain freehold estates on trust for his son Thomas Bradshaw, for life, and after D his death, in default of appointment by Thomas Bradshaw (the situation which happened), in trust for Thomas Bradshaw's children at the age of 21 or on marriage (in the case of females) equally. There were five children of Thomas Bradshaw who attained the age of 21 years: (i) Thomas Claridge Bradshaw—the eldest, born on July 4, 1872—who died on June 6, 1946, leaving a son, the defendant Hengist Richard Edward Bradshaw; (ii) Percival Edward Bradshaw, E who died on Feb. 16, 1941, without issue; (iii) Alfred Ernest Bradshaw, who is still alive; (iv) the intestate; and (v) John Horsley Bradshaw, who died on July 15, 1927, leaving issue, the second defendant, John Stratlii Bradshaw. Accordingly, under the law of inheritance existing before 1926 the defendant, Hengist Richard Edward Bradshaw, would be the heir-at-law of the intestate. Freeholds devised by the will of William Bradshaw on the above-mentioned F trusts remain unsold, and are vested in the trustees of his will and are held by them on the statutory trusts for sale mentioned in s. 35 of the Law of Property Act, 1925, by virtue of the provisions of s. 39 and sched. I, pt. IV, para. 1, to the Law of Property Act, 1925.

The Administration of Estates Act, 1925, s. 51 (2), is in the following terms:

> "The foregoing provisions of this Part of this Act do not apply to any G beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death, and any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will H of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case. For the purposes of this sub-section, a lunatic or defective who dies intestate as respects any beneficial interest in real estate shall not be deemed to have recovered his testamentary capacity unless his committee or receiver has been discharged."

It appears, therefore, that the conditions of this sub-section are satisfied in the present case, subject to the question of the nature of the interest of the intestate in regard to the freeholds devolving under the will of William Bradshaw. It is clear that on Dec. 31, 1925, the intestate was entitled, and, if the Administration of Estates Act, 1925, had not been passed and the former law were still in operation, would at the date of her death have been entitled, in equity and beneficially, to an undivided share in the freeholds, which share would have A been real estate and would have passed to her heir-at-law. Under the relevant sub-section, however, the question is whether, at the date of her death, the intestate was entitled to a " beneficial interest in real estate." The legislation of 1925 deprived the intestate of her former undivided share in the freeholds, and, instead, gave her a right to a share of the proceeds of sale and of the income pending sale (Law of Property Act, 1925, s. 35). None the less, there is, it B seems to me, undoubted authority that the interests of the intestate were properly to be described as an interest in real estate, at any rate for many purposes : see *Re Mellish* (1), referred to with approval in *Re Kempthorne* (2), and *Re Fuller's Contract* (3) ; and it seems not unreasonable to suppose that, as the undivided share in the land in equity would have devolved before 1926 on the heir-at-law, the intention of s. 51 (2) of the Administration of Estates Act, C 1925, was that the heir-at-law should not be deprived of his expectation that he would inherit the property. Section 51 (2), however, concentrates on the beneficial interest which the intestate had at the date of her death. *Prima facie*, the conditions of the sub-section would seem to be satisfied if it is then an interest in real estate, even if the beneficial interest itself be not then real estate.

There are a number of references in the Administration of Estates Act, 1925, D to " real estate," and, generally, they do not appear to clarify the matter. Section 33 imposes a trust for sale on the " real estate " of a person who dies intestate. Section 45, abolishing the old rules of descent, refers to the " real estate and personal inheritance " of persons dying after 1925, and s. 52 contains a definition of " real and personal estate." An argument against the heir-at-law was, however, founded on s. 55 (1) (xix) which is in these terms :

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> " ' Real Estate ' save as provided in pt. IV of this Act means real estate, including chattels real, which by virtue of pt. I of this Act devolves on the personal representative of a deceased person."

Part IV of the Act includes s. 51. It is said that s. 55 (1) (xix) refers back to s. 1, which provides for the devolution on the personal representative of :

F

> " Real estate to which a deceased person was entitled for an interest not ceasing on his death . . . "

and so invokes the interpretation provision (for the purposes of pt. I of the Act) in s. 3 (1) that :

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> " . . . ' real estate ' includes . . . (ii) real estate held on trust (including settled land) or by way of mortgage or security, but not money to arise under a trust for sale of land, nor money secured or charged on land."

It is said that the effect of these provisions is to exclude from " real estate " for the purposes of s. 51 (2) money to arise under a trust for sale of land. This argument, however, does not seem to me to give proper effect to the exception H of the provisions of pt. IV in s. 55 (1) (xix), and I do not find it convincing.

There is, however, a decision of ROXBURGH, J. on the actual sub-section which I have to construe. *Re Donkin* (4) was concerned with the estate of a person of unsound mind, who died a spinster and intestate in 1934. In 1928 her brother had died intestate leaving her as his sole next of kin. No letters of administration had been obtained in respect of his estate, which included freehold houses, but, after the death of the sister, the Public Trustee obtained letters of administration in respect of each estate. The facts differ in some respects from the present case, but by reason of the imposition of a trust for sale on the brother's property by the Administration of Estates Act, 1925, s. 33, the question which arose in that case is similar to that which I have to decide. Roxburgh, J., after reading the provisions of s. 51 (2), said ([1947] 2 All E.R. 692) :

> "It seems to me that, to make sense of that provision, it is necessary to confine the beneficial interests indicated to such interests as would under the general law in force before the commencement of the Act have devolved in accordance with the law applicable to freehold land. If that be the true meaning of the section—and it is not an easy point—the rest seems to follow as a matter of course, because nobody would contend that before 1926 the interest of a beneficiary in the proceeds of a trust for sale of land would have devolved in accordance with the law applicable to the devolution of freehold land. At any rate, nobody has contended that before me. Accordingly, unless I can find some difference between a trust for sale such as could exist before the commencement of the Administration of Estates Act, 1925, and the trust for sale imposed by the Administration of Estates Act, 1925, in the case of an intestacy, it must follow that the beneficial interest which Miss Donkin had in her brother's estate on his intestacy was not one which under the general law in force before Jan. 1, 1926, could have devolved in accordance with the law applicable to freehold land. In my judgment, that is a good ground for holding that the interest which Miss Donkin had was not a 'beneficial interest in real estate' within the meaning of that phrase in s. 51 (2) of the Administration of Estates Act, 1925."

That seems to me to be a decision on the point which I have to decide in this case, and, accordingly, I must follow it and hold that in the present case the interest in the property devised by the will of William Bradshaw, deceased, to which the intestate was entitled at her death was not a "beneficial interest in real estate" within the meaning of s. 51 (2) of the Administration of Estates Act, 1925 ; but, if that be the true interpretation of the sub-section, it seems to me that by some mischance the drafting of the sub-section has probably failed to carry out in this case the intention that persons with expectations of succeeding to real estate should not be defeated by the alterations in the law of descent made by the legislation of 1925.

Declaration accordingly. Costs of all parties to be taxed as between solicitor and client, and paid out of the estate in due course of administration.

Solicitors : *Blyth, Dutton, Wright & Bennett* (for all parties).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

BOLTON *v.* BOLTON.

[Probate, Divorce and Admiralty Division (Lord Merriman, P., and Ormerod, J.), October 28, 1949.]

Court—Jurisdiction—Magistrate—Proceedings partly heard by one metropolitan magistrate—Continuation by another magistrate—Conflict of evidence between the parties.

The wife brought a summons against her husband on the ground of persistent cruelty. After one metropolitan magistrate had heard the whole of the wife's evidence in chief the hearing was adjourned. On the date of the resumed hearing another magistrate was sitting and both parties assented to his dealing with the case. Thereupon the notes of the wife's evidence were read and she swore : "That evidence is true," and was cross-examined. Evidence in support of the wife's case was heard, and the husband gave evidence denying the wife's evidence *in toto*, there thus being a serious conflict of evidence, and he was cross-examined.

HELD : (i) where proceedings have been started and evidence given before a judge or magistrate who is judge both of fact and law it is not proper, even with the consent of the parties, to continue the proceedings before another judge or magistrate, especially where there is the slightest risk of any conflict of evidence.

Observations of SCRUTTON, L.J., in *Coleshill* v. *Manchester Corporation* ([1928] 1 K.B. 785), and of MACKINNON, J., in *Re British Reinforced Concrete Engineering Co., Ltd.'s Application* (1929) (45 T.L.R. 186), *applied.*

(ii) in the present case there was a grave conflict of evidence and the second magistrate (who made an order in favour of the wife) was not in a position to compare the evidence of the husband with that of the wife which he had not heard, and the whole proceeding was irregular, but the case was so clear that it would be wrong to send it back and the husband's appeal must be dismissed.

[AS TO THE JURISDICTION OF ANOTHER JUDGE TO CONTINUE A HEARING, see HALSBURY, Hailsham Edn., Vol. 26, p. 87, para. 158, footnote (*a*); and FOR CASES, see DIGEST, Practice, p. 552, Nos. *2112, 2113.*]

Cases referred to :

(1) *Coleshill* v. *Manchester Corpn.*, [1928] 1 K.B. 776 ; 97 L.J.K.B. 229 ; 138 L.T. 537 ; 92 J.P. 37 ; Digest, Practice, 552, *2112.*

(2) *Re British Reinforced Concrete Engineering Co., Ltd.'s Application*, (1929), 45 T.L.R. 186 ; Digest, Practice, 552, *2113.*

APPEAL from a decision of a metropolitan magistrate given at Lambeth Magistrates' Court on July 13, 1949, whereby he made an order against the husband on the ground of persistent cruelty to the wife. The husband now appealed and the Divisional Court, in dismissing the appeal with costs, gave directions as to the practice to be followed when there is a change in the composition of a tribunal during a hearing. On May 25, 1949, MR. WIGHTWICK heard the wife's evidence in chief and on July 13, 1949, MR. ROSE continued the hearing with the consent of the parties and made the order. The facts appear in the judgment of LORD MERRIMAN, P.

The husband (appellant) appeared in person.
Borders for the wife (respondent).

LORD MERRIMAN, P. : This is a husband's appeal from a decision of the metropolitan magistrate sitting at Lambeth whereby, on July 13, 1949, he found the husband guilty of persistent cruelty and made a maintenance order in favour of the wife which, in so far as the amount is concerned, is not challenged. The whole contest has turned on the propriety of the decision. I am not going to examine the evidence in detail. Suffice it to say that there is a detailed and circumstantial account by the wife of a series of assaults of a grave nature ending on at least three occasions with a black eye, and on other occasions consisting of beating with a belt in an unmerciful manner, extending from the end of 1947, and ending with a comparatively minor assault at Easter, 1949, after which the wife left the husband and took out this summons which first came on for hearing in May. The husband's case was that from first to last the whole thing was sheer imagination or invention and that he had never lifted a finger to his wife. Without discussing the evidence, it seems to be a case in which the positive evidence of the assaults was very strong and circumstantial and I have no hesitation in saying that the wife's case was abundantly proved.

Unfortunately there is a difficulty. The case was begun before one metropolitan magistrate and finished before another. MR. WIGHTWICK heard, in substance, the whole of the wife's evidence in chief on May 25, evidence setting out in detail and more or less in chronological order the story of the assaults of which she complained. To put the matter at the very lowest, it is a very grave disadvantage to anybody who has to give a decision in such a case not to have been able to judge the demeanour of the complainant wife while she was giving her own story. Everything that has been said about the advantages of seeing and hearing the witnesses, as against an appellate tribunal which only reads evidence on paper, A applies *a fortiori* to a court which only reads the principal evidence on paper and hears the rest of the evidence *viva voce*. I think it is necessary to speak plainly. I know that both parties consented to the evidence, which represented the best part of a day's hearing, being read over to Mr. Rose, the magistrate who took up the case, and to the wife saying in the witness-box : "That evidence is true." It still remains the fact that Mr. Rose never heard her give her B evidence in chief. He heard a very slight addendum to her evidence in chief and one not of great importance, and he heard her cross-examination and the rest of the evidence, including the evidence of a neighbour called on her behalf and the evidence of the husband. He found that the acts complained of by the wife amounted to persistent cruelty. About that there cannot be any dispute because, if the facts were proved, it is a perfectly clear case of persistent cruelty, C but it remains that the magistrate was contrasting the evidence of the husband with that of the wife which had only been partly heard by him.

It must be said plainly that this was a wholly irregular proceeding and ought not to be repeated. Everyone can understand the temptation to make a short cut like this, but, particularly in a case which is going to depend on the conflict between the two principal witnesses, it is essential to remember the commonplace D that it is important not merely that justice should be done but that it should manifestly be seen to be done. There is authority on this point, and it is contained in *Coleshill* v. *Manchester Corporation* (1), during which Fraser, J., who was trying the action with a jury died. In the Court of Appeal Scrutton, L.J., commented on the fact that after three witnesses had been called before Fraser, J., the case was resumed four days later before the same jury, but another E judge. He said ([1928] 1 K.B. 785) :

> "Acton, J., was sent down from London on the Sunday and, having read Thursday's shorthand notes, at the urgent request of the parties continued the case with the same jury on Monday the 11th, the Thursday's witnesses not being recalled. I can understand that in the unprecedented and painful circumstances it is unnecessary to take any objection to what F happened, but I think it is a precedent which should not be followed in the future. I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in court in the course of the trial before the jury and another judge, it not being a case of evidence being taken on commission or before an examiner."

However, it is only right to say that the court did not think it necessary to G interfere or—I use Scrutton, L.J.s., own words—"to take any objection to what happened."

I will contrast that with *Re British Reinforced Concrete Engineering Co., Ltd.'s Application* (2), a case before the Railway and Canal Commission in which MacKinnon, J., was acting as president of the Commission. The headnote, which closely follows the ruling given by MacKinnon, J., reads (45 T.L.R. 186) : H

> "Where during proceedings without a jury, after some of the witnesses have been called, the presiding judge dies, another judge, if there is no conflict of evidence, may at the request of the parties preside at the continuation of the hearing, after reading the shorthand notes of the evidence, and need not have the witnesses recalled."

The whole emphasis is on the absence of any conflict of evidence. In the present case the evidence which was read was that of the principal witness herself who was, in every single detail, in direct conflict with the witness who was going to be called, her husband. That is almost more directly in point than a case where there is a jury, as in *Coleshill* v. *Manchester Corporation* (1), because the jury remained the same throughout, and the change was only on the bench. It is manifestly an immaterial circumstance whether the change in the tribunal is brought about by death or illness. When the magistrate or judge, as the case may be, is the judge of both fact and law, it is, to quote the words of SCRUTTON, L.J., " a precedent which should not be followed," at any rate, where there is the slightest risk of any conflict of evidence.

Having said that, I am bound to say that I think this case is so clear that we should be in danger of doing a grave wrong if we were to send it back, as the husband asked us to do, for a re-hearing, and I, therefore—but with the general protest that I have uttered—propose that we should follow the course taken by the Court of Appeal in *Coleshill* v. *Manchester Corporation* (1) and decide that it is unnecessary to take objection to what happened on this occasion. In my opinion, this appeal fails and must be dismissed.

ORMEROD, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Seifert, Sedley & Co.* (for the wife).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

TURNER *v.* ARDING & HOBBS, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), November 8, 1949.]

Negligence—Invitee—Customer in shop—Duty of shopkeeper—Slippery substance on floor.

The plaintiff was shopping in the defendants' shop at a time when there were only a few other customers there and she slipped on a piece of vegetable matter, fell, and was injured.

HELD: it was the duty of the defendants to see that the floors of the shops were kept reasonably safe for the use of customers; in the present case the piece of vegetable matter was an unusual danger and the burden was on the defendants either to explain how it came to be on the floor or to adduce evidence to show that reasonable steps had been taken to avoid the accident; that burden had not been discharged; and, therefore, the defendants were liable in negligence to the plaintiff.

Stowell v. *Railway Executive* ([1949] 2 All E.R. 193), *applied.*

[AS TO DUTY TO INVITEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 600-609, paras. 851-858; and FOR CASES, see DIGEST, Vol. 36, pp. 41, 42, Nos. *247-258.*]

Case referred to:

(1) *Stowell* v. *Railway Executive*, [1949] 2 All E.R. 193; [1949] 2 K.B. 519.

ACTION for damages for negligence.

The plaintiff sued the defendants for injuries received by her through slipping on some vegetable matter and falling while she was shopping in the defendants' store. LORD GODDARD, C.J., gave judgment for the plaintiff and awarded her £450 damages. The facts appear in the judgment.

Berryman, K.C., and *F. G. Paterson* for the plaintiff.
Ryder Richardson for the defendants.

LORD GODDARD, C.J. : The plaintiff, Mrs. Turner, sues the defendants, Arding & Hobbs, Ltd., for damages in respect of the personal injuries which she received when she was shopping at their premises. The facts are not in dispute. The accident took place somewhere between 2 p.m. and 2.30 p.m. on a mid-week afternoon. The plaintiff had been shopping in the store and was passing between two counters when she slipped on a piece of vegetable matter, and fell heavily.

The duty of the shopkeeper in this class of case is well established. It may be said to be a duty to use reasonable care to see that the shop floor, on which people are invited, is kept reasonably safe, and if an unusual danger is present of which the injured person is unaware, and the danger is one which would not be expected and ought not to be present, the onus of proof is on the defendants to explain how it was that the accident happened. That was the view of LYNSKEY, J., in *Stowell* v. *Railway Executive* (1). The injured person need only say : " This was the trap which caused me to fall. It was something which ought not to have been there." It is true that the defendants may be able to prove that they have taken all reasonable steps to see that the floor remains safe, but what impresses me in the present case is that this accident took place, not at a crowded shopping time, when anybody might drop something from his or her bag and the assistants would have no reasonable chance of discovering it, but at a slack time when there were not many people about.

Assistants cannot be expected to walk behind each customer to sweep up anything that he or she may drop, and if this accident had happened at a very busy time when the shop was crowded with people I can well understand that it would be difficult to say that the defendants were negligent because something had got on the floor which they may not have had the opportunity of sweeping up. Here, however, I think that there is a burden thrown on the defendants either of explaining how this thing got on the floor or giving me far more evidence than they have as to the state of the floor and the watch that was kept on it immediately before the accident. I do not mean that it was their duty to have somebody going round watching it, but, in a store of this sort, into which people are invited to come, there is a duty on the shopkeeper to see that his floors are kept reasonably safe. No one was called to say that he passed over the floor just before the accident, and there is an utter lack of explanation on the part of the defendants as to how the accident happened. Apparently, a moment of two after it happened somebody seems to have kicked aside whatever it was that caused the plaintiff to fall, and it seems to me that the defendants have not discharged the burden which I think is placed on them. I find that the plaintiff was injured by a slippery substance on the floor, and that no explanation has been given of how that substance got on the floor or how it was that such a thing as this could happen at the time when it did happen. Therefore, I hold that the plaintiff is entitled to damages. [HIS LORDSHIP assessed the damages at £450 and gave judgment for the plaintiff with costs.]

Judgment for the plaintiff with costs.

Solicitors : *R. I. Lewis & Co.* (for the plaintiff) ; *Gardiner & Co.* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

WHITESIDE *v.* WHITESIDE AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ.), November 8, 1949.]

Deed—Rectification—No relief required as between the parties—Rectification to secure reduction of tax payable by party to deed.

In October, 1940, the parties were divorced, and, after discussion in regard to the maintenance of the wife, a deed was drafted by her solicitors in which the husband was expressed to covenant to pay " such a sum after deduction of income tax at the rate of not more than 7*s.* 6*d.* in the £ as shall represent £1,000 per annum." The husband by his solicitors altered the draft so that the covenant provided that the husband should pay " £1,000 per annum free of British income tax up to but not exceeding 7*s.* 6*d.* in the £," and on Apr. 16, 1942, the deed was executed in that form. The husband made the payments to the wife on the basis of freedom from tax at 7*s.* 6*d.* in the £ until the inland revenue authorities refused to allow deductions against his sur-tax on account of these payments, on the ground that under r. 23 (2) of the All Schedules Rules in the Income Tax Act, 1918, he had no right to make the payments under the deed without deducting the tax. On Mar. 30, 1948, the parties executed a supplemental deed whereby it was agreed that the deed of Apr. 16, 1942, should be treated as rectified by the substitution in the husband's covenant of the words, " such an annual sum as after deduction of British income tax at a rate up to but not exceeding 7*s.* 6*d.* in the £ will leave the sum of £1,000 per annum," for the words " £1,000 per annum free of British income tax up to but not exceeding 7*s.* 6*d.* in the £." The husband now sought rectification of the deed of Apr. 16, 1942, by the insertion therein of the words substituted by the supplemental deed, his object being to place himself in a position in which he would be entitled to claim deductions from sur-tax as against the revenue authorities.

HELD : in view of the supplemental deed of Mar. 30, 1948, there was no issue between the parties as to their rights *inter se*, and the court would not grant the discretionary remedy of rectification.

Burroughes v. *Abbott* ([1922] 1 Ch. 86), *distinguished.*

Jervis v. *Howle and Talk Colliery Co., Ltd.* ([1936] 3 All E.R. 193), *approved and distinguished.*

Decision of HARMAN, J. ([1949] 1 All E.R. 755), *affirmed.*

[AS TO RECTIFICATION FOR MISTAKE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 140-143, paras. 197-200 ; and FOR CASES, see DIGEST, Vol. 35, pp. 91-95, Nos. *11-36.*]

Cases referred to :

(1) *Van der Linde* v. *Van der Linde*, [1947] Ch. 306 ; [1947] L.J.R. 592 ; 176 L.T. 297 ; 2nd Digest Supp.

(2) *Burroughes* v. *Abbott*, [1922] 1 Ch. 86 ; 91 L.J.Ch. 157 ; 126 L.T. 354 ; 28 Digest 68, *358.*

(3) *Jervis* v. *Howle and Talke Colliery Co., Ltd.*, [1936] 3 All E.R. 193 ; [1937] Ch. 67 ; 106 L.J.Ch. 34 ; 155 L.T. 572 ; Digest Supp.

(4) *Shelburne* (*Countess Dowager*) v. *Inchiquin* (*Earl*), (1784), 1 Bro. C.C. 338; *on appeal sub nom., Inchiquin* (*Earl*) v. *Fitzmaurice*, (1785), 5 Bro. Parl. Cas. 166 ; 35 Digest 137, *356.*

APPEAL by the plaintiff from a judgment of HARMAN, J., dated Mar. 11, 1949, and reported [1949] 1 All E.R. 755, dismissing his action for rectification of a deed, dated Apr. 16, 1942, whereby the plaintiff covenanted to pay an annuity to his former wife, from whom he was divorced in October, 1940.

The covenant in the deed was to pay a certain sum free of income tax, and the husband, who had been making the payments without deducting income tax, found that he was not allowed to make deductions against his sur-tax in respect of the full amounts paid under the deed. By a supplemental deed, dated Mar. 30, 1948, the husband covenanted to pay the wife such a sum as after deduction of income tax would amount to the sum he had actually been paying her, and he sought to have the deed of Apr. 16, 1942, rectified accordingly. HARMAN, J., dismissed the action on the ground (*inter alia*) that there was no issue *inter partes*, A and, therefore, rectification could not be ordered, and the Court of Appeal now upheld his decision on this ground. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

J. A. Wolfe and *Honeyman* for the husband, the covenantor.
Colinvaux for the trustees of the deed.

B

SIR RAYMOND EVERSHED, M.R.: This is an appeal from a judgment of HARMAN, J., in which he expressed his reasons for refusing to make an order, at the suit of the plaintiff, for rectification of a deed of covenant entered into, on Apr. 16, 1942, by the plaintiff and his former wife, who was the first defendant in the action. I will say at once that, in my judgment, HARMAN, J., was right in refusing the order. The deed in question arose out of the fact that the marriage C of the plaintiff and the first defendant had been dissolved and the deed was executed in order to make provision for the claim which the wife had for maintenance from her former husband. The trouble has been caused by a misapprehension—a misapprehension which has figured in more than one case which has come before the courts—as to the effect in a deed of a promise to pay a sum of money " free of income tax," for it is beyond doubt that in a deed or contract D between the parties such a form of obligation contravenes the provisions of r. 23 (2) of the All Schedules Rules in the Income Tax Act, 1918, disentitles the covenantee from receiving the named sum free of obligation in respect of tax, and imposes on the covenantor the duty of deducting from the sum promised the appropriate tax.

This case is curious in that, when the deed was first drafted, the form of the E obligation assumed the language legally appropriate to achieve what, no doubt, the parties intended. It was :

> " . . . during the life of the wife pay to the wife such a sum after deduction of income tax at the rate of not more than 7*s*. 6*d*. in the £ as shall represent £1,000 per annum . . . "

According to the evidence, shortly before the deed was executed the husband, F by his solicitor—I use that phrase because it has been suggested that the husband can deny the solicitor's authority—altered the draft. For present purposes it seems to me that the case is exactly the same as though the husband had, by his own hand, altered the draft. However, altered it was, and it took the form ineffective for the purposes which are now the subject of the debate, *viz.* :

G

> " . . . to pay to the wife . . . the sum of £1,000 per annum free of British income tax up to but not exceeding 7*s*. 6*d*. in the £."

The deed having been executed in that form, the result in law was that the right of the wife was limited to receiving £1,000 less income tax on that figure and not a gross sum free of tax, and it was the right, and, indeed, in strictness, the duty, of the husband to deduct the tax. For some time, however, the error passed H unnoticed, and the husband, who, it is right to say, behaved towards the wife with perfect propriety and in the most honourable way, paid her the full sum which it was intended by him that she should receive, namely—I leave out the complication caused by the limitation of the amount of the tax—the net figure of £1,000 per year. I gather that for a time he was allowed by the revenue authorities to deduct from his own taxable income for sur-tax purposes a sum on the basis that the obligation was to pay, not £1,000 less tax, but the gross

figure which, after deduction of tax, would leave £1,000. In due course the error came to light, and the writ in the present action was issued on Jan. 21, 1948. The husband claimed against the wife and the trustees of the deed to have it rectified by restoring in the deed the language of the draft. As I have said, from the start the husband paid to the wife the sum of income he intended her to receive, and which she had intended, and, indeed, bargained and stipulated,
A to get. After the date of the writ, but before the matter came on for hearing, the parties, being not at issue on this point, proceeded to execute a supplemental deed rectifying the error, so that as between themselves the deed then took the form, and was thereafter to be treated as having always taken the form, that the obligation was to pay such a sum as, after deduction of tax, would leave £1,000 per annum.

B The fact of there having been that rectification *inter partes* is, to my mind, the vital element in this case. HARMAN, J., based his refusal to exercise the discretionary remedy of rectification (which, as has been said, must be cautiously watched and jealously exercised) on more than one ground. One of them was based on observations of my own in *Van der Linde* v. *Van der Linde* (1). The particular passage ([1947] Ch. 311) which the learned judge cited and relied
C on is where I am reported as saying, in reference to the argument then put forward on behalf of the Crown :

> " . . . where on the facts it is shown that there never was any obstacle as between the two parties to the deed to put right any mistake, it would not be a case in which on any view the court should exercise its discretion, more particularly where the object is on the plaintiff's part to obtain, so to speak,
> D by a side wind an advantage which he could have obtained and which he only lost through the error which was made."

I do not find it necessary, after hearing the argument, to qualify that formulation of the point in any way, but it was, of course, merely a statement of the argument and was unnecessary for my decision. I do not think that in the present case it is necessary to pursue that aspect of the matter further, or to express a decided
E view one way or the other whether that proposition be well-founded. I would, however, say that I agree with HARMAN, J., in thinking that the headnote to *Van der Linde* v. *Van der Linde* (1) ([1947] Ch. 306), does not very accurately state what the point was. In that case the plaintiff, who had covenanted voluntarily to make a payment to his sister, sought rectification by inserting provisions which would enable him to better his position *vis-a-vis* the revenue, and the
F ground of the decision was failure on the part of the plaintiff to prove as a fact that he ever intended that the document which he executed should take any particular form with regard to the resulting tax position.

Two other decisions to which HARMAN, J., referred were *Burroughes* v. *Abbott* (2), a decision of P. O. LAWRENCE, J., and *Jervis* v. *Howle and Talke Colliery Co., Ltd.* (3). In *Burroughes* v. *Abbott* (2) an order had been made by the Divorce
G Court which, though expressed to be that the husband should pay £*x* per annum free of tax, was held to mean and intend that, by whatever form the order was implemented, the obligation should be to pay such a sum as, after deduction, would leave £*x*. In that case, the deed having followed the strict terms of the order of the Divorce Court, the result was that the wife was only entitled to the smaller sum, and the action arose because in the circumstances the husband,
H or those who represented him, stood on the strict legal obligation, and the wife, therefore, sued for rectification so that the true position, as the Divorce Court had ordered it *inter se*, should be reflected accurately by the instrument prepared by conveyancing counsel, which, it was held, failed adequately to reflect it. There was, therefore—and this was, I think, the essence of the matter and distinguishes the present case from that case—a substantial issue between the parties. The question was : Would the court in the exercise of its equitable powers call on or order the defendant husband to give effect to what the Divorce

Court had said he should do ? P. O. Lawrence, J., held that, although the trouble had arisen from a misapprehension common to both parties of the effect of conveyancing counsel's document, nevertheless there was a ground for exercising the equitable remedy vested in the court. I do not, therefore, see that there is any ground for suggesting that the decision in *Burroughes* v. *Abbott* (2) cannot stand with the view (which, as I have already indicated, is the right view in this case), taken by Harman, J., that no order for rectification ought to be made.

In *Jervis* v. *Howle and Talke Colliery Co., Ltd.* (3), which came before Clauson, J., the question was not dissimilar save that it arose, not between a husband and wife, or a former husband and wife, but between the parties to a mining lease. The learned judge described the parties as not being men of wide business experience or culture. It was proved that the contract into which they entered was a bargain that one should pay to the other a royalty expressed in this form : " 3*d.* per ton on all coal . . . to be paid free of tax." Clauson, J., found as a fact that the intention of the parties when they so bargained was that the 3*d.* per ton should be the net sum. The error was made of drafting the mining lease in a form which adhered strictly to the language above stated, so that the obligation of the mining lessee entitled and bound him, in paying his 3*d.*, to deduct income tax from it. The matter came before the court because the defendant company, who assumed the rights and obligation of the original lessee, claimed that it was entitled to make that deduction, whereas the lessor said that, if the agreement as executed had that effect, it failed to implement the bargain. There was, therefore, a substantial issue between the parties, and, following the principle of *Burroughes* v. *Abbott* (2), Clauson, J., held that there was again room and occasion for the exercise by the court of its equitable jurisdiction to reform. In the course of his judgment the learned judge referred ([1937] Ch. 71) to the well-known words of Lord Thurlow, L.C. (1 Bro. C.C. 341), in *Shelburne* v. *Inchiquin* (4), and indicated that the fact that the mistake arose from the legal result of the language used was not a bar to the relief claimed. I think that Harman, J., in the present case thought that the decision of Clauson, J., was inconsistent with the conclusion at which he felt constrained to arrive. With all respect to Harman, J., I do not think it is, and I, therefore, do not associate myself with the criticism that he directed to *Jervis* v. *Howle and Talke Colliery Co., Ltd.* (3), nor do I find it necessary to express any doubt of the correctness of the decision of Clauson, J.

In the course of his judgment ([1949] 1 All E.R. 760) Harman, J., referred to the statement in Kerr on Fraud and Mistake, 6th ed., p. 620, which he cited as a correct statement of the law. The statement is :

> " Though the court will rectify an instrument which fails through some mistake of the draughtsman in point of law to carry out the real agreement between the parties, it is not sufficient in order to create an equity for rectification that there has been a mistake as to the legal construction or the legal consequences of an instrument."

I do not read that passage as meaning that, if the mistake made is in using language to perfect an agreement which in law has some result different from the common intention, that is not a case in which there can be rectification, and I think, as at present advised, that, if that were the meaning of the passage, it would be too wide. In my opinion, it may well be that, if the mistake has arisen from the legal effect of the language used, that may provide a ground for the exercise of the court's reforming power. Subject, however, to that qualification, I think that the passage cited is correct.

I have dealt with the legal aspects of the matter. There were other grounds on which the learned judge came to his conclusion. It is on those grounds that I, for my part, think that he rightly decided the case. I have already referred to the fact that here—and it is a curious feature of the case—the husband, through his solicitor, deliberately altered the draft from the form which it originally took and which, as the result of the rectification of the parties, it now takes—to the form to which he objects. The learned judge, in the course of his judgment, said that here the agreement, as evidenced by the draft, was precisely the agreement which the document took, and that it was a deliberate agreement in so far as it involved a change from the form of words which the husband now prefers to the form to which he now objects. I do not say that that of itself would be fatal to the husband's case, but, in considering whether the court should exercise its equitable jurisdiction, I think that it is a material consideration that the court is asked to do so at the suit of a plaintiff who has to come forward and say: "This error was due to my own alteration of the draft. It is true that my wife accepted it, but, as appears from the evidence, I cannot show that this question of tax was ever a matter with which she was concerned or that it was ever present in the least in her mind." If the unfortunate result is due to the mistake made by the husband's legal adviser, that does not seem to me to be a good ground for saying that there should now be rectification, and rectification at a time when *inter partes* there is no issue or substantial question.

The only real point of substance is, indeed, that, as a consequence, the position of the husband as regards a third party, *viz.*, the taxing authorities, has been adversely affected. The ground, therefore, on which I prefer to base my conclusion is that which I have already indicated—that, having regard to the rectification deed which followed the absence, and was a consequence of the absence, of any issue at any time between the parties as to their real rights *inter se* under the arrangement which took the form of this deed, it seems to me that the necessary condition for the reforming powers of the court are absent.

Counsel for the husband, at the request of this court, formulated the equitable right which, he said, the husband was entitled to assert. He formulated it thus:

> "When a document has been executed which does not carry out the intention of the parties, each party has the right against the other to have the document reformed in such a way that the document will place each in the same position as that which they had intended."

If that be a correct formulation of the right to reform—and I am not saying that it is not—the difficulty in his way in the present case is, as it seems to me, that he has not brought the husband's case within it. In the first place, I venture to doubt whether it could be here alleged that this agreement does not carry out the intention of the parties. I have already referred to the way in which alteration of the draft took place, and it is a fact that there is no evidence whatever that, so far as the bargain was concerned between the two contracting parties, the relationship of the husband to the revenue authorities, which would result from the form of words in fact selected, was ever in the wife's mind, or formed any part of the contractual relationship. Secondly, adopting the language of counsel for the husband, each party "has the right against the other." That seems to me to postulate that, in a case in which this equitable relief is sought, it must be a case in which one party is asserting a right against another and calling on the court of equity to say that it is inequitable and unconscionable for the other party to stand on the terms of the instrument as executed. As I have said, that condition is wholly absent. There never has been an issue between the parties. It has never been necessary for the husband to call on the wife to have the document reformed. When the matter arose, both agreed that it should be reformed, and reformed it has been. Therefore, as I say, as between the parties there seems to be no issue—no substantial matter which can form the basis of the claim in this court. It is to be noted that the wife took virtually no part in the proceedings in the court below, and on this appeal she has not, for obvious reasons, thought it necessary even to attend, and no order which the court makes in this action can affect her legal position under the document in the smallest degree. She is not, therefore, in any way interested in the point, nor, indeed, are the trustees. There is, in truth, before the court no person interested on whose conscience it is suggested that a court of equity should operate in ordering rectification.

I proceed to the conclusion of the formulation, where counsel for the husband said :

> ". . . have the document reformed in such a way that the document will place each in the same position as that which they intended." A

I think that that proposition must be qualified by saying, "in the same position *vis-a-vis* each other as they intended," and, as I have already said, that has already been done. I agree that on the facts the case has worked somewhat of a hardship on the husband, and, had he, having got the document in this form, B stood on the strict rights which it conferred, there is no doubt, I assume, that the other party, namely, the wife, could successfully have sued him for rectification, and, if the document had then been rectified, in its rectified form the husband would have had an advantage which, as things have turned out, and on the view of the learned judge and of this court, he does not now get, but that is assuming that the husband was withstanding the claim and that he was asserting C that his only obligation was the net figure. On that basis an order for rectification would not have put him in a better, but in a worse, position. However, that may be, and if there may be a hardship, it is not, in my judgment, sufficient, as counsel for the husband puts it, to state that, as things have turned out, the parties cannot now do that which will put the husband in the position he would have been in as regards third parties. It is true that, had the document taken D the other form, that would have been the position, but, in my judgment, that is not a sufficient ground for saying that in an action of this kind the court can, or, at any rate, ought to, rectify the instrument. I have not found it necessary to deal fully with all the points which were covered by the learned judge, and I have ventured to take a rather different view from that which he took in regard to the decision of Clauson, J., in *Jervis* v. *Howle & Talke Colliery Co., Ltd.* (3), E but I come to the conclusion that the judgment of Harman, J., was correct and that the appeal, accordingly, fails.

COHEN, L.J. : I, too, am of the opinion that this appeal fails. I very much doubt whether at any time the husband had a cause of action against the wife in respect of the matters alleged in the pleadings. The mistake, if mistake it be, had given him no cause of complaint against the wife, whatever may have F been the effect of the mistake on his position *vis-a-vis* the revenue authorities, but, even if he ever had any cause of action against the wife in respect of the matters in question, all possible dispute between the parties to this action was removed by the supplemental deed of Mar. 30, 1948. In the result, when the matter came before the learned judge on Mar. 11, 1949, there was no issue between the parties that the judge could determine. I cannot think that in those circum- G stances it would have been right for the judge to grant the discretionary remedy of rectification. Counsel for the husband submitted that the effect of refusing it would be to deprive their client of the benefit which, from the point of view of sur-tax, it was intended that he should have, but there is no evidence that it was the common intention of the parties to secure him that benefit. The wife's solicitor, who conducted the negotiations on her behalf, made it plain that his H mind was never directed to the sur-tax position. If, therefore, this element can ever be material in influencing the judge in deciding whether to exercise his discretion and grant rectification, this is not a case where it should be granted.

What I have said is sufficient to dispose of the matter, but the learned judge gave a secondary reason for his decision, namely, that he was not satisfied that the parties ever had made the agreement which the husband sought to introduce into the deed. He based this conclusion on the ground that the language used had been deliberately introduced into the deed by the husband's solicitors, despite the fact that the alternative language, which it is now sought to substitute, had been proposed by the wife's solicitors. It is not necessary to reach a definite conclusion on this point, but I must observe that I think that, if the husband had refused to execute the supplemental deed and the wife had commenced proceedings for rectification against him and had supported her claim by the evidence of the solicitors given in this action and by the documents, that claim would have succeeded. Such a decision would have accorded with that of CLAUSON, J., in *Jervis* v. *Howle and Talke Colliery Co., Ltd.* (3), to which my Lord has already referred, a decision with which I respectfully agree. For these reasons I would dismiss the appeal.

ASQUITH, L.J. : For the reasons given by my Lords, to which I cannot usefully add, I think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors : *Kimber Bull & Co.* (for the husband and the trustees of the deed).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BLACK MILL, LTD. *v.* STRAKER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning, L.J., and Hodson, J.), October 20, 21, November 9, 1949.]

Agriculture—Housing—Rural worker—Rent—Right to increase—" General increase of rents in the district "—Dwelling in respect of which grant towards cost of repairs given by local authority—Rent fixed after execution of works in 1938*—Housing* (*Rural Workers*) *Act*, 1926 (*c.* 56), *s.* 3 (1) (*b*) (*as amended by the Housing* (*Rural Workers*) *Amendment Act*, 1938 (*c.* 35), *s.* 4).

Rent Restriction—Agricultural housing—Standard rent—Dwelling-house subject to the provisions of the Housing (*Rural Workers*) *Acts, but not included among the dwelling-houses expressly excluded from scope of Rent Restrictions Acts—Rent and Mortgage Interest Restrictions Act*, 1939 (*c.* 71), *s.* 3 (2) (*c*).

By the Housing (Rural Workers) Act, 1926, s. 3 (1), as amended by the Housing (Rural Workers) Amendment Act, 1938, s. 4 : " In the case of a dwelling in respect of which assistance has been given under this Act by way of grant the following conditions shall, subject as hereinafter provided, apply in relation to the dwelling for a period of twenty years from the date on which it first becomes fit for occupation after the completion of the works and shall so long as they continue to have effect be deemed to be part of the terms of any lease, agreement for a lease, or tenancy of the dwelling, and shall be enforceable accordingly . . . (*b*) The rent payable by the occupier in respect of the dwelling shall not exceed the amount of the normal agricultural rent, increased by a sum equal to four per cent. of the amount by which the estimated cost of the works in respect of which assistance has been given exceeds the amount of the assistance given by way of grant, and no fine, premium or other like sum shall be taken in addition to the rent ; For the purposes of this provision the expression ' normal agricultural rent ' means (i) in the case of a dwelling which had not previously to the execution of the works been, or which was not within the period of five years immediately preceding the execution of the works separately let as such, the rent which the local authority determine to be the rent normally paid by agricultural workers in the district, or, if it appears to the local authority that the number of agricultural workers in the district is insufficient for the determination of any sum as being such rent as aforesaid, the rent normally paid by persons of substantially the same economic condition in the district; and (ii) in the case of a dwelling which was separately let as such at any time within the said period of five years, the average amount determined by the local authority to have been payable by way of rent per week during the period of the letting: Provided that, if in the case of a dwelling to which para. (ii) applies the amount of the normal agricultural rent payable in respect thereof is by reason of a general increase of rents in the district less than the rent normally paid by agricultural workers in the district, or, if it appears to the local authority that the number of agricultural workers in the district is insufficient for the determination of any sum as being such rent as aforesaid, than the rent normally paid by persons of substantially the same economic condition in the district, the rent so normally paid shall be taken to be the normal agricultural rent."

The landlords of a cottage, which had been occupied by the tenant since before 1914, received a grant from the county council, under the Housing (Rural Workers) Act, 1926, s. 2 (1), in respect of certain works done to the premises in and before 1938. The rent which the tenant was paying was the maximum rent fixed under the provisions of s. 3 (1) (*b*) of the Act of 1926 at the date of the completion of the works in 1938, and was also the standard rent of the premises under the Rent Restrictions Acts. The works done to the premises did not have the effect of converting the premises into new premises, and the house was not one in respect of which the local authority for the purposes of pt. V of the Housing Act, 1936, were required by s. 128 of that Act to keep a housing revenue account, and, therefore, the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (2) (*c*), did not apply expressly to exclude the application of the Rent Restrictions Acts to the premises. The landlords sought to impose an increase in the rent by reason of a general increase of rents in the district, but the tenant challenged the validity of the proposed increase.

HELD: (i) "the general increase of rents in the district," contemplated in the proviso to s. 3 (1) (*b*) of the Housing (Rural Workers) Act, 1926, as amended by the Act of 1938, was a "general increase" up to, but not beyond, the date when the rent had to be first determined, *i.e.*, the date of the execution of the works, and, the normal agricultural rent appropriate to the case having been arrived at, pursuant to the definition in para. (ii) of s. 3 (1) (*b*), on the facts as they stood in 1938, the rent of the cottage could not now be increased by reference to a general increase in the level of the relevant rents since that date.

Per curiam: as the legislature, by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (2) (*c*), had deliberately excluded from the ambit of the Rent Restrictions Acts certain of the houses falling within the housing (Rural Workers) Act, 1926, the necessary implication was that those houses which were not so excluded were not intended to be excluded, and, therefore, there being no conflict between the two sets of Acts as to the rent payable, the provisions in the Rent Restrictions Acts in regard to the rent payable in respect of the cottage continued to apply.

Roberts v. *Jones* ([1946] 2 All E.R. 678), *distinguished*, and *observations of* SCOTT, L.J. (*ibid.*, p. 680) *criticised.*

[FOR THE HOUSING (RURAL WORKERS) AMENDMENT ACT, 1938, s. 4, see HALSBURY'S STATUTES, Vol. 31, p. 580.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3 (2) (*c*), see HALSBURY'S STATUTES, Vol. 32, p. 974.]

Cases referred to:

(1) *Roberts* v. *Jones*, [1946] 2 All E.R. 678; [1947] K.B. 221; [1947] L.J.R. 606; 176 L.T. 33; 2nd Digest Supp.

(2) *Gloucester (Bp.)* v. *Cunnington,* [1943] 1 All E.R. 61 ; [1943] K.B. 101 ; 112 L.J.K.B. 151 ; 168 L.T. 68 ; 2nd Digest Supp.
(3) *Rose* v. *Hurst,* [1949] 2 All E.R. 24 ; [1949] 2 K.B. 372.

APPEAL by the tenant from an order of His Honour JUDGE KINGSLEY GRIFFITH, at Kingston-upon-Hull County Court, dated June 10, 1949, whereby he held that the landlords were entitled to arrears of rent at 7*s.* 11*d.* a week in respect of a cottage occupied by the tenant. The rate of 7*s.* 11*d.* a week was the adjusted maximum rent determined by the local authority, the East Riding County Council, as from Apr. 1, 1948, under the Housing (Rural Workers) Act, 1926, s. 3 (1), and it represented an increase on the rent previously paid by the tenant, which was the maximum rent fixed under s. 3 (1) in 1938, on the completion of works done to the premises pursuant to the Act of 1926, and was also the standard rent of the premises under the Rent Restrictions Acts. The tenant challenged the validity of the increase, and her appeal from the order of the county court judge was now allowed by the Court of Appeal. The facts appear in the judgment of the court read by SIR RAYMOND EVERSHED, M.R.

A. W. Stephenson for the tenant.
R. W. Payne for the landlords.

Cur. adv. vult.

Nov. 9. **SIR RAYMOND EVERSHED, M.R.,** read the following judgment of the court. The defendant, Mrs. Straker, is the tenant of a cottage, No. 7 High Street, Patrington, which she has occupied since a date prior to 1914. It is conceded on behalf of the plaintiffs, her present landlords, that, apart from the effect which the Housing (Rural Workers) Act, 1926 (as varied by the Housing (Rural Workers) Amendment Act, 1938), may have on it, the premises are and have ever since 1914 been within the scope of the relevant Rent Restrictions Acts. In the present action the substantial question raised is that of the validity of an increase in her rent which the landlords have sought to impose. The actual figures do not for present purposes matter, and are complicated, for example, by an addition in respect of rates. It is, however, clear that the rent which the tenant was paying immediately before the increase which she challenges represents (*a*) the maximum rent fixed under the relevant provisions of s. 3 (1) of the Act of 1926 at the date of the completion of the works done pursuant to that Act in 1938, and (*b*) the standard rent of the premises under the Rent Restrictions Acts.

The tenant is entitled to succeed in this appeal, therefore, and to challenge successfully the validity of the attempted increase in her rent if she can establish *either* of the two following propositions, namely, (*a*) that, on the true construction of the Act of 1926, s. 3 (1), as amended by the Act of 1938, the maximum or " normal agricultural " rent ascertained thereunder is not liable to variation, and, particularly, to increase by reference to circumstances occurring after the date of the execution of the relevant works ; or (*b*) that the application of the Rent Restrictions Acts in regard to standard rent is not displaced or excluded by the Housing (Rural Workers) Act, 1926, during the period when the provisions of the latter Act are applicable to the premises. The learned county court judge rejected the tenant's contentions under both heads, and we have heard argument on both in this court. We are much indebted to the learned counsel for the assistance they have given to us on what have appeared to us to be matters of considerable difficulty on the construction of and conflict between Acts of Parliament.

Before proceeding to state our conclusions on the two points it is convenient to re-state two other agreed matters of fact recorded by the learned county court judge, *viz.,* (i) that the works done on the premises in and prior to 1938, in respect of which the landlords received a grant pursuant to s. 2 of the Act of 1926 from the East Riding of Yorkshire County Council, did not have the effect of converting the premises into new premises, *i.e.*, of destroying their previous identity, as was held by this court to have been the result of the works done in *Roberts* v. *Jones* (1), to which we shall later refer ; and (ii) the house is not one in respect of which the relevant local authority (since it is a county council) for the purposes of pt. V of the Housing Act, 1936, are required by s. 128 of that Act to keep a housing revenue account with the result that s. 3 (2) (*c*) of the Rent and Mortgage Interest Restrictions Act, 1939, does not apply expressly A to exclude the application of the Rent Restrictions Acts to the premises.

We turn now to the first of the two contentions of the tenant. The relevant language of the Housing (Rural Workers) Act, 1926, s. 3 (1), as it stood before amendment, is as follows :

> " In the case of a dwelling in respect of which assistance has been given under this Act by way of grant the following conditions shall, subject as B hereinafter provided, apply in relation to the dwelling for a period of twenty years from the date on which it first becomes fit for occupation after the completion of the works and shall so long as they continue to have effect be deemed to be part of the terms of any lease, agreement for a lease, or tenancy of the dwelling, and shall be enforceable accordingly . . . (*b*) The rent payable by the occupier in respect of the dwelling shall not exceed the C amount of the normal agricultural rent, increased by a sum equal to three per cent. of the amount by which the estimated cost of the works in respect of which assistance has been given exceeds the amount of the assistance given by way of grant, and no fine, premium or other like sum shall be taken in addition to the rent."

D

Then comes the definition, on which the matter largely turns :

> " For the purposes of this provision the expression ' normal agricultural rent ' means (i) in the case of a dwelling which had not previously to the execution of the works been, or which was not within the period of five years immediately preceding the execution of the works separately let as E such, the rent which the local authority determine to be the average rent for the time being paid by agricultural workers in the district ; and (ii) in the case of a dwelling which was separately let as such at any time within the said period of five years, the average amount determined by the local authority to have been payable by way of rent per week during the period of the letting : Provided that, if in the case of a dwelling to which para. (ii) F applies the amount of the normal agricultural rent payable in respect thereof is by reason of a general increase of rents in the district less than the rent normally paid by agricultural workers in the district, the rent so normally paid shall be taken to be the normal agricultural rent."

It is unfortunate that it was on this, the unamended, language of s. 3 (1) of the Act that the county court judge reached his decision, for it is clear that he G placed considerable reliance on the point, conceded before him on the tenant's behalf, that, had her rent fallen to be determined by reference to para. (i) of the definition of " normal agricultural rent " instead of (as the fact is) by reference to para. (ii), it would have been liable to increase or variation in accordance with the average " for the time being " paid by agricultural workers in the district, and there is, to say the least, a strong argument for the view that, if H a rent determined in reference to para. (i) of the definition is variable, so in logic should be a rent determined in reference to para. (ii). But the terms of the definition have been materially altered by the Housing (Rural Workers) Amendment Act, 1938, s. 4, which does not appear to have been brought to the attention of the county court judge. In particular, the phrase " for the time being " in para. (i) of the definition has now been removed. As amended the two paragraphs of the definition and the proviso to para. (ii) now read as follows :

> "For the purposes of this provision the expression 'normal agricultural rent' means—(i) in the case of a dwelling which had not previously to the execution of the works been, or which was not within the period of five years immediately preceding the execution of the works separately let as such, the rent which the local authority determine to be the rent normally paid by agricultural workers in the district, or, if it appears to the local authority that the number of agricultural workers in the district is insufficient for the determination of any sum as being such rent as aforesaid, the rent normally paid by persons of substantially the same economic condition in the district; and (ii) in the case of a dwelling which was separately let as such at any time within the said period of five years, the average amount determined by the local authority to have been payable by way of rent per week during the period of the letting: Provided that, if in the case of a dwelling to which para. (ii) applies the amount of the normal agricultural rent payable in respect thereof is by reason of a general increase of rents in the district less than the rent normally paid by agricultural workers in the district, or, if it appears to the local authority that the number of agricultural workers in the district is insufficient for the determination of any sum as being such rent as aforesaid, than the rent normally paid by persons of substantially the same economic condition in the district, the rent so normally paid shall be taken to be the normal agricultural rent."

As we have already stated, the premises here in question have been continuously let to the tenant since at least 1914. It is clear that, applying para. (ii) of the definition of "normal agricultural rent," apart from the proviso, the figure arrived at would be fixed and finally fixed for the whole twenty years' period contemplated by the section (subject only to the owner's rights on repayment of the grant) by reference to the average weekly payments made by the tenant prior to the execution of the works. It is equally clear that the effect of the proviso is that some increase in the sum so calculated may be made, if justified by reason of "a general increase of rents in the district." The question is whether the "general increase" contemplated is one experienced up to, but not beyond, the date when the rent has to be first determined (in this case the date of the execution of the works), or whether it is one experienced at any time and from time to time during the period when the statutory restrictions apply.

It is, we think, true to say that phrases such as "normal agricultural rent," and "rent normally paid by agricultural workers in the district, or . . . normally paid by persons of substantially the same economic condition," when applied to a substantial period of time such as twenty years, are, at any rate, apt to import the notion of variability in accordance with changes in the relevant economic circumstances during that period, and, if the figure arrived at under the corresponding definition in para. (i) were shown to be variable during the period, we should find it difficult to resist the conclusion that the figures under para. (ii) were similarly intended to be variable, but, as a matter of English, the words and phrases to which we have alluded in our judgment are also properly referable to a particular point of time, *e.g.*, the date when the works were undertaken. And it is to be observed that there is nowhere found in the introductory sentences of s. 3 (1) or, now, in the definition paragraphs of s. 3 (1) (*b*), as there is in s. 3 (1) (*c*), the common phrase "from time to time" or other similar formulae, and if the words, "for the time being" in definition (i) could properly have been relied on to show an intention that the normal agricultural rent under that part of the paragraph was a variable figure, it is to be noted that those words, as part of the amendment, contained in s. 4 of the Act of 1938, have now been removed and their place has not been taken by any corresponding language. It is further to be observed, as it seems to us, that, if the normal agricultural rent is, under either branch of the definition, liable to variation, it would appear to follow that any increase justified at one point of time should thereafter cease to be justified if there followed a fall in the relevant level of rents, and, in the case of a rent determined under definition (i), the proper figure might fall below the figure appropriate at the date of the original determination. Such a result would plainly be inconvenient, particularly in the light of the landlord's obligation under s. 3 (1) (*c*) to certify from time to time that the conditions of the preceding paragraphs of s. 3 (1) are being complied with. No doubt, the landlord would *prima facie* be protected by the local authority's determination, but we are not satisfied that such a determination would necessarily be available in all cases on the strict wording of definition (ii). In any case, the section does not appear to contemplate any procedure whereby, if there is a general fall in rent levels, the tenant could apply to the local authority and require them to determine afresh the amount of the normal agricultural rent.

For these reasons we have reached a conclusion different from that arrived at by the county court judge who, as we have said, had not had brought to his attention the amendments made in the Act of 1926 by the Act of 1938. In our judgment, the normal agricultural rent appropriate to the present case, having been arrived at pursuant to definition (ii) on the facts as they stood in 1938, cannot now be increased by reference to a general increase in the level of the relevant rents since that date. Whether in any case under para. (ii) of the definition, if the house on which the works had been executed was not occupied by a tenant until, say, ten years after the execution of the works, the " normal agricultural rent " would have to be determined at the date when such tenancy began or at the date of the execution of the works, it is unnecessary to determine, for on the facts of the present case the tenant has been the tenant at all relevant times.

If this conclusion is right, the tenant is entitled to succeed, and it is not strictly necessary to consider the second point, *viz.*, the applicability of the Rent Restrictions Acts, but, as the case is of some importance and the matter was very fully argued, we think it right to express our opinion also on this point. As we have said, the circumstances of the present case taking it outside the terms of s. 3 (2) (*c*) of the Rent and Mortgage Interest Restrictions Act, 1939, it cannot, in our judgment, be regarded as directly covered by the authority of *Roberts* v. *Jones* (1), for in that case, as we understand the facts, the house in question was one in respect of which the relevant local authority was required to keep a housing revenue account. It is true, however, that certain passages in the judgment of Scott, L.J., and his invocation of the maxim *generalia specialibus non derogant* seem to go beyond the strict requirements of the decision, and were naturally and properly considered as of weight by the county court judge. Scott, L.J., said ([1946] 2 All E.R. 680) :

> " That raises a question of first principle on which there is no direct authority, though there is authority which is relevant. The Rent Restrictions Acts impose a status on a house. In my view, in exactly the same sense, the Housing (Rural Workers) Acts impose a status on a house. That, I think, leads to the necessary conclusion of law that the Rent Restrictions Acts are not intended to apply to houses the rent of which is fixed within the Housing (Rural Workers) Acts."

He then referred to *Bishop of Gloucester* v. *Cunnington* (2), and proceeded :

> " This court decided that the Rent Restrictions Acts, being general Acts, did not apply to a house governed by special legislation of that kind, on the principle of the maxim *generalia specialibus non derogant.* That same principle applies, though in a different way, I think, to the Rent Restrictions Acts generally. They constitute general legislation. The Housing (Rural Workers) Acts are special legislation. *Prima facie*, the general was not intended to override or to conflict with the special legislation, and that, in

> my opinion, is the proper interpretation to be put on the Rent Restrictions Acts."

It is to be noted that SCOTT, L.J., qualifies his observation in the last sentence by the words "*prima facie*," and, given that one of two apparently conflicting Acts can be defined as "special" and the other as "general," the lord justice's statement so qualified could not, we think, be open to question. Our main
A difficulty in the present case in applying the maxim so as wholly to exclude from the Rent Restrictions Acts all houses comprehended by the Housing (Rural Workers) Act, 1926, arises from the terms of s. 3 (2) (*c*) of the Rent and Mortgage Interest Restrictions Act, 1939, itself. For by the express reference to s. 128 of the Housing Act, 1936, Parliament must have had in mind the reference in that section to the Act of 1926. If, therefore, as we think, Parliament expressly and
B deliberately excluded wholly from the ambit of the Rent Restrictions Acts certain, but certain only, of the houses falling within the Act of 1926, we feel compelled to hold that by necessary implication those houses within the Act of 1926 which were not so excluded by s. 3 (2) (*c*) of the Act of 1939 were intended not to be excluded, and, therefore, unless we are compelled by some irreconcilable conflict to hold otherwise, we are of opinion that the provisions as to standard
C rent in the Rent Restrictions Acts continue to apply to the present house.

In cases arising under the Pluralities Act, 1838, *e.g.*, *Bishop of Gloucester* v. *Cunnington* (2), there is such an irreconcilable conflict in regard to the right to obtain possession. In that case LORD GREENE, M.R., said ([1943] 1 All E.R. 63):

> "This review of the relevant statutory provisions which were in force
> D when the Rent Restrictions Acts were passed shows that parsonage houses are placed by the legislature in a category by themselves. Save where a licence is obtained, residence by the incumbent in a parsonage house is compulsory. An incumbent who fails to reside in the house can be ordered to do so and an occupier can be expelled to make room for him. The reasons for this special treatment are of a spiritual nature and are based on the
> E necessity for ensuring that the cure of souls shall be conducted by an incumbent residing not only in the benefice, but in the parsonage house itself which is provided in order to enable him to perform his spiritual duties and (what is important) the duties of hospitality connected therewith. These considerations make it, in our view, impossible to suppose that the legislature intended that where a parsonage house has been let the tenant should have
> F the protection of the Rent Restrictions Acts. Particular confirmation of this view is to be found by a consideration of s. 59 [of the Pluralities Act, 1838.] Under that section, as has been already pointed out, every lease of a parsonage house can be avoided and the tenant evicted whenever the bishop orders the incumbent to reside in the house. If the Rent Restrictions Acts apply to such a house they must impliedly have repealed the provisions
> G of that section under which possession can be obtained in order to enable the incumbent to reside. It is, in our view, impossible to think that any such implied repeal could have been intended."

Similarly in *Rose* v. *Hurst* (3) an irreconcilable conflict arose between the right of the tribunal under the Landlord and Tenant Act, 1927, s. 5 (2), to determine
H a fair rent between a willing lessor and a willing lessee and the standard rent imposed by the Rent Restrictions Acts which negatives the conception of free bargain: see, for example, the language of DENNING, L.J. ([1949] 2 All E.R. 26):

> "Those two sections cannot possibly apply at one and the same time to the self-same premises. Under the Landlord and Tenant Act, 1927, a tribunal has got to 'determine' what the rent is to be. If it had already been fixed by the Rent Acts, there will be nothing for the tribunal to determine. Again, under the Landlord and Tenant Act the rent is to be that which a 'willing'

> lessee would agree to give and a ' willing ' lessor would agree to accept, but, if the Rent Acts apply, the rent is fixed without regard to what either is ' willing ' to do. So the two provisions are inconsistent one with the other, and the task of this court is to say which provision is to prevail. The Act of 1927 is later and more specific than the Act of 1920 and must be taken to prevail."

We add that it does not seem to us to follow from the decision of this court in *Rose* v. *Hurst* (3) that the premises there in question were necessarily taken out of the scope of the Rent Restrictions Acts for all purposes and for all time, *e.g.*, on the falling in of a new lease then granted.

If and in so far, therefore, as there is any direct conflict between the two Acts here in question, the courts may, no doubt, have to resolve the conflict by choosing one or the other, as it did in *Rose* v. *Hurst* (3), but there is, at the least, a large field where there is no conflict and in which each Act must be given its full effect. When a landowner repairs his farm cottages with his own money entirely and their identity is not thereby destroyed, the tenants clearly remain protected by all the provisions of the Rent Restrictions Acts. They cannot be turned out and their rents cannot be raised. It would be a remarkable thing if they should entirely lose the protection of the Rent Restrictions Acts simply because the landowner receives a grant from the county council to help him to do the repairs. We are satisfied that that is not the result of the Acts. There is no conflict between the Acts as to the rent payable. The Rent Restrictions Acts provide one maximum rent. The Housing (Rural Workers) Acts provide another maximum rent. The rent payable must not exceed either of the maxima. Whether there is such a conflict as regards security of tenure may be another matter. The question does not arise in this case, we have heard no argument on it, and we prefer, therefore, to express no opinion.

In the result, therefore, we think that the provisions of the Rent Restrictions Acts in regard to the rent payable in respect of this house continue to apply. As we have already stated, the precise point which has arisen in the present case did not arise in *Roberts* v. *Jones* (1), and, although we do not, of course, in any way question the correctness of the decision in that case, we think that the principle stated by SCOTT, L.J., in the first of the two passages from his judgment which we have quoted above does not lead to so broad a conclusion as he formulated. We are unable to agree, for the reasons we have stated, that the Rent Restrictions Acts are not intended to have any application to any houses falling within the Housing (Rural Workers) Acts. The tenant, therefore, in our judgment, is also entitled to succeed on this part of her case.

Appeal allowed. No order as to costs.

Solicitors: *Smith & Hudson*, agents for *Mainprize, Rignall & Whitworth*, Hull (for the tenant); *Stevenson & Couldwell*, agents for *E. B. Burstall*, Hull (for the landlords).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

WALL *v.* WALL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), November 3, 4, 9, 1949.]

Death—Presumption—Petition—Jurisdiction—Parties domiciled abroad—Petitioner resident in England—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 8 (1).

By the Matrimonial Causes Act, 1937, s. 8 (1): "Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage."

In 1917 the wife married in England a private soldier of the Australian forces. Three months later he left England in a troopship. She remained in England, and, apart from a letter written on board ship, she had not seen or heard from him since that date. In 1949, while resident in England, she presented a petition under s. 8 (1) to have her husband's death presumed, alleging that her domicil was in New South Wales where he resided. The petition was rejected by the registry on the ground that, as the petitioner was not domiciled in England, there was no jurisdiction to entertain it. On appeal to the judge in chambers,

HELD: English courts had accepted the principle that, where the parties were domiciled abroad, the court of domicil had sole jurisdiction in suits for dissolution of marriage, but the relief afforded under the Matrimonial Causes Act, 1937, s. 8 (1), was not primarily or in essence dissolution of marriage, and the residence in England of the petitioner gave the court jurisdiction to entertain the petition.

[AS TO THE JURISDICTION OF THE ENGLISH COURTS IN DIVORCE AND OTHER MATRIMONIAL CAUSES, see HALSBURY, Hailsham Edn., Vol. 6, pp. 296-314, paras. 353-365; and FOR CASES, see DIGEST, Vol. II, pp. 421-428, Nos. *874-926* and First and Second Supplements.]

Cases referred to:

(1) *Forster* v. *Forster and Berridge*, (1862), 3 Sw. & Tr. 144; 31 L.J.P.M. & A. 185; 9 L.T. 147; 27 Digest 398, *2947*.

(2) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest 422, *885*.

(3) *Niboyet* v. *Niboyet*, (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 11 Digest 423, *894*.

(4) *Salvesen* (*or von Lorang*) v. *Austrian Property Administrator*, [1927] A.C. 641; 96 L.J.P.C. 105; 137 L.T. 571; Digest Supp.

(5) *Eustace* v. *Eustace*, [1924] P. 45; 93 L.J.P. 28; 130 L.T. 79; Digest Supp.

(6) *Stathatos* v. *Stathatos*, [1913] P. 46; 82 L.J.P. 34; 107 L.T. 592; 11 Digest 425, *905*.

(7) *De Montaigu* v. *De Montaigu*, [1913] P. 154; 82 L.J.P. 125; 109 L.T. 79; 11 Digest 425, *906*.

(8) *Ogden* v. *Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 11 Digest 334, *228*.

(9) *Hutter* v. *Hutter* (*otherwise Perry*), [1944] 2 All E.R. 368; [1944] P. 95; 113 L.J.P. 78; 171 L.T. 241; 2nd Digest Supp.

(10) *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 2nd Digest Supp.

(11) *Casey* v. *Casey*, [1949] 2 All E.R. 110.

(12) *Inverclyde* (*otherwise Tripp*) v. *Inverclyde*, [1931] P. 29; 100 L.J.P. 16; 144 L.T. 212; 95 J.P. 73; Digest Supp.

(13) *Antania Anskaitis or Labcianskas* v. *Antania Anskaitis or Labcianskas*, [1949] S.L.T. 199.

(14) *Cocks* v. *Cocks*, [1946] Q.S.R. 146.

DIVORCE SUMMONS adjourned into court.

The Divorce Registry rejected *in limine*, on the ground of lack of jurisdiction, a proposed petition by the wife to presume the death of her husband. The wife, an Englishwoman, married an Australian soldier in England in 1917, and within three months he left England in a troopship. Apart from a letter written on board ship she had not heard from him since that date and was unaware whether he was alive or dead. In her petition she alleged that the domicil of her husband and herself was in New South Wales. PEARCE, J., ordered that the petition should be filed. A

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R. J. A. Temple for the wife (the proposed petitioner).

Colin Duncan for the King's Proctor.

Cur. adv. vult.

Nov. 9. **PEARCE, J.**, read the following judgment. In 1917 the wife, who was a shop assistant, married in England a private soldier in the Australian forces. Three months later he left England by troopship. She stayed in England. C Apart from a letter written on board ship she has neither seen nor heard of him since he left. She now wishes to petition under s. 8 (1) the Matrimonial Causes Act, 1937, to have it presumed that her husband is dead and to have the marriage dissolved. In her proposed petition she states her belief that the domicil of her husband and herself is in New South Wales. This belief rests, I understand, on the somewhat insecure foundation that her husband told her that his father D (who was a cattle drover) was living at an address in New South Wales. The petition was rejected *in limine* by the registry on the ground that it did not allege an English domicil, and that, therefore, the court had no jurisdiction to entertain it. Application is now made to me by the wife to allow it to be filed on the ground that an English domicil is not necessary to found jurisdiction. As the case is one of difficulty I invited the King's Proctor to assist the court by E arguing the matter.

Section 8 (1) of the Matrimonial Causes Act, 1937, provides :

> " Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable F grounds exist, may make a decree of presumption of death and of dissolution of the marriage."

In the ecclesiastical courts before 1857 jurisdiction depended on residence, not on domicil. By the Matrimonial Causes Act, 1857, all jurisdiction then exercisable by the ecclesiastical courts in respect of divorces *a mensa et thoro*, suits of G nullity of marriage, and other matrimonial matters was vested in the Divorce Court. Decrees of judicial separation having the same effect as divorces *a mensa et thoro* were substituted for them. The court was given a new power of decreeing dissolution of marriage. It was provided that in all proceedings other than those for dissolution of marriage the court should proceed on principles and rules as nearly as might be conformable to those of the former ecclesiastical courts. H The Act of 1857 contained no express provision with regard to jurisdiction. The legal principles determining the jurisdiction of the newly constituted court were at first in doubt.

In *Forster* v. *Forster* (1) it is to be noted that CRESSWELL, J.O., said (3 Sw. and Tr. 155) :

> " I should have been very glad indeed if the legislature had said that the court had no jurisdiction except over persons domiciled in England. When

> LORD CAMPBELL was Lord Chancellor, I asked him to bring in a bill to settle the question and to define my jurisdiction ; but he said, 'I cannot do it. Whenever that question is raised, it must be decided upon legal principles. It cannot be defined'."

In 1895 the Judicial Committee of the Privy Council in *Le Mesurier* v. *Le Mesurier* (2), on appeal from Ceylon, reviewed the English and Scottish cases, A and came to the conclusion that according to international law the domicil for the time being of the married pair afforded the only true test of jurisdiction to dissolve their marriage. The reasons for adopting domicil as the true test are clearly set out in a dissenting judgment of BRETT, M.R., in *Niboyet* v. *Niboyet* (3), a case which in the light of the later decisions must be considered to have been wrongly decided. From 1895 onwards the courts have followed *Le* B *Mesurier* v. *Le Mesurier* (2) and held that domicil is the true test in suits for dissolution of marriage. In 1927 the House of Lords regarded it as established that for a decree of dissolution of a marriage the court of the domicil is the true court of jurisdiction and that in principle that jurisdiction ought to be regarded as exclusive, since it affected the status of the parties and was equivalent to a judgment *in rem* : *Salvesen* (*or von Lorang*) v. *Administrator of Austrian Pro-* C *perty* (4), *per* VISCOUNT HALDANE ([1927] A.C. 654). Concurrently with the refusal of the court to entertain suits for dissolution of marriage where a foreign domicil is involved, there has been an acceptance by it of suits that do involve an alteration in status and are equivalent to judgments *in rem.* For instance, the court makes decrees of judicial separation where the parties are domiciled abroad. These involve alteration of status : *Eustace* v. *Eustace* (5), *per* ATKIN, L.J. D ([1924] P. 54). The court in certain cases makes decrees of nullity where the parties are domiciled abroad. These also involve alteration in status : *Salvesen* (*or von Lorang*) v. *Administrator of Austrian Property* (4), *per* VISCOUNT HALDANE ([1927] A.C. 654, 656), and *per* VISCOUNT DUNEDIN ([1927] A.C. 662). Counsel for the wife relies on these instances as showing that the court has not in the past been, and should not be, rigidly prevented by the existence of a foreign E domicil from making decrees in any cases involving alteration of status where it is necessary to do so to avoid hardship. Counsel for the King's Proctor says that these instances are justifiable on historical grounds and do not lessen the rigidity with which the court refuses to deal with cases of dissolution where there is a foreign domicil.

Counsel for the wife also referred to *Stathatos* v. *Stathatos* (6), and *De Montaigu* F v. *De Montaigu* (7), both of which adopted a *dictum* of SIR GORELL BARNES, P., in the Court of Appeal in *Ogden* v. *Ogden* (8) as showing that in a proper case the court will assume jurisdiction even in suits for dissolution. Those cases dealt with a situation that had arisen because the court of the husband's domicil had declared a marriage void on grounds not recognised in England. They assumed in the wife her original English domicil to support her petition for dissolution of the G marriages that had been avoided in the courts of domicil, but since those cases were decided before *Salvesen* (*or von Lorang*) v. *Administrator of Austrian Property* (4), I do not think they are of much assistance.

In *Hutter* v. *Hutter* (*otherwise Perry*) (9), where the marriage was in England but the domicil was foreign, the court assumed jurisdiction and gave a decree of nullity on the ground of wilful refusal to consummate the marriage, a ground H that was first created by the Matrimonial Causes Act, 1937. The ground of the decision was the historical jurisdiction of the ecclesiastical courts in cases of nullity. This case was referred to in the Court of Appeal in *De Reneville* v. *De Reneville* (10) and in *Casey* v. *Casey* (11), and there was no unfavourable comment on it. In the latter case SOMERVELL, L.J., said of it ([1949] 2 All E.R. 118) :

> "No doubt there is force in the argument that nullity suits where the marriage is voidable are similar to suits for dissolution. On the other hand there seems to me considerable reasons of convenience for giving the courts

> where the respondent or both parties reside jurisdiction in this class of case, and I would desire, so far as this court is concerned, to keep that point open until it arises."

Casey v. *Casey* (11) was a case of nullity where there was a foreign domicil and BUCKNILL, L.J., there said (*ibid.*, 117) :

> "My opinion in favour of dismissing this appeal is based partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicil is the sole court in dissolving a valid marriage."

The effect of the cases (both now and in 1937 when the Matrimonial Causes Act of that year was passed) appears to me to be this. (i) Both in theory and practice our courts have accepted the principle that the court of domicil has sole jurisdiction in suits to dissolve an existing marriage where there is a foreign domicil and that our courts should not take jurisdiction in such suits. In such cases questions of hardship or convenience are irrelevant. (ii) In suits for relief not involving dissolution of an existing marriage but involving alteration of status our courts have in theory accepted the principle that the court of domicil is the appropriate court to pronounce decrees that alter status and are equivalent to judgments *in rem.* How far they have accepted the principle that it is the *only* appropriate court does not appear certain : see *Salvesen* (*or von Lorang*) v. *Administrator of Austrian Property* (4), *per* VISCOUNT HALDANE ([1927] A.C. 654) and *per* LORD PHILLIMORE ([1927] A.C. 671), *Inverclyde* v. *Inverclyde* (12), *De Reneville* v. *De Reneville* (10) and *Casey* v. *Casey* (11). In practice, however, the courts have taken jurisdiction, which theory might find it difficult to justify, in certain cases where the domicil is foreign and alteration of status is involved. They have done so where they have found historical, or (as in *Hutter* v. *Hutter* (9)), quasi-historical, grounds for so doing. In such cases questions of convenience and hardship are not irrelevant. (iii) In suits where no alteration of status is involved there is no objection to our courts accepting jurisdiction where there is a foreign domicil if the parties are resident in England.

If, therefore, the suit now under discussion is a suit for dissolution of marriage, this court should not take jurisdiction and the question of hardship is irrelevant. It becomes necessary to see what is the essential nature of the relief claimed under s. 8 of the Matrimonial Causes Act, 1937. Section 2 sets out the grounds on which divorce may be obtained (by substituting a fresh s. 176 in the Supreme Court of Judicature (Consolidation) Act, 1925). The list of grounds there set out does not include the relief under s. 8. Section 8 (3) provides that ss. 181 to 184 inclusive of the Supreme Court of Judicature (Consolidation) Act, 1925

> ". . . shall apply to a petition and a decree under this section as they apply to a petition for divorce and decree of divorce respectively."

It would seem, therefore, that the legislature is not regarding relief under s. 8 as being a decree of divorce. The sections of the Supreme Court of Judicature (Consolidation) Act, 1925, that are applied to such relief are those providing for interventions by the King's Proctor or other persons and the right of re-marriage. Many sections dealing with maintenance, variation of settlements, custody, the duty of the court to inquire into questions of connivance or condonation, and the effect of misconduct by the petitioner (which would, of course, be unsuitable where there is a presumption of death) are clearly intended to be excluded (by the inclusion of the four specified sections) from applying to proceedings under s. 8. As the sections thus excluded by implication each contain such words of application as " on a petition for divorce " or " on a decree of divorce," it becomes clear that the legislature considered that proceedings under s. 8 would not attract the operation of sections that apply to divorce.

The reason for this is, I think, apparent in the section. Its primary and essential purpose is to enable a petitioner to have it declared that the other party to the marriage is presumed to be dead. It was intended, no doubt, that, where it was

reasonable to presume death but impossible to prove it, widows or widowers should no longer have to sterilise their whole lives, but could marry again without being haunted by the probably unfounded fear that their spouses might reappear with disastrous results to their new families. It was *not*, in my view, intended that this should really be a fresh ground for divorce (masquerading as a presumption of death) where the vanished spouse is in fact alive. Since facts sometimes
A belie presumptions, provision was made for the fact that occasionally spouses who were presumed dead would, in fact, be still living. To provide no safeguard for a petitioner in such a case would stultify the whole object of the relief given. PROFESSOR WOLFF in PRIVATE INTERNATIONAL LAW, p. 281, discusses the methods of various legislatures for dealing with the problem of the return of a spouse presumed to be dead, and it is interesting to note in passing
B that he assumes inferentially that under the Matrimonial Causes Act, 1937, s. 8, the English courts *can* deal with cases involving a foreign domicil.

As a safeguard, therefore, this Act has joined to the decree of presumption of death a decree of dissolution of the marriage and has thereby produced a new, and, in my view, anomalous, form of relief. It is this safeguard that has led to the difficulty in this case. It is argued, I think rightly, that the relief under s. 8
C is not severable, and, therefore, it is argued that a petition to have it presumed that the other party is dead and have the marriage dissolved, in fact, constitutes a petition for dissolution of marriage. It is fair to assume that in most cases where it is reasonable to presume death the decree of dissolution will not dissolve an existing marriage, since death will have already dissolved it, but in the occasional cases where the person presumed dead is alive the safeguard will take
D effect and an existing marriage will, in fact, have been dissolved by decree of the court. Does this occasional effect make a petition under s. 8 a petition for dissolution of marriage or prevent the court having jurisdiction where the domicil is foreign ? There is, to my mind, a fundamental difference between deliberately dissolving a marriage which the court knows to exist and dissolving *ex abundanti cautela* a marriage which the court presumes not to exist. Although
E there must always be some risk that the decree may alter status, owing to the party presumed dead being in fact alive, yet the risk in each case should not be a large one. In practice the alteration in status, if it occurred, would not be severe, since, where a husband's contact with his wife is so tenuous that his wife and the court presume him to be dead, it is unlikely that he or the community of his domicil are strongly conscious of his marriage status. Must that risk deter
F the court from accepting jurisdiction ? I do not think that the legislature so intended. The preamble to the Matrimonial Causes Act, 1937, sets out that it is expedient for *inter alia* the removal of hardship that the Acts relating to marriage and divorce be amended. If it had been intended that the removal of this particular hardship should not be available to Englishwomen who have married husbands domiciled elsewhere it would have been easy to say so by
G enacting that the remedy shall be available not to "any married person" but to "any married person domiciled in England." An almost identical provision in a South Australian statute [the Matrimonial Causes Act Amendment Act, 1941, s. 4] gives the relief to "any married person *domiciled in the State*." Many wives are not very certain where their husband's domicil is and are not in a position to conduct experimental litigation abroad, and I think it was the inten-
H tion of the legislature that they should be able to participate in the benefits of the Act. It certainly seems just to such wives and also in the public interest that they should have their status as married women or widows established by this court if it properly can be done. To allow them to do so seems more in accord with the tenor of this Act of Parliament. Section 13 of the Act of 1937, in order to alleviate the hardship in certain cases where the husband of a deserted wife has changed his domicil from England to some other country, gives jurisdiction for dissolution although this is a clear infringement of the principle that

dissolution belongs only to the court of domicil. It seems unlikely that, owing to the mere risk of such infringement, the Act intended to withhold relief under s. 8 from a class whose hardship was obvious. I think it more likely that the legislature assumed and intended that, owing to the anomalous nature of the relief under s. 8, our courts should not be deterred from taking jurisdiction under it when the husband had a foreign domicil.

There have been two cases cited to me in respect of similar statutory provisions —one decided in Scotland, the other in Queensland. The Scottish case was decided at first instance against the petitioner on the ground that she had failed to prove a Scottish domicil. On appeal she succeeded because it was held that she had proved a Scottish domicil : *Antania Anskaitis* (*or Labcianskas*) v. *Antania Anskaitis* (*or Labcianskas*) (13). In both courts it was assumed that a Scottish domicil had to be proved, and that point was never argued. The Divorce (Scotland) Act, 1938, s. 5, is in different terms from s. 8 of the Matrimonial Causes Act, 1937. It does not give a right to apply to have it presumed that the other party is dead, with dissolution as a secondary safeguard. It only gives a right to apply for a " dissolution of the marriage on the ground of the presumed death of the other party." This difference in terms and the absence of argument or comment on the point before me make it dangerous to give weight to that case in respect of the matter that I now have to decide. The other case, *Cocks* v. *Cocks* (14), dealt with s. 39A of the Queensland Matrimonial Causes Jurisdiction Act, 1864, introduced into the legislation (without preamble, and in company only with an amending section relating to dispensation with the service of writs) by the Matrimonial Causes Acts Amendment Act, 1943, s. 3. That section is in terms identical for all practical purposes with the section that I am now considering. In that case it was held that the petitioner must at the date of the institution of proceedings be domiciled in Queensland. I have studied the judgments carefully and the reasoning in them is bound to carry great weight with me. MACROSSAN, C.J., was of opinion that the terms of the section with which he was dealing clearly indicated ([1946] State Reports of Queensland, 149) :

> " that the exercise of the powers conferred on the court by the section is subject to the same requirements as to jurisdiction as the ordinary action for dissolution of marriage "

and found himself unable to accept the view that the jurisdiction conferred by the section was an anomalous jurisdiction, and that, therefore, the court should exercise jurisdiction in favour of any person resident in Queensland.

The section that I am now considering was introduced into the legislation in a different way from that in Queensland, and, though many of the considerations before me are the same as those before the learned Chief Justice, some are different. I have had some doubt in the matter and I regard the question as far from easy, but for the reasons which I have indicated I find myself unable to take the same view of the section before me as he did of the section before him. In my view, relief under s. 8 is not primarily or in essence dissolution of marriage and was not intended to be so. The dissolution was added as a safeguard. The risk that in certain cases the presumption may be incorrect so that the safeguard will then come into operation and effect an alteration of status in respect of a person domiciled abroad was not, in my opinion, intended by the legislature to deter this court from accepting jurisdiction and should not prevent its doing so. I think, therefore, that residence is the test, not domicil. Since the husband is, *ex hypothesi*, presumed dead and as such has no residence, it cannot have been his residence that was intended to be the test. It is the residence of the petitioner that was intended to give jurisdiction. I, accordingly, direct that the petition should be filed.

Order that the petition be filed.

Solicitors : *Malcolm Slowe & Co.* (for the wife) ; *Treasury Solicitor* (for the King's Proctor).

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Re DRIFFILL. HARVEY AND ANOTHER *v.* CHAMBERLAIN AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), November 17, 1949.]

Charity—Charitable purpose—Advancement of armed forces of Crown—Direction to trustees to "devote the net proceeds" of the testatrix's residuary estate "in whatever manner they may consider desirable to promote the defence of the United Kingdom from the attack of hostile aircraft."

By her will, made on Apr. 25, 1916, the testatrix, who died on Aug. 3, 1948, directed her trustees to "devote the net proceeds" of her residuary estate "in whatever manner they may consider desirable to promote the defence of the United Kingdom from the attack of hostile aircraft."

HELD: the gift was intended to secure the protection of the United Kingdom by means of the armed forces of the Crown, and, therefore, as it entailed the advancement of the armed forces of the Crown, it was a good charitable bequest.

Re Stephens (1892) (8 T.L.R. 792), and *Re Good* ([1905] 2 Ch. 60), *applied.*

[AS TO GIFTS FOR THE ADVANCEMENT OF THE ARMED FORCES OF THE CROWN, see HALSBURY, Hailsham Edn., Vol. 4, p. 124, para. 164; and FOR CASES, see DIGEST, Vol. 8, pp. 257, 258, Nos. *196-199*.]

Cases referred to:

(1) *Re Smith*, [1932] 1 Ch. 153; 100 L.J.Ch. 409; 146 L.T. 145; Digest Supp.

(2) *Williams' Trustees* v. *Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 2nd Digest Supp.

(3) *Re Stephens*, (1892), 8 T.L.R. 792; 8 Digest 259, *213*.

(4) *Re Good*, [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 8 Digest 258, *197*.

ADJOURNED SUMMONS to determine whether a gift by the testatrix of her residuary estate to trustees on trust to "devote the net proceeds in whatever manner they may consider desirable to promote the defence of the United Kingdom from the attack of hostile aircraft" was a valid charitable gift. DANCKWERTS, J., held that it was. The facts appear in the judgment.

J. L. Arnold for the executors.
John Monckton for the next of kin.
Denys B. Buckley for the Attorney-General.

DANCKWERTS, J.: The testatrix died on Aug. 3, 1948, having made her will on Apr. 25, 1916. By her will, after making certain bequests with which I need not deal, she gave, devised and bequeathed the whole of her residuary estate, whether real or personal, unto her trustees on the usual trusts for conversion, and, after providing for the payment of her debts, funeral and testamentary expenses, she directed that the trustees should

> "... devote the net proceeds in whatever manner they may consider desirable to promote the defence of the United Kingdom from the attack of hostile aircraft."

The question is whether that bequest is a valid charitable bequest or is void on the ground of uncertainty.

It is argued by counsel for the next of kin that the bequest is void because it is really for patriotic purposes and, therefore, exceeds the ambit of charitable purposes in the legal sense of the term. He contended that it would include the promotion of a newspaper or the support of a political candidate, if those methods might be considered by the trustees to advance the defence of the United Kingdom from the attack of hostile aircraft. He also contended that the reference to the United Kingdom was a reference to a political entity rather than a territorial conception, and that, therefore, the trustees might find themselves, in the event of there being a war—which is an unthinkable situation to me—between Eire and the rest of the former United Kingdom of Great Britain and Ireland, in such a situation that they had to support both sides. That seems to me to be a very far-fetched interpretation of the gift in the present case. It seems to me that it is obviously limited to the defence of the United Kingdom of which the deceased was a citizen, and would, I think, be confined to the defence of the United Kingdom as constituted from time to time. Further, it seems to me that it is obviously intended to promote the protection of the United Kingdom from the attack of hostile aircraft by means of the armed forces of the Crown.

Counsel for the next of kin contended that *Re Smith* (1), where a gift made " unto my country England " was held to be a valid charitable bequest, was distinguishable on the ground suggested by Lord Simonds ([1947] 1 All E.R. 521) in *Williams' Trustees* v. *Inland Revenue Comrs.* (2). It seems to me, however, that this is a clear case which falls within the well-known authorities in which gifts for the promotion of the armed forces of the Crown were held to be valid charitable bequests. I was referred by counsel for the Attorney-General to *Re Stephens* (3) and *Re Good* (4). *Re Stephens* (3) was a case where the bequest was of a sum in consols

> " . . . to the National Rifle Association, of which the Duke of Cambridge is president, and whose office is 12, Pall-mall East, and which association is also to be my residuary legatee, to form a fund to be called the Stephens' Prize Fund, to be expended by the council for the teaching of shooting at moving objects in any manner they may think fit, so as to prevent as far as possible a catastrophe similar to that at Majuba Hill."

Kekewich, J., held in that case that the reference to Majuba Hill in the latter part of the bequest showed that a gift for the promotion of shooting at moving objects was a charitable bequest because it obviously entailed the advancement of the armed forces of the Crown. In the same way, in *Re Good* (4), which otherwise is rather different on its facts from the present case, Farwell, J., said ([1905] 2 Ch. 66) :

> " I have come to the conclusion that this is a good charitable gift on the first ground—namely, that it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection of the country."

It seems to me that those two authorities exactly cover the gift in the present case and, therefore, I hold that this is a good charitable bequest.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the estate in due course of administration.

Solicitors : *Druces & Attlee*, agents for *Calthrop & Leopold Harvey*, Spalding (for the executors and the next of kin) ; *Treasury Solicitor* (for the Attorney-General).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

Considered. *Re* STEVENS (*decd.*).
[1952] 1 All E.R. 674.

Re TURNER. CARPENTER *v.* STAVELEY.

[CHANCERY DIVISION (Danckwerts, J.), November 11, 1949.]

Will—Gift of residue—"I give and bequeath unto" eleven named persons followed by specific gift to one of them.

A testator, by his will, made on a printed form, appointed C.C. and E.S. to be his "executor" (*sic*) and directed the payment of his debts and funeral expenses as soon as conveniently might be after his decease. The will proceeded: "I give and bequeath unto," and under those words was written the names of eleven persons, one name on each line, including C.C. Immediately under the last of the names were written the words: "My gold wrist watch to go to C.C."

HELD: the gift of the gold watch to C.C. was an afterthought, and, as the testator must be taken not to have intended to die intestate, it was reasonably clear that he intended to give all his property to the eleven persons named, who were, therefore, jointly entitled to the whole residuary estate apart from the gold watch.

Dicta of LORD ESHER, M.R., in *Re Harrison* (1885) (30 Ch.D. 393), and *Re Messenger's Estate* ([1937] 1 All E.R. 355), *applied.*

[AS TO ABSENCE OF STATEMENT OF SUBJECT-MATTER OF BEQUEST, see HALSBURY, Hailsham Edn., Vol. 34, pp. 219-222, paras. 274-277; and FOR CASES, see DIGEST, Vol. 44, pp. 610, 611, Nos. *4376-4385.*]

Cases referred to:

(1) *Re Bassett's Estate,* (1872), L.R. 14 Eq. 54; 41 L.J.Ch. 681; 44 Digest 837, *6912.*

(2) *Re Harrison,* (1885), 30 Ch.D. 390; 55 L.J.Ch. 799; 53 L.T. 799; 44 Digest 550, *3684.*

(3) *Re Messenger's Estate,* [1937] 1 All E.R. 355; Digest Supp.

(4) *Fell* v. *Fell,* (1922), 31 C.L.R. 268; 23 S.R.N.S.W. 285; 40 N.S.W.W.N. 4; 29 Argus L.R. 31; 44 Digest 610, *e.*

ADJOURNED SUMMONS for the determination, *inter alia,* of the question whether, on the true construction of the will of William Henry Turner, the words "I give and bequeath unto" followed by the names of eleven persons operated as an effective gift or bequest to those eleven named persons of the testator's residuary estate, or whether (except as regards the specific gift of a gold watch) the testator died without having effectively disposed thereof. DANCKWERTS, J., held that the testator had effectively disposed of his residuary estate by his will.

Richmount for the executors.
Spears for the persons named in the will as beneficiaries.
Bassett for Henry Albert Turner, one of the next of kin.

DANCKWERTS, J.: The testator, William Henry Turner, who died on Sept. 13, 1948, made his will dated Sept. 2, 1948, on a printed form. After appointing Charles Carpenter and Edward Staveley executors and directing that all the testator's debts and funeral expenses should be paid as soon as convenient after his decease, the will proceeds: "I give and bequeath unto" and then follows a list of eleven named nephews and nieces, including Charles Carpenter. After a blank space the will continues: "My gold wrist watch to go to Charles Carpenter."

The question is whether the testator made an effective bequest of the gold watch to Charles Carpenter and an effective gift of his residuary estate to the eleven named persons, or whether he has failed to dispose of his residuary estate, only the specific gift being a valid disposition. In my judgment, on the true construction of this will, the bequest of the gold watch was an afterthought, and is clearly a specific and separate bequest. The next consideration is whether there is an effective residuary bequest in favour of the eleven named persons. Unless I can find the subject-matter to be ascertained the gift would, of course, be void for uncertainty, but it appears reasonably clear that the testator intended to give all the eleven named persons the whole of his estate, and, in the absence of words of severance, they take as joint tenants.

In reaching this conclusion I have been assisted by these cases. In *Re Bassett's Estate* (1) SIR JAMES BACON, V.-C., had no real difficulty in inferring a gift of residue in similar circumstances. In *Re Harrison* (2) a testatrix, in making her will, used a law stationer's form, which was partly in print, blanks being left in it which were to be filled up by the person who made use of it. After directing that her debts and funeral and testamentary expenses should be paid by her executrix thereinafter named, the testatrix gave all her property both real and personal "unto—to and for her own use and benefit absolutely," adding "and I nominate, constitute, and appoint my niece Catherine Hellard to be executrix of this my last will and testament." It was held by KAY, J., and by the Court of Appeal that there was an effectual gift of the residue to Catherine Hellard. In the present case, there is no description of the subject-matter of the intended gift, while in *Re Harrison* (2) there was such a description, but in the latter case a gift of residue was inferred by applying the rule stated therein by LORD ESHER, M.R., who said (30 Ch.D. 393):

> "There is one rule of construction, which to my mind is a golden rule, *viz.*, that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."

In *Re Messenger's Estate* (3), a testator, by his will, which was on a printed form, appointed E.A.C. to be his executor. After providing for the payment of the testator's debts, funeral and testamentary expenses, the will proceeded: "I give and bequeath to E.A.C." It was held that E.A.C. was entitled to the whole of testator's estate. That case is distinguishable from the present case only by the fact that in the present case a specific gift follows the alleged gift of residue, and CLAUSON, J., applying the rule in *Re Harrison* (2), having considered the judgment in *Re Bassett's Estate* (1), and deriving assistance from an Australian case, *Fell* v. *Fell* (4), had no difficulty in concluding that the testator intended the whole of his property to pass to the person named. Though there was there no reference to the subject-matter of the disposition, CLAUSON, J., held that it was reasonable to hold that the testator meant to dispose of the whole of his estate. In the present case there is a specific gift, but, as I have concluded that it was an afterthought and therefore stands apart, I have no difficulty in deciding that the testator was referring to the whole of his estate, and I so hold.

Declaration accordingly. Costs of all parties to be taxed as between solicitor and client out of the estate.

Solicitors: *H. E. Thomas & Co.* (for the plaintiffs); *Philcox, Son & Edwards* (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Re MUNICIPAL AND GENERAL SECURITIES CO., LTD.'S TRUST. MUNICIPAL AND GENERAL SECURITIES CO., LTD. *v.* LLOYDS BANK LTD. AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), November 2, 4, 8, 9, 1949.]

Trust—Trust to hold shares—Duty of trustee to sell securities received "in respect of" shares—Government stock substituted for shares by statute—"Securities"—Effect of Electricity Act, 1947 (*c.* 54), *sched. III, pt. I, para.* 5—*Power to sell shares if "fundamental change" made in rights attaching thereto—Ordinary stock awaiting conversion into Government stock—Gas Act,* 1948 (*c.* 67), *sched. II, pt. II, para.* 2—*Jurisdiction of court to confer power of sale—Trustee Act,* 1925 (*c.* 19), *s.* 57 (1).

The Second British Fixed Trust was constituted by a trust deed dated Dec. 6, 1932, which provided *inter alia*, by cl. 1 : ". . . 'Ordinary share' means any share or stock of any company which entitles the holder to participate without limit in the earnings and assets of the company and is not redeemable or repayable at the will of the company. 'Security' means any bond debenture debenture stock obligation or certificate of indebtedness and any share or stock or other interest in the profits or assets of a company other than an ordinary share . . . 'Share unit' means the ordinary shares specified in sched. I to this deed with only such changes therein as are provided for in this deed . . ." Clause 27 provided : "The trustee shall as soon as practicable sell and convert into cash all ordinary shares and securities received by it in respect of any unit (other than ordinary shares forming the share unit and fully paid bonus ordinary shares which the trustee is expressly required to retain by the provisions of these presents) and if there shall be deposited with the trustee by the managers as part of any unit any property which the trustee would have been required to sell if the same had been received in respect of any existing unit the same shall also be forthwith sold and converted into cash." By virtue of the Transport Act, 1947, the Electricity Act, 1947, and the Gas Act, 1948, each share unit constituted under the trust came to include £295 6*s.* 3*d.* British Transport 3 per cent guaranteed stock 1978/83, and £178 18*s.* 4*d.* British Electricity 3 per cent. guaranteed stock 1968/73, and in due course would include a holding of British Gas stock, and the question arose whether each such holding ought to be sold by the trustee in accordance with cl. 27 of the trust deed. The relevant provisions of the three Acts in question were considered by the court and taken to be the same. The Electricity Act, 1947, sched. III, pt. I, para. 5 (which applied to shares included in a share unit) provides : "Where the holder of any securities becomes, under this Part of this schedule, instead the holder of British Electricity stock, he shall hold that stock in the same right and on the same trusts and subject to the same powers, privileges, charges, restraints and liabilities as those in, on or subject to which he held those securities, and any provision of any deed, will, disposition or other instrument, and any statutory provision as to what is to be done by the holder of the securities or the redemption moneys thereof, shall, with any necessary modifications, have effect in relation to the said stock as it would have had effect in relation to the securities if they had not been extinguished."

HELD : the government stocks in question fulfilled the definition of "security" in cl. 1 of the trust deed, and if, therefore, they were to be regarded for all purposes of the trust deed, not as ordinary shares, but as securities, cl. 27 would operate and they would have to be sold, but the intention and effect of para. 5 of pt. I of sched. III to the Act of 1947 was to place the holder of the securities taken over under the Act in the same position as regards the substituted electricity stock as he was in before the expropriation, and, if there existed in the trust deed provisions which would be inconsistent with the retention of the substituted stock as part of the unit, those provisions were to be treated as modified so that they had not that operation, and, therefore, the trustee was not bound to sell the substituted stock.

Clause 23 of the trust deed provided : "If the managers shall certify in writing to the trustee that in the opinion of the managers . . . (E) Any fundamental change has been made in the rights attaching to any ordinary shares of any company . . . and shall at the same time require the trustee to sell the ordinary shares of such company then held by the trustee under this deed the trustee shall sell those shares." The question arose whether the managers were in a position to give a certificate under cl. 23 in relation to the substituted stocks, or in relation to the Gas Light & Coke Co. £1 units of ordinary stock (of which each unit included a holding, and in substitution for which British Gas stock had not yet been issued), and to require any of those holdings to be sold. The Gas Act, 1948, sched. II, pt. II, para. 2, provides : "During the period beginning with the vesting date and ending immediately before the conversion date, the securities to which this Part of this schedule applies shall, notwithstanding the dissolution of the bodies by whom the securities were issued, continue to exist and may be transferred, and the Gas Council shall keep the registers or other records of the holders of those securities, but the only rights which shall attach to those securities shall be—(*a*) the right to have instead British Gas stock which attaches to the securities by virtue of the next following paragraph ; and (*b*) the right to the payment of interest which attaches to the securities under para. 5 of this Part of this schedule ; and all other rights attaching to the securities shall, by virtue of this Act, be extinguished on the vesting date."

Held : having regard to para. 2, the managers were in a position to give a certificate under cl. 23 in relation to the Gas Light and Coke Co. ordinary stock because the rights attaching thereto had undergone a fundamental change, but in relation to the substituted stocks (including the gas stock when issued) the time had passed when such a point could be taken and no certificate under cl. 23 could be issued with regard to them.

Held, *further*, that the holding by the trustee of the substituted stocks did not raise any difficulty or inconvenience in relation to the management or administration of the property subject to the trust, and, moreover, there was a power of sale exercisable in certain circumstances under the trust deed, and there was, therefore, no jurisdiction under the Trustee Act, 1925, s. 57 (1), to confer a power on the trustee to sell the substituted stock and re-invest the proceeds.

Re Pratt's Will Trusts, ([1943] 2 All E.R. 375), *applied.*

[For the Electricity Act, 1947, sched. III, pt. I, para. 5, see HALSBURY'S STATUTES, Vol. 40, pp. 497, 498 ; and for the Trustee Act, 1925 (c. 19), s. 57, see HALSBURY'S STATUTES, Vol. 20, pp. 149, 150.]

Case referred to :

(1) *Re Pratt's Will Trusts*, [1943] 2 All E.R. 375 ; [1943] Ch. 326 ; 112 L.Ch. 269 ; 169 L.T. 263 ; 2nd Digest Supp.

Adjourned Summons to determine (i) whether, on the true construction of the trust deed constituting the Second British Fixed Trust and supplemental deeds and of the Transport Act, 1947, the Electricity Act, 1947, and the Gas Act, 1948, all or any of the stocks substituted by those Acts for stocks held by the trust (including those under the Gas Act, 1948, when they were issued) ought to be sold by the trustee ; (ii) if the answer to question (i) were negative, whether, in relation to the British Transport stock, the British Electricity stock, or the Gas Light and Coke Co. £1 ordinary stock units, or the British Gas stock, the managers were in a position to issue a certificate under cl. 23 of the trust deed that there had been a fundamental change in the rights attaching thereto and that, consequently, the stocks should be sold ; and (iii) that power might be conferred on the trustee to sell the stocks substituted or to be substituted by the said Acts and all or any other stocks or securities (if any) which might from time A to time be received by the trustee pursuant to any statutory provisions for compensation.

The Second British Fixed Trust was one of a series of trusts, all bearing the name "Fixed British Trust," each of which was constituted by a separate trust deed. Each trust was, in effect, a method of investment whereby small sums of money could be spread over a wide and defined list of companies. Each trust B was called "fixed" because the companies whose shares were included in its holding of securities were determined at the formation of the trust, and those shares could only be sold if certain conditions were no longer satisfied. Each investor purchased a number of "sub-units" and his investment was spread in the unit holding over all the shares comprised therein. Certain of the holdings in the units of the Second British Fixed Trust were replaced by government C stocks under the Acts mentioned, and the question of their sale, therefore, arose.

WYNN-PARRY, J., answered question (i) in the negative, question (ii) in the affirmative as regards the Gas Light and Coke Co. £1 ordinary stock units, but otherwise in the negative, and (iii) he held that the court had no jurisdiction (under the Trustee Act, 1925, s. 57 (1)) to make the order asked for.

K. J. T. Elphinstone for the plaintiffs, the managers of the Second British D Fixed Trust.

R. H. Walton for the first, second and fourth defendants, the trustee, and persons interested in the trust.

Peter Foster for the third defendant, a person interested in the trust.

WYNN-PARRY, J. : The first question which I have to decide on this E summons involves the construction of the original trust deed constituting the Second Fixed British Trust and the relevant provisions of the Transport Act, 1947, the Electricity Act, 1947, and the Gas Act, 1948. The question, which in the end comes down to a short, but not easy, question of construction, is whether, in the events which have happened, the British Transport stock and the British Electricity stock which has been received in substitution for ordinary shares, F and the British Gas stock, which will be received in respect of ordinary shares, in companies which existed before the coming into effect of those Acts, and which stocks, under their provisions, have been or will be issued in substitution for these ordinary shares, ought to be sold by the first defendant as the trustee under the trust deed as soon as practicable in accordance with certain clauses of the trust deed, the chief one being cl. 27.

G The trust deed provides, in cl. 1, certain definitions of which the relevant ones are these. "Ordinary share" is defined as meaning

> "any share or stock of any company which entitles the holder to participate without limit in the earnings and assets of the company and is not redeemable or repayable at the will of the company."

"Security" means

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> "any bond debenture debenture stock obligation or certificate of indebtedness and any share or stock or other interest in the profits or assets of a company other than an ordinary share and includes rights as hereinafter defined."

There is also a definition of the word "Rights" which makes it clear that it is used in respect of, and limited to, ordinary shares. "Company" is defined as meaning

> " any corporation (whether incorporated under the Companies Act or not) incorporated in the United Kingdom of Great Britain and Northern Ireland "

and " share unit " is defined as meaning

> " the ordinary shares specified in sched. I to this deed with only such changes therein as are provided for in this deed."

My attention has been drawn to a number of clauses in the trust deed, A particularly those following on the heading " Changes in and sales of deposited property." I do not propose to go through them in detail, but I accept for this purpose the submission of counsel for the second and fourth defendants that the object of the trust, as indicated by these clauses, was that the portfolio to be held by the trustee should consist exclusively of ordinary shares. The important clause for the purpose of this question is cl. 27 which provides : B

> " The trustee shall as soon as practicable sell and convert into cash all ordinary shares and securities received by it in respect of any unit (other than ordinary shares forming the share unit and fully paid bonus ordinary shares which the trustee is expressly required to retain by the provisions of these presents) and if there shall be deposited with the trustee by the managers as part of any unit any property which the trustee would have been required C to sell if the same had been received in respect of any existing unit the same shall also be forthwith sold and converted into cash."

There follow the provisions as to the methods of sale to which I need not refer.

Put shortly, what has happened is that, as a result of the coming into force of the Transport Act, 1947, the Electricity Act, 1947, and the Gas Act, 1948, D each of the units constituted under the trust includes a holding of £770 British Transport 3 per cent. guaranteed stock 1968/73, a holding of £295 6*s.* 3*d.* British Transport 3 per cent. guaranteed stock 1978/83, and a holding of £178 18*s.* 4*d.* British Electricity 3 per cent. guaranteed stock 1968/73. In addition, each of the units includes a holding of 100 Gas Light and Coke Co. £1 units of ordinary stock. That undertaking has become subject to the vesting provisions of the E Gas Act, 1948, and under that Act there will eventually be issued, in substitution for that holding of Gas Light and Coke Co. units of ordinary stock, British Gas stock, but there has as yet been no determination of the amount of British Gas stock which, pursuant to the Act, should be issued by way of compensation in respect of the particular holding, and, therefore, there has as yet not been received by the trustee any British Gas stock. As regards the holding of £770 British F Transport 3 per cent. guaranteed stock 1968/73, that was part of the stock issued to Messrs. Thomas Tilling, Ltd., as consideration for the transfer to the British Transport Commission of such of that company's interests in passenger road transport and road haulage undertakings as were effected by the Transport Act, 1947, and were, subsequently to such issue, distributed by Messrs. Thomas Tilling, Ltd., by way of a special capital profits dividend, so that that stock, as G will be seen, and as is, indeed, admitted by counsel for the third defendant, stands in a different position from the other government stocks issued and to be issued.

My attention has been directed in detail to the relevant provisions of each of the three Acts in question, but the argument has been illustrated conveniently by reference only to the Electricity Act, 1947, on the basis, with which I am dealing, that the relevant provisions of the three Acts for the purposes of this H question may be taken to be the same. The Electricity Act, 1947, s. 1 (1), provides :

> " There shall be established an Authority, to be known as the British Electricity Authority, and it shall be the duty of that Authority as from the vesting date to develop and maintain an efficient, co-ordinated and economical system of electricity supply for all parts of Great Britain except the North of Scotland District, and for that purpose . . . "

to fulfil certain activities which are then specified. Section 1 (2) provides :

> " There shall be established Boards, to be known by the names mentioned in the first column of sched. I to this Act, for the areas which are described in general terms in the second column of that schedule and are to be defined by Orders made under this Part of this Act, and it shall be the duty of every such Board as from the vesting date to acquire from the British Electricity A Authority bulk supplies of electricity . . ."

Section 3 provides :

> " (1) The Central Authority and every Area Board shall be a body corporate with perpetual succession and a common seal and power to hold land without licence in mortmain."

B Section 13 provides for the vesting of assets of authorised undertakers and covers the undertaker whose shares are in question, the Lancashire Electric Light and Power Co., Ltd. The matter is carried further by s. 14, and I need not refer in any detail to either of those two sections. Section 20 (1) provides :

> " Every holder of securities of any body to whom this Part of this Act applies, not being securities of a local authority or a composite company, C shall be entitled to be compensated by the issue to him by the Central Authority, in accordance with the provisions of sched. III to this Act, of British Electricity stock of such amount . . . "

as is to be calculated under the Act. Under sched. III provision is made for the issue of stock in satisfaction of compensation. The schedule is divided into two parts. Part I deals with " Provisions applicable to securities with values D determined before the vesting date," and pt. II, with " Provisions applicable to other securities," but I need not pursue the provisions of those two Parts of the schedule except as regards para. 5 of pt. I, which also is made applicable to securities falling within pt. II. Paragraph 5 reads as follows :

> " Where the holder of any securities becomes, under this Part of this E schedule, instead the holder of British Electricity stock, he shall hold that stock in the same right and on the same trusts and subject to the same powers, privileges, charges, restraints and liabilities as those in, on or subject to which he held those securities, and any provision of any deed, will, disposition or other instrument, and any statutory provision as to what is to be done by the holder of the securities or the redemption moneys thereof, F shall, with any necessary modifications, have effect in relation to the said stock as it would have had effect in relation to the securities if they had not been extinguished."

The electricity stock in question was issued under s. 40. Under the relevant corresponding provisions of the Transport Act, 1947, the British Transport stock in question was issued and under the corresponding provisions of the G Gas Act, 1948, gas stock will in due course be issued. Those three stocks (apart from the £770 British Transport 3 per cent. guaranteed stock 1968/73 which, as I have said, stands in a different position) have been, or will be, received by the trustee in satisfaction of the ordinary stocks of the railway company, the electricity company and the gas company which previously were held as part of the unit subject to the trust.

H As will be seen, the question which now emerges is whether those government stocks (for this purpose treating the gas stock as being issued) are to be regarded as being in all respects substituted for the ordinary stock in respect of which they have been issued, or whether they are to be regarded strictly as government stock, and in the latter event what is the impact on that position of cl. 27 of the trust deed ?

I do not entertain any doubt that the government stocks in question do not fulfil the definition of " ordinary share " in cl. 1 of the trust deed. They do, in my view, fulfil the definition of "security" in cl. 1 thereof. Further, I think that the statutory corporations set up by the respective Acts fulfil the definition of "company" in cl. 1 of the trust deed. Further, in my view, if the government stock received and to be received under the provisions of those three Acts is to be regarded for all purposes of the trust deed, not as ordinary shares, but as securities, then the argument on behalf of the second and fourth defendants that cl. 27 operates and the government stocks should be sold is well-founded. In my view, however, the crux of the whole matter is: What is the effect and true meaning of para. 5 of pt. I of sched. III which I have already read? It will be observed that so far as the first part of that paragraph is concerned it is couched in very wide language, for it provides that the holder of British Electricity stock which is issued to him in place of securities previously held by him is to A

> "... hold that stock in the same right and on the same trusts and subject to the same powers, privileges, charges, restraints and liabilities as those in, on or subject to which he held those securities ..." B

Pausing there, it appears to me that the intention and the effect of the paragraph is to place the holder of the substituted electricity stock in the same position, as regards that stock, as he was previously in as regards the securities in substitution for which the stock was issued. I, therefore, proceed to the second part of the paragraph to see whether that confirms my reading of the intention of the draftsman as expressed in that first part of the clause, or contains any matter to displace that interpretation. C

In my view, I find confirmation, and no matter to displace that interpretation. The paragraph goes on to say: D

> "... and any provision of any deed, will, disposition or other instrument, and any statutory provision as to what is to be done by the holder of the securities or the redemption moneys thereof, shall, with any necessary modifications, have effect in relation to the said stock as it would have had effect in relation to the securities if they had not been extinguished ..."

The effect of that latter part of the paragraph, as it appears to me, is that the draftsman has continued his paragraph in order expressly to deal with any doubt that might otherwise have been felt as to what was to be the position under some written provision, whatever be its nature, if that written provision were to some extent in conflict with the first part of the paragraph. He expressly provided, as I read the second part of the paragraph, that the written provision (in this case the trust deed) is to be read as modified so far as is necessary to enable the object of the paragraph as expressed in the first half thereof to be achieved. That, I think, appears clearly from the words E F

> "shall, with any necessary modifications, have effect in relation to the said stock as it would have had effect in relation to the securities if they had not been extinguished ..."

That is, you look at the position as it would have been if the securities had not been extinguished. G

These were ordinary shares and they formed part of the unit. In their place is issued, or is to be issued, government stock, and that is to be regarded, therefore, as part of the unit, but to the extent that there exists in the trust deed provisions which would be inconsistent with the retention of the substituted stock as part of the unit, those provisions are to be treated as being modified. H

In my view, therefore, for these reasons question (i) in the amended summons must be answered in the negative. [HIS LORDSHIP added, however, that the holding of £770 British Transport 3 per cent. guaranteed stock, 1968/73, which had formed part of the capital profits dividend distributed by Thomas Tilling, Ltd., was in a different category, and should be sold.]

HIS LORDSHIP heard argument on question (ii).

WYNN-PARRY, J.: The second question which I have to answer is, on the basis and to the extent to which question (i) was answered in the negative,

> "Whether in the events which have happened the managers are now in a position to give a certificate in writing under cl. 23 of the trust deed in A relation to the transport stock or the electricity stock, or in relation to the Gas Light & Coke Co. £1 units of ordinary stock, or in relation to the British Gas stock when issued in substitution for those units of ordinary stock, and to require any of those holdings to be sold."

The relevant provision of cl. 23 is:

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> "If the managers shall certify in writing to the trustee that in the opinion of the managers . . . (E) Any fundamental change has been made in the rights attaching to any ordinary shares of any company . . . and shall at the same time require the trustee to sell the ordinary shares of such company then held by the trustee under this deed the trustee shall sell those shares."

C I propose to deal first with the position of the £1 units of ordinary stock of the Gas Light and Coke Co., Ltd. The present somewhat nebulous position as regards those securities is to be found on a perusal of the Gas Act, 1948, sched. II, pt. II, para. 2, which provides:

> "During the period beginning with the vesting date and ending D immediately before the conversion date, the securities to which this Part of this schedule applies shall, notwithstanding the dissolution of the bodies by whom the securities were issued, continue to exist and may be transferred, and the Gas Council shall keep the registers or other records of the holders of those securities, but the only rights which shall attach to those securities shall be—(*a*) the right to have instead British Gas stock which attaches E to the securities by virtue of the next following paragraph; and (*b*) the right to the payment of interest which attaches to the securities under para. 5 of this Part of this schedule; and all other rights attaching to the securities shall, by virtue of this Act, be extinguished on the vesting date."

To some extent a fiction is employed, but the language of the paragraph, in my judgment, is plain, and, taking one's stand at this date, *i.e.*, after the Act had F come into force, but before the British Gas stock has been issued as compensation for the £1 units of ordinary stock of the Gas Light and Coke Co., Ltd., it is true that there has been a fundamental change made in the rights attaching to those units of ordinary stock of the Gas Light and Coke Co., Ltd. Therefore, as regards those units of ordinary stock, in my judgment, the managers are, if they so desire, in a position to give a certificate in writing under cl. 23 of the G trust deed.

As regards the transport stock and the electricity stock, and also the British Gas stock when issued—and I include the British Gas stock on the basis that the managers may not exercise the discretion under cl. 23 to which I have just referred—the position is different. As regards the transport stock and electricity stock, they have already been issued. No such point as has been successfully H taken in regard to the Gas Light and Coke Co. £1 units of ordinary stock was taken as regards the Great Western Railway ordinary shares (a holding of which is also included in each unit) or the electricity company's ordinary shares under the Transport Act or the Electricity Act. Although in one sense it is true to say that there has been a fundamental change in those ordinary shares, yet having regard to the circumstance that the British Transport stock and the British Electricity stock has been issued in respect of those shares, it is now, in my judgment, too late for any such point to be taken as regards those stocks. Such a point could only be taken if in the future it could be postulated that a fundamental change had been made in the rights attaching to the British Transport stock and the British Electricity stock or either of them. The same reasoning, in my view, will apply to the British Gas stock when issued.

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HIS LORDSHIP heard argument on question (iii).

WYNN-PARRY, J.: By the summons it is asked that there may be conferred on the trustee, so as to be exercisable at the request of the managers for the time being of the trust, put shortly, a power to sell the stocks issued under the three Acts in question, as to which I have held that on the terms of the B trust deed as it stands there is no power to sell, and, further, that there be a general power to sell all or any other stocks or securities, if any, which may from time to time hereafter be received, so as to form part of a unit, by the trustee pursuant to any statutory provisions for compensation. That is a power looking to the future and anticipating further schemes for nationalisation. It is further asked that power shall be given to re-invest, not only the net proceeds of the C sale of any of the stocks coming within the purview of the power of sale to which I have referred, but also the whole or part of the net proceeds of any sale of investments or rights effected in accordance with the existing provisions of the trust deed and the supplemental trust deeds, in a manner set out in detail in the question, which, in effect, would involve investing the proceeds in buying further ordinary shares of the holding which, at the time of the proposed re- D investment, was the smallest in value of the holdings of ordinary shares comprised in each unit, and so on upwards with a view to achieving, so far as possible, a perfect balance in the spread among the investments constituting the securities.

The first point which I have to decide is whether there is jurisdiction in the court under the Trustee Act, 1925, s. 57, which is the section invoked, to make E any such order, either as regards authority to sell or as regards authority to re-invest. The section is couched in wide language, and there is little guidance in the reported cases, a circumstance which is explained by the fact that most applications under this section are dealt with in chambers. It appears to me that there must be some limit to the scope of this section. It cannot be construed as a section having such wide import as would allow a complete re-writing of a F trust deed or a substitution of a completely different object for that to achieve which the trust was brought into being. I find support in the view that there must be some limit to the scope of s. 57 (1) in the opening words, which are: "Where in the management or administration of any property vested in trustees . . ." If those words "management or administration" are to have no significance, it would have been the easiest thing in the world for the section to G have opened with the words: "Where any property is vested in trustees . . ." I do not intend to attempt to state what, in my view, is the exact scope of the section. I cannot see that I should be doing any service by embarking on any such attempt, for it is much better that each case as it comes up should be considered separately. I do feel, however, that I have to consider whether this application is one which I have jurisdiction to entertain, on the view, which H I take, that the words "management or administration" at the beginning of the section have a limiting effect on the jurisdiction conferred on the court. The resulting position, on the view which I have expressed in answer to question (i), is that there is now contained in each unit a certain holding in the compensation stocks, issued or to be issued under the three Acts in question, and that those compensation stocks are now to be regarded as, for all purposes, forming part of the unit. It is true, as I have already had occasion to point out, that, looking only at the trust deed, the presence of those stocks as part of the unit is foreign to the policy of the trust deed, but, according to the view which I have expressed, that is the effect of the policy and the language of the Acts in question.

Giving the matter the best consideration I can, I cannot see that the continued holding of these compensation stocks can raise any question of difficulty or real inconvenience in relation to the management or administration of the
A property subject to the trust, or in carrying out the trust. It, therefore, appears to me impossible in those circumstances to say that the mere fortuitous circumstance that, as the result of the coming into effect of the three Acts in question, there is now, in each unit, stock not of the nature originally contemplated, but which, by the effect of the Acts of Parliament, is to be deemed for all purposes to be ordinary stock and held as part of each unit,
B gives the court jurisdiction to make an order under s. 57 conferring an authority on the trustee or the managers, the object of which is to eliminate those stocks or any of them from the portfolio of the trust, particularly in view of the circumstance that I have already mentioned—that I am unable to see that any considerations of difficulty or inconvenience can arise.

There appears to me to be a second objection to the invocation of the jurisdic-
C tion under this section. Section 57 (1) contains these words :

> " . . . but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument . . ."

There is a power of sale expressly conferred on the trustees under the trust deed in specified circumstances, though the particular power of sale asked for by this summons is absent.

D In *Re Pratt's Will Trusts* (1), MORTON, J., had to consider a somewhat similar question. In that case a testatrix bequeathed to her executors and trustees certain shares and the dividends and income accruing therefrom at her death on trust to pay the dividends or income thereof to her nephew for life and then, as to both income and capital, on trust for other persons. The will contained no express trust for sale. It was held that the shares were " trust funds . . . in a
E state of investment " in the hands of the trustees, within the meaning of s. 1 (1) of the Trustee Act, 1925, and that the wording of that sub-section was wide enough to give to the trustees a power to sell the shares, and, therefore, the Trustee Act, 1925, s. 57, could not be invoked. MORTON, J., having dealt with the first question, namely, whether s. 1 (1) of the Trustee Act, 1925, applied, and having held that it did, said ([1943] 2 All E.R. 378) :

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> " The result is that in the present case the trustees have a power of sale. I cannot, therefore, make the order which is asked under s. 57 of the Trustee Act, 1925, because the words ' by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law ' are not applicable to the present case."

G It appears to me that that reasoning applies equally here, and, in my judgment, for those two reasons, the Trustee Act, 1925, s. 57, cannot be invoked in this case.

The matter may be taken further, and, therefore, in case I should be held by a higher court to have taken a wrong view on the question of jurisdiction, I will state what view I would have taken if, contrary to my own view, I had had jurisdiction to entertain this question. As regards the proposed power of sale,
H it was strongly urged on me that a perusal of the trust deed disclosed that the whole underlying policy of the trust and the main object with which it was brought into existence was that there should be held ordinary shares, and nothing other than ordinary shares, and that, therefore, it could be said to be expedient that these holdings of compensation stock should be sold. Here again I have to take into consideration the circumstances that, as a result of the deliberate policy of Parliament, achieved by the relevant provisions of the three Acts in question, the compensation stock has become part of the portfolio of the trust

deed and is to be regarded, substantially speaking, as being for all purposes part of the unit, and that there is no difficulty or inconvenience likely to be encountered in giving effect to that policy. In these circumstances a case is not made out to my satisfaction that it is expedient that any of those stocks should be sold. Therefore, had I arrived at the conclusion that I had jurisdiction under s. 57, I should not have exercised that jurisdiction. It follows, therefore, *a fortiori*, that I should not in any event have been prepared to authorise any power of re-investment. In this connection I would add that in no circumstances can I see that any case has been made out for describing as expedient the introduction of a power to re-invest the whole or any part of the net proceeds of any sale of investments or rights effected in accordance with the existing provisions of the trust deed.

Order accordingly. Costs of all parties as between solicitor and client out of the capital of the trust fund.

Solicitors : *Linklaters & Paines* (for the plaintiffs) ; *Slaughter & May* (for all defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

Reversed. C.A. [1950] 1 All E.R. 720.

CUNLIFFE *v.* GOODMAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), November 16, 1949.]

Landlord and Tenant—" Repair "—Reinstatement of business premises as private house—Landlord and Tenant Act, 1927 (c. 36), *s.* 18 (1).

By the Landlord and Tenant Act, 1927, s. 18 (1) : " . . . no damages shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

Under the terms of a lease of " land, messuage and tenement " the tenant was entitled to use the premises " for the trade or business of a manufacturing chemist only and not . . . for any other trade or business whatsoever without the consent in writing of the landlord." He covenanted to keep the premises " in good and sufficient repair during the said term and in particular will reinstate the premises at the end of the term hereby granted as a private dwelling-house . . . " At the end of the term the premises were in a bad state of repair and had not been reinstated as a dwelling-house, but it was found as a fact that the landlord intended at that time to pull them down and erect other buildings in their place.

HELD : the reinstatement as a private dwelling-house required by the covenant was " repair " within the meaning of the Landlord and Tenant Act, 1927, s. 18 (1), under which no damages were recoverable for breach of the covenant because the premises " would at or shortly after the termination of the tenancy . . . be pulled down."

[AS TO DAMAGES FOR BREACH OF A COVENANT TO LEAVE IN REPAIR, see HALSBURY, Vol. 20, pp. 220, 221, para. 241 ; and FOR CASES, see DIGEST, 2nd Supp.

FOR THE LANDLORD AND TENANT ACT, 1927, s. 18 (1), see HALSBURY'S STATUTES, Vol. 10, p. 389.]

Cases referred to :

(1) *Salisbury* v. *Gilmour*, [1942] 1 All E.R. 457 ; [1942] 2 K.B. 38 ; 111 L.J.K.B. 593 ; 166 L.T. 329 ; Digest, 2nd Supp.

(2) *Eyre* v. *Rea*, [1947] 1 All E.R. 415 ; [1947] K.B. 567 ; [1947] L.J.R. 1110 ; Digest, 2nd Supp.

(3) *Thomson* v. *Clanmorris* (*Lord*), [1900] 1 Ch. 718 ; 69 L.J.Ch. 337 ; 82 L.T. 277 ; 9 Digest, 132, *703*.

ACTION for damages for breach of covenant to keep demised premises and to deliver them up in good and tenantable repair and to reinstate as a dwelling-house. A

The landlord owned a cottage tenement which she let to the defendant tenant for the duration of the war. On Sept. 7, 1945, notice to quit was served on the tenant who went out of possession on Nov. 30, 1949. The premises were then, admittedly, in a bad state of repair and they had not been reinstated as a dwelling-house. The tenant contended that the landlord's right to damages for B breach of the covenant was barred by the Landlord and Tenant Act, 1927, s. 18 (1), because it was her intention at or shortly after the termination of the tenancy to have the premises pulled down. The landlord contended that s. 18 (1) applied only to a breach of a covenant to keep and deliver up in repair and not to a breach of a covenant to reinstate premises as a private dwelling-house. LORD GODDARD, C.J., held that the reinstatement of premises fell within the C word " repair " and gave judgment for the tenant with costs.

Lewis F. Sturge for the landlord (plaintiff).

Berryman, K.C., and *Myles* for the tenant (defendant).

LORD GODDARD, C.J., stated the facts, found that it was the landlord's intention at the end of the term to pull down the demised premises and erect D another building in their place, and held that the landlord could not recover damages for the breach of covenant to repair even if she changed her mind subsequently : *Salisbury* (*Marquess*) v. *Gilmour* (1), and continued : One other point has been raised by counsel for the tenant who argued : " True it may be that the landlord is debarred by the statute from recovering damages under the breach of covenant to repair, but she is not debarred from recovering damages for breach of the covenant to reinstate."

E The first clause of the lease simply provides that :

> " The landlord shall let and the tenant shall take all that land, messuage and tenement . . . "

It does not describe it as a dwelling-house. The tenant, Henry Goodman

> F " may use the said premises for the trade or business of a manufacturing chemist only and is not to use the said premises for any other trade or business whatsoever without the consent in writing of the landlord."

Then comes the covenant by the tenant :

> " To keep the said premises in good and sufficient repair during the said term and in particular will reinstate the premises at the end of the term G hereby granted as a private dwelling-house and re-place all the fixtures removed during the tenancy except the bath and washbasin which were handed over to the landlord at the commencement of the tenancy."

Section 18 of the Landlord and Tenant Act, 1927, deals with breaches of covenant to keep or put premises in repair during the currency of a lease or at the termination of a lease and counsel for the landlord argued that anything H that can be said to be a work of reinstatement to restore the premises as a private dwelling-house is not caught by the section because, he said, the covenant to reinstate the premises is a separate and distinct covenant. He relied on the judgment of ATKINSON, J., in *Eyre* v. *Rea* (2). That case does not assist counsel for the landlord in his argument because there the tenant, having covenanted that he would use the premises as a private dwelling-house only, proceeded to alter them entirely and convert them into a set of flats, and it was held that the Landlord and Tenant Act, 1927, did not prevent the landlord from recovering damages for breach of that covenant. Construing the covenant in the present case, I should say that the reinstatement to which it refers was regarded by both parties as a matter of repair and that they both meant it to be a matter of repair. When one is construing an Act of this sort it is right to bear in mind the judgment of Sir Nathaniel Lindley, M.R., in *Thomson* v. *Lord Clanmorris* (3), in which he pointed out ([1900] 1 Ch. 725) that when construing an Act of Parliament one must have A

> " . . . regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided."

If I look to see why this Act was passed and the mischief that it was passed to cure, it seems to me that it would be giving an unduly narrow construction to it, if I were to hold that, because part of this work consists of taking away B something which is inconsistent with a private dwelling-house and not inconsistent with a factory, the work is not caught by the words of s. 18 (1). I think I ought to hold that the reinstatement of these premises as a private house is a work of repair, and, consequently, there must be judgment for the defendant with costs.

Judgment for the defendant with costs. C

Solicitors: *Atkins, Walter & Locke* (for the landlord); *Amphlett & Co.* (for the tenant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

D

Re GROSVENOR METAL CO., LTD.

[Chancery Division (Vaisey, J.), November 7, 8, 1949.]

Company—Winding-up—Execution—Levying of execution delayed until after order for winding-up—Rights of creditor—Discretion of court—Companies Act, 1948 (*c.* 38), *s.* 325 (1) (*c*). E

The Companies Act, 1948, s. 325, provides: " (1) Where a creditor has issued execution against the goods or lands of a company . . . and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution . . . against the liquidator in the winding-up of the company F unless he has completed the execution . . . before the commencement of the winding-up: Provided that . . . (*c*) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

On Nov. 23, 1948, B.I. Ltd., obtained judgment against the G.M. Co., G Ltd., and on Nov. 25 a writ of *fieri facias* was issued. Owing to representations made by the G.M. Co., Ltd., B.I. Ltd. were induced to delay execution, and on Jan. 17, 1949, when an order for the compulsory winding-up of the G.M. Co., Ltd., was made, the execution had not been completed. B.I. Ltd. now applied under para. (*c*) to have the rights of the liquidator set aside in their favour. It was found as a fact that the representations H of the G.M. Co., Ltd., which induced B.I. Ltd. to delay execution had not been in any way dishonest or improper.

Held: under para. (*c*) the court had jurisdiction to make the order asked for, the jurisdiction not being limited, as it probably was before the Act of 1948, to cases in which there had been dishonesty or trickery on the part of the debtor company.

[As to Incomplete Execution, see HALSBURY, 1949 edn., Vol. 5, pp. 778, 779, para. 1278 ; and FOR CASES, see DIGEST, Vol. 10, pp. 1013, 1014, Nos. *7031-7039*.]

Case referred to :

(1) *Armorduct Manufacturing Co., Ltd.* v. *General Incandescent Co., Ltd.*, [1911] 2 K.B. 143 ; 80 L.J.K.B. 1005 ; 104 L.T. 805 ; 10 Digest 1013, *7036*.

A ADJOURNED SUMMONS for an order under the Companies Act, 1948, s. 325 (1) (*c*), that the rights of the liquidator might be set aside in favour of a creditor.

Bebb Industries, Ltd., carried on business as metal merchants. Between Aug. 13, 1948, and Sept. 22, 1948, they paid to the Grosvenor Metal Co., Ltd., considerable sums in respect of goods to be delivered to them. The latter com-B pany failed to deliver goods to the value of £1,268 13*s*. 9*d*., and on Nov. 23, 1948, Bebb Industries, Ltd., in an action in the King's Bench Division, obtained judgment against the Grosvenor Metal Co., Ltd., for that amount, and damages to be assessed, and costs. On Nov. 25 a writ of *fieri facias* was issued. Between Dec. 3 and Dec. 17 certain representations were made in good faith by the Grosvenor Metal Co., Ltd., to Bebb Industries, Ltd., as a result of which the C execution of the judgment was delayed, and on Jan. 17, 1949, when an order for the compulsory winding-up of the Grosvenor Metal Co., Ltd., was made (on the petition of another creditor), execution had not been completed.

VAISEY, J., who acquitted the Grosvenor Metal Co., Ltd., of anything in the nature of dishonesty, granted the application.

D *Weitzman* for the applicants, Bebb Industries, Ltd.

Hewins for the respondents, Grosvenor Metal Co., Ltd.

VAISEY, J. : This is a summons which arises under the Companies Act, 1948, s. 325 (1), which enacts :

> " Where a creditor has issued execution against the goods or lands of a E company . . . and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution . . . against the liquidator in the winding-up of the company unless he has completed the execution . . . before the commencement of the winding-up."

There follows a proviso which is divided into three heads of which the last, para. (*c*), is in these words :

F

> " the rights conferred by this sub-section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court may think fit."

The case which I am deciding today raises no general question of principle, and the only question about which I think I ought to say a word is whether para. (*c*) G of the proviso has made any alteration in the existing law. Counsel for the applicants has referred me to four cases of which I need only mention *Armorduct Manufacturing Co., Ltd.* v. *General Incandescent Co., Ltd.* (1), in which it was held by the Court of Appeal that where the postponement of execution had been caused by a trick on the part of the defendant company the plaintiff ought not to be prevented from proceeding with his execution. That was a decision under H the Companies (Consolidation) Act, 1908, of which s. 211 was substantially identical with the present section, save that it did not contain the exception stated under para. (*c*) of the present proviso. The effect of the decision made it clear that in the case of a trick, or something equivalent to dishonesty, the court had power to act, although there was no express statutory provision enabling it to do so. *Armorduct Manufacturing Co., Ltd.* v. *General Incandescent Co., Ltd.* (1) has always been regarded hitherto as the high-water mark of this jurisdiction, and I think that prior to the passing of the Companies Act, 1948, nothing short of a trick or some actual dishonesty would justify interference by the court. It is suggested that this new para. (*c*) of the proviso does no more than declare the law as it existed before the passing of the Act of 1948 and that I ought to proceed on the footing, as I should have proceeded before the Act of 1948 came into operation, that, in view of the decision in *Armorduct Manufacturing Co., Ltd.* v. *General Incandescent Co., Ltd.* (1), nothing short of trickery would justify my interference, but when I look at the words of para. (*c*) it appears to me that I am given a wider jurisdiction. In my view, it enables me to defeat the rights conferred on the liquidator either wholly or partially because of the words "to such extent." It enables me also to impose terms. For instance, I think I could say that the execution creditor should have the benefit of fifty per cent. of the judgment or that he should have the benefit of the judgment subject to any terms I might think fit to impose. Therefore, I hold that under this proviso I have a wider discretion than I should have had before that proviso became part of the statute law.

I am not going through the facts of this case. I do not think anybody could say there was any trickery here, but I hold as a fact that the applicants, Bebb Industries, Ltd., were persuaded, or induced, or requested, to stay their hands in the matter of this execution. While I acquit the officers of Grosvenor Metal Co., Ltd., of any kind of dishonesty or impropriety, I think that, but for their requests and the pressure they put on the applicants, this execution would have been completed before the commencement of the winding-up. I think that the rights of the liquidator must be set aside in favour of the applicants, and I so decide.

The only question which has given me any real anxiety is what I should do about costs. The liquidator could not possibly accede to this claim without a decision of the court, but, on the other hand, I do not see why the applicants should not have their costs. I think the proper course is for me to make the declaration asked for and to direct the liquidator to pay the costs of the applicants.

Order accordingly.

Solicitors: *Gilbert, Clarke & Gilbert* (for the applicants); *Linklaters & Paines* (for the respondents).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

SCHOOLEY *v.* NYE.

[Court of Appeal (Bucknill, Somervell and Denning, L.JJ.), November 14, 15, 1949.]

Landlord and Tenant—New lease—Compensation—Application by tenant—Reference to referee—Report by referee—Private conversation between county court judge and referee—Validity of judge's subsequent decision—Landlord and Tenant Act, 1927 (c. 36), *s.* 4 (1), *s.* 5 (1), *s.* 20 (2)—*County Court Rules,* 1936, *Ord.* 19, *r.* 2 (*f*) (*g*) (*h*); *Ord.* 40, *r.* 5.

A tenant of business premises applied for a new lease under the provisions of the Landlord and Tenant Act, 1927, s. 5 (1). The landlord put in an answer and the matter was referred to a referee who made a written report to the county court judge. The judge asked for a supplemental report which was duly made with the consent of both parties. After reading the report and supplemental report the judge had a conversation with the referee concerning a point arising out of the reports, and, subsequently, heard the matter in court and gave judgment against the tenant.

HELD : without finding as a fact that the mind of the judge was influenced by his conversation with the referee or suggesting that he was doing anything but seeking to arrive at a proper and fair decision between the parties, oral communications should not take place between a judge and a referee, and the incident was an irregularity for which the tenant was entitled to have the judgment set aside.

[AS TO A TENANT'S RIGHT TO A NEW LEASE OF TRADE OR BUSINESS PREMISES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 297-301, paras. 340-345 and p. 304, paras. 351-355 ; and FOR CASES, see DIGEST Supp.]

Cases referred to :

(1) *Whiteman Smith Motor Co., Ltd.* v. *Chaplin*, [1934] 2 K.B. 35 ; 103 L.J.K.B. 328 ; 150 L.T. 354 ; Digest Supp.

(2) *Richardson* v. *Redpath, Brown & Co., Ltd.*, [1944] 1 All E.R. 110 ; [1944] A.C. 62 ; 113 L.J.K.B. 81 ; 170 L.T. 93 ; 2nd Digest Supp.

(3) *Simpson* v. *Charrington & Co., Ltd.*, [1934] 1 K.B. 64 ; 103 L.J.K.B. 49 ; 150 L.T. 103 ; *on appeal, sub nom. Charrington & Co., Ltd.* v. *Simpson*, [1935] A.C. 325 ; 104 L.J.K.B. 226 ; 152 L.T. 469 ; Digest Supp.

APPEAL by tenant from the decision of His Honour JUDGE ARCHER, K.C., sitting at Brighton County Court, dated Sept. 16, 1949.

The tenant's application under the Landlord and Tenant Act, 1927, for a new lease of a garage which had been held under the present lease by him or his predecessors in title for twenty years was referred to a referee. On receiving the referee's report the county court judge asked for a supplemental report, which was supplied, and the matter came on for hearing in court. The judge then announced that before the hearing he had discussed the reports in private with the referee on the question whether there was adherent goodwill attached to the premises. Objection was at once taken to this conversation by counsel for the tenant, but after discussion as to the proper course to be followed the hearing was continued with the consent of the parties and judgment was given against the tenant on a finding that there was no adherent goodwill. The Court of Appeal now set aside that decision on the ground that the judge had adopted an irregular procedure, and it was ordered that the matter be transferred to the High Courts to be heard *de novo*, the costs in the county court and in the Court of Appeal being left to the discretion of the trial judge.

Paull, K.C., and *R. Gwyn Rees* for the tenant.
Salmon, K.C., and *W. J. Carter* for the landlord.

BUCKNILL, L.J. : I will ask SOMERVELL, L.J., to deliver the first judgment.

SOMERVELL, L.J. : This is an appeal from a decision of JUDGE ARCHER, K.C., in proceedings under the Landlord and Tenant Act, 1927. The tenant was the lessee of a garage, and the lease was coming to an end. Section 4 of the Act provides for a tenant being able to claim compensation for goodwill at the end of his lease. Section 5 (1) provides :

> " Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him."

By s. 5 (2) the tribunal have to consider whether the grant of a new tenancy is in all the circumstances reasonable, and they are given power to order the granting of a new tenancy to the lessee. Section 21 deals with procedure thus :

> " (1) The tribunal for the purposes of pt. I of this Act shall be the county court within the district of which the premises or any part thereof are situated acting under and in accordance with this section . . . (2) Where proceedings are commenced in the county court in respect of any claim or application under pt. I of this Act and are not transferred to the High Court, the matter shall, unless the parties otherwise agree, or it is otherwise prescribed, stand referred for inquiry and report to such one of the panel of referees appointed by the Reference Committee hereinafter mentioned as may be selected by the county court, as if with the consent of the parties the matter had been so referred to him in pursuance of s. 6 of the County Courts Act, 1919."

The equivalent of s. 6 of the County Courts Act, 1919, is now s. 90 of the County Courts Act, 1934.

The tenant put in his application for a new lease on Apr. 30, 1947, and no question arises as to that. It was in proper form. Then, in a document dated Feb. 12, 1949, again in accordance with the procedure, the particulars about this garage were given. The tenant had been lessee for some twenty years. There was an answer, and then the matter was referred to a referee in accordance with s. 21 (2). The referee made a report, which is dated June 8, 1949. It is unnecessary, in the view which I take of this case, to go into any detail on the facts, but I think it is necessary to say that this garage was in the rear of the Grand Hotel, Brighton, and near the Hotel Metropole and a large part of the business which it did was owing to its proximity to those two hotels.

The nature of the goodwill which is referred to in the Landlord and Tenant Act, 1927, was considered by a Divisional Court in *Whiteman Smith Motor Co., Ltd.* v. *Chaplain* (1), the judgments of SCRUTTON, L.J., and MAUGHAM, L.J., in which have often been referred to in connection with the application of the Act. One thing which is clear from that decision is that goodwill which results from the position or from the site of the premises in question is not goodwill which the lessee can rely on, either for compensation or for a new lease. The present was a case in which, admittedly, a large part of the business and the goodwill which attached to it was due to its proximity to the hotels, and, therefore, was something on which the tenant could not rely. The position with regard to the other business which came to this garage fell to be ascertained in the light of the Act and decisions upon the Act. The referee made a report, and in para. 6 he said :

> " Having carefully considered the evidence, including that of the experts on either side, I have reached the conclusion that the trade derived from the visitors to the Grand and Metropole Hotels constitutes much the largest element in any goodwill belonging to the business, and, as this is due to the situation of the premises, it must be ignored in considering the question whether there is any adherent goodwill. On this point I have come to the conclusion, though not without considerable hesitation, that I ought to accept the view (though not the figures) of the tenant's first expert witness who had had a wide experience of the motor trade and to report that, having regard to the length of time during which the tenant and his predecessors have carried on business on the premises, to the evidence of custom apart from that derived from the hotels, and to all the circumstances, but disregarding any value attributable to situation, the value of the premises has been enhanced to some extent as the direct result of the carrying on on the premises of the trade of a garage proprietor and motor engineer by the tenant, and that the tenant would, therefore, be entitled to some compensation under s. 4 of the Act. If I am right in this it is clear that the amount he would receive (which, in my opinion, would be quite small) would not compensate him for the loss he would sustain by removal."

The referee goes on to say that, in his view, the tenant is entitled to a new lease. The matter came before the county court judge, who wanted that report supplemented. To this both parties agreed, so the matter was sent back to the referee for a further report, and a further report was obtained, called "Particulars of Goodwill," which set out figures of the annual takings, the proportion of cash takings not derived from hotel visitors, the annual profit, the proportion of annual profit not derived from hotel visitors, the proportion of adherent profit, and the rental value of adherent profit, say, £50. Then there is a note: "The estimate of adherent profit must, as pointed out by MAUGHAM, L.J., in the judgment to which I have been referred, be largely a matter of guesswork."

It is now necessary to refer to the rules of procedure which govern proceedings of this kind. Order 19 of the County Court Rules, 1936, contains rules made under s. 90 of the County Courts Act, 1934. Rule 2 begins with the words: "Subject to any order of the judge as to the conduct of the reference"—this, of course, deals generally with cases under s. 90—and sets out various things that the registrar or the referee can do. It provides that the attendance of witnesses can be enforced by summons, and matters of that sort, and continues:

> "(*f*) the registrar or referee may submit any question arising in the inquiry for the decision of the judge."

Then follow these important words:

> "(*g*) The report shall be in writing and shall be filed in the court office, and the registrar shall:—(i) give notice to all parties of the filing of the report . . . (*h*) when the report has been filed, (i) if the further consideration of the proceedings has been adjourned to a day named, any party may apply on that day to the judge to adopt the report, or may give not less than three clear days' notice of his intention to make an application on that day to vary the report, or to remit the report or any part thereof for further inquiry or report; or (ii) if the further consideration has not been adjourned to a day named, any party may, on not less than three clear days' notice, apply to the judge to adopt or vary the report, or to remit the report or any part thereof for further inquiry and report."

That shows, I think clearly, that the report is a document which has to be filed, and will be the basis of further proceedings, though, plainly, it does not bind the county court judge. I must also refer to the rules which relate to the Landlord and Tenant Act, 1927. Ord. 40, r. 5, provides:

> "(1) The referee shall complete his inquiry and file his report within a period of four weeks from the receipt by him of the notice of his appointment, unless that period is enlarged by the court, and at the same time shall file a statement of his claim for remuneration and expenses."

There is a provision about giving notice, and then there is a form for the final order of the county court judge (County Court Practice, 1949, form 339, p. 1302) granting or refusing a new lease.

When the present matter came before the county court judge, the report and the supplemental report having been received, the judge, according to his note, said:

> "I said that, to my mind, very considerable difficulty remained, and that the referee had kindly seen me, and, in answer to the question: 'Would any proposing lessee be likely to be affected as regards the rent that he would pay by the alleged existence of adherent goodwill vested in the tenant?', it seemed he thought not, and that he had felt great doubt and difficulty in making his report. I said that both the referee and I must follow the process set out by SCRUTTON, L.J., and that I saw great difficulty in doing so on the materials available, so as to arrive at an answer to the question what (if any)

> adherent goodwill was created by the tenant during the term of his lease—what has accrued to the landlord as additional value of his reversion ? "

That incident is the basis of this appeal. Counsel for the tenant submits that that constitutes—I am using neutral words—an irregularity in the proceedings as a result of which this court must set aside the order which the judge made. The matter was argued and the judge gave a decision. We have, without objection by counsel for the tenant, been supplied with a note made by the junior counsel for the landlord, a rather more detailed note of what happened which, I think, is important because it satisfies me that objection was taken in the court below to that conversation with the referee. According to this note, the judge discussed various courses—whether the matter should again be sent to a referee, and, if so, whether it should be sent back to this referee or sent to a different referee. Both parties agreed that the case should proceed. Counsel for the landlord suggests that, even if the point was taken, the fact that the tenant elected to go on before the judge precludes him from taking the point here. I do not think it does. I think that he was entitled to take the line : "I object to this, but go on. If I go to the Court of Appeal and it turns out that the point is a bad one, there is your judgment. If the point is a good one, not much time will have been wasted, because we are here with all the documents available." The judge decided that there was no adherent goodwill. He makes a reference, which I think should be read, to this interview with the referee. He says :

> "He kindly gave me an opportunity of seeing him and I asked him whether he thought the suggested goodwill could affect the bargain which a new lessee would make, but I got no answer which assists me. The guess that he has made is, proportionately, a very little guess. Are there any units in the calculations which permit it ? It is to be an 'intelligent guess'."

On the report and the evidence before him, he being the final court to decide this matter, the judge decided that there was no adherent goodwill. Counsel for the tenant, admitted that, apart from the point about the conversation between the judge and the referee, he would have been in great difficulty in asking this court to interfere with the decision which the judge had reached.

That brings me to the point which we have to decide. Is this such an irregularity as to entitle the tenant to have the decision set aside ? We were referred to *Richardson* v. *Redpath, Brown & Co., Ltd.* (2). That case deals with the position of a medical assessor in a workman's compensation case, and I do not think it assists us in the present problem. Let me make it perfectly plain that the judge in the present case was actuated by the best possible motives. He was troubled about the case and felt there was a difficulty about it. He thought he might save costs and assist the course of justice by seeing the referee. No one is attacking or impugning his motive in any way, but, notwithstanding his motive, he may have done something which is not sanctioned by the procedure, and vitiates the proceedings. At one time in his argument counsel for the landlord submitted that the only effect this conversation could have had was on the referee's mind. I do not so read the notes which we have with regard to it. I think the judge took a view of this case, which, no doubt, is a possible view, and put it to the referee, and I think it is possible that the attitude which the referee adopted when that view was put to him might have influenced the judge's mind in coming to his final conclusion. In those circumstances, without finding as a fact—it is not necessary to do so—that his mind was influenced, still less suggesting that he was doing anything but seeking to arrive at a proper and fair decision between the parties, I think the occurrence of that incident does entitle the tenant to have the judgment set aside. It is unnecessary to decide any case other than the present, but I would like to say that, to my mind, the rules plainly contemplate that the report should be in writing. They set out in detail the circumstances in which further reports can be obtained and matters can be further elucidated or not further elucidated by the referee. Therefore, it is most undesirable that methods of communication between the court and referee should be resorted to other than those which are clearly laid down by the rules. For these reasons I think this appeal must succeed. No doubt what should then be done is a matter which can be discussed later.

BUCKNILL, L.J.: I agree. It seems to me that the action taken by the A judge, no doubt with good intentions, was contrary to the procedure laid down by the Act and the rules made thereunder, and that his action was in excess of his jurisdiction. The result of the interview between him and the referee was, in effect, to cancel the operative part of the report.

DENNING, L.J.: It is settled practice that an appellate court is entitled to consult the judge who tried the case. At one time it was not unusual for the B trial judge to form one of the court *in banc* which heard the appeal. That was dropped more than a hundred years ago, but the practice of an appellate court consulting the trial judge has continued right up to the present time, though it is now infrequent except in criminal cases. The Criminal Appeal Act, 1907, not only contemplates, but requires, that the Court of Criminal Appeal shall have before them a report from the judge who tried the case, giving his opinion of it, C and that is a report which the prisoner and his counsel have no right to see. I do not, however, think this practice applies as between a referee who makes a report and the judge who tries the case. The judge is, after all, the trial judge, and he has to decide the case on information which is properly before him, whether it be in the shape of a report or in the shape of evidence. Each side must have an opportunity of dealing with any information adverse to his case. If, and in D so far as, that information comes from the referee and is embodied in the written report or a supplemental report to which the parties have access, justice is not only done but is manifestly seen to be done. If the information comes by word of mouth in a private conversation when the parties are not present, justice may, perhaps, be done, but it is not seen to be done, and one of the parties will go away with the feeling that the case has been decided against him behind his E back. It is elementary in our jurisprudence that justice must not only be done, but also must manifestly be seen to be done. It must be remembered that the parties have the right to apply to vary the report or to ask the judge to hear further evidence, and, as SCRUTTON, L.J., said in *Simpson* v. *Charrington & Co., Ltd.* (3) ([1934] 1 K.B. 76):

F "A motion to vary a report is necessary if it is to be challenged."

How can parties do this if they do not know the terms of the report? And how can they know the terms of the report unless it is in writing? Order 19 of the County Court Rules specifically requires that the report shall be in writing, and I see no justification for an oral report such as was given in this case. I agree that the appeal shall be allowed.

G **BUCKNILL, L.J.**: The appeal will be allowed, and, both parties applying to us under the Landlord and Tenant Act, 1927, s. 21 (1) (*b*), to transfer this matter to the High Court, we make the appropriate order. As regards costs, we think that in all the circumstances the just order to make is that the costs below and the costs of the appeal should be in the discretion of the new trial judge. We think the matter should start *de novo* in the High Court.

H *Appeal allowed. Order transferring action to the High Court. Costs reserved to trial.*

Solicitors: *Cripps, Harries, Hall & Co.* (for the tenant); *Finch, Turner & Tayler* (for the landlord).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

CAPITAL AND NATIONAL TRUST, LTD. *v.* GOLDER.

[Court of Appeal (Tucker, Singleton and Jenkins, L.JJ.), November 16, 1949.]

Income Tax—Repayment of tax—Management expenses—Investment company—Expenses of changing investments—Brokerage and stamp duty—Income Tax Act, 1918 (*c.* 40), *s.* 33 (1).

The Income Tax Act, 1918, s. 33 (1) provides : " Where . . . any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom . . . claims and proves to the satisfaction of the Special Commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise . . . the company . . . shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year . . . " A B

An investment company within s. 33 (1) sought to include in its claim for management expenses sums disbursed for brokerage and stamp duty in changing its investments.

Held : such disbursements were not " expenses of management " within s. 33 (1). C

Decision of Croom-Johnson, J. (*ante* p. 132), *affirmed.*

[As to Allowance for Management Expenses, see HALSBURY, Hailsham Edn., Vol. 17, pp. 135-137, paras. 267-273 ; and for Cases, see DIGEST, Vol. 28, pp. 55, 56, No. *283*, and Supplement.]

Appeal by the Capital and National Trust, Ltd., from an order of Croom-Johnson, J., dated May 19, 1949, and reported *ante* p. 132, on a Case stated by the Special Commissioners of Income Tax. D

The Special Commissioners had found that the expenses incurred by the company, an investment trust company, in changing investments were not " expenses of management " within the Income Tax Act, 1918, s. 33 (1), and were, therefore, not to be included in claims under that sub-section. Croom-Johnson, J., upheld the decision of the Special Commissioners, and his decision was now affirmed by the Court of Appeal. The facts appear in the judgment of Tucker, L.J. E

Grant, K.C., *Talbot, K.C.*, and *Borneman* for the company.
Donovan, K.C., and *R. P. Hills* for the Crown.

TUCKER, L.J. : This is an appeal from a judgment of Croom-Johnson, J., in a case which raised the question whether sums paid by way of stamp duty and brokerage commission on the purchase or sale of investments were or were not expenses of management of the company in question. That point arises under the Income Tax Act, 1918, s. 33 (1), which provides : F

> " Where . . . any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom . . . claims and proves to the satisfaction of the Special Commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise . . . the company . . . shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year . . . " G H

It is not in dispute that the Capital and National Trust, Ltd., is a company whose business consists mainly in making investments and that the principal part of its income is derived therefrom. For a number of years the Inland Revenue Commissioners have been accustomed to offer no objection to the inclusion of sums disbursed by way of brokerage and stamp duty in connection with changes of investments made by this company and other similar companies, as distinguished from investments representing capital expansion, but when the company came to make its claim on the customary basis for the year ending Apr. 5, 1948, they were informed that the Inland Revenue Commissioners were no longer prepared to regard any part of the expenditure it had incurred in brokerage and stamp duties in connection with changes of investments as sums disbursed as " expenses of management (including commissions) " within the meaning of s. 33 (1). Hence this litigation.

The question is whether, when the company took the matter before the Special Commissioners, it succeeded in establishing its claim that these payments were " expenses of management (including commissions) " within the meaning of that section. The Case having found, as I have said, what the nature of the business of this company was, there are the following findings with regard to the functions of the management. This was stated in the evidence of a witness whose testimony is summarised in the Case and was accepted by the commissioners :

> " The chief duty concerned with the management of an investment trust company was to maintain the income, and to do that it was necessary to keep a day to day watch on its investments. Investments had frequently to be changed whether the market was rising or dull, solely with the view of maintaining the income yield. Market fluctuations were not matters of primary concern, but if the market value of an investment rose an investment trust company might realise its holding with the object of re-investing the proceeds to secure an improved yield of income. The sums paid or suffered in respect of brokerage and stamp duty were part of the cost of acquiring an investment and a charge that had to be incurred on the sale of an investment."

The commissioners decided that the sums paid by the company

> " in respect of brokerage and stamp duty, when purchasing investments, constitute an integral part of the purchase price, thus increasing the price to be paid. In the same manner the sums deducted for brokerage and stamp duty, in effecting a sale, constitute an integral part of the selling price, thus diminishing the amount received by the appellant company. We are unable to divorce these sums from the price paid or the amount received when changes take place in the investments. In our view, in the case of the appellant company, expenses of management are mainly concerned with matters up to the time when the actual purchase or sale of an investment is effected. These matters include the payment for the services of those whose duty it is to maintain, as far as possible, the income yield from the investments, to keep a constant watch on those investments, and to decide when and what changes are advisable. Once a decision about a change in the investments has been arrived at, we are unable to say that charges for brokerage and stamp duty necessarily incurred in a purchase or sale constitute expenses of management within the meaning of the said section. We do not consider that the words ' including commissions ' in the said section or the use of the word ' commission ' in the said contract notes to be conclusive of the matter."

Some criticism may be directed towards the reasoning which appears in those findings and in the statement that the sums paid in respect of brokerage and stamp duty constitute an integral part of the purchase price. That may, perhaps, not be quite accurate, but they are certainly sums necessarily paid in the course of the transaction of purchase. The gist of the decision lies in the view expressed that the expenses of management in this case are mainly concerned with matters up to the time of the actual purchase or sale of an investment. I think that is the foundation of the commissioners' finding.

When the matter came before the learned judge, he dealt with it in this way. I read the language he used because I find myself in complete agreement with it and quite unable to express myself in any better language. He said (*ante* p. 133) :

> " . . . it seems to me that it is impossible for the company here to say, on the facts as proved, not only that as a matter of law these payments are expenses of management, but that the commissioners ought to have been satisfied that they were. I do not think they are expenses of management, although, no doubt, it was judicious for the company to do what was done. If they are not expenses of management, then the sub-section is not satisfied and the company is not entitled to relief under it. I cannot see how, giving the expression ' management ' its ordinary everyday meaning, it can possibly be said, with regard to an investment company, that the cost of stamps on transfers and contract notes and brokers' remuneration can be said to be expenses of the management of the company. It is, no doubt, incidental to the business of an investment company, but I do not think it is within the expression which is used, giving it, as I must give it, its ordinary meaning. The only other point left in the case is that the section refers to ' commissions.' I think that that reference is not apt to cover a stockbroker's remuneration, which is calculated as a commission, in making bargains on behalf of the company. The section is aimed at something quite different—managing a concern where somebody gets, as part of his remuneration, perhaps, a commission on income, or something of that sort."

Those last words are merely indicating the kind of case which the learned judge was envisaging. They are not purporting to be an exhaustive definition. As I have said, I find myself in complete agreement with that statement of the case.

I would only add that the argument of counsel for the company, as it seems to me, is really that these expenses were " expenses of management," because they were expenses incurred by the management in carrying out the business of the company. That seems to me a totally different thing. What we are concerned with here is the expenses *of* management, not expenses incurred *by* the management in carrying out the proper business of the company. The word " commissions," in my view, in no way extends the meaning of " expenses of management." Before these deductions can be made by the company, they must, first of all, be expenses of management, but it is made clear that those expenses can properly include expenses which have been paid by way of commission. For these reasons, I agree with the decision of the learned judge, and I think this appeal fails.

SINGLETON, L.J. : I agree.

JENKINS, L.J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Linklaters & Paines* (for the company) ; *Solicitor of Inland Revenue.*

[*Reported by* C. N. Beattie, Esq., *Barrister-at-Law.*]

WAY v. WAY: ROWLEY v. ROWLEY: KENWARD v. KENWARD: WHITEHEAD v. WHITEHEAD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), October 13, 14, November 9, 1949.]

A *Nullity—Conflict of Laws—Marriage in Russia—Validity—Parties domiciled in England—Requirements of Soviet law not observed—Mutual consent—"Mistake"—Wife forbidden to leave Russia.*

Four husbands, domiciled in England, petitioned for decrees of nullity of their marriages in Soviet Russia to Russian wives, contending that the marriages were invalid for want of form, or, alternatively, were void for want of consent. In each case the marriage had taken place at the local B bureau (corresponding to an English register office) and a certificate of marriage had been signed by a government official and handed to the husband. Under s. 2 of the Russian marriage Law of 1926 registration was indisputable evidence of the existence of the marriage, and by s. 4 of the Law and the Code issued by order of the Presidium of the Supreme Council of the Union of Soviet Socialist Republics in 1945 the requirements for C registration of a marriage were (*a*) mutual consent, (*b*) attainment of the marriageable age, and (*c*) the production of documents certifying identity, freedom to marry, and state of health. The provisions of (*c*) were not complied with in any of the cases.

HELD: (i) the question of form must be determined by the *lex loci contractus* and the effect of s. 2 of the Law of 1926 was that the marriages D were not invalidated by the omission to comply with the requirements of para. (*c*).

(ii) the question of consent must be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract to marry was made, and, as the husbands were domiciled in England, English law applied, and under it the marriages were not void for want of consent, there being no mistake in the identity of the party E whom each husband married nor any erroneous belief by any of the parties as to the nature of the ceremony in which he was taking part, nor did the fact that by Russian law the husbands and wives were prevented from living together invalidate the marriage although at the time of the ceremonies the husbands believed that they would be able to do so.

F [**EDITORIAL NOTE:** The problem of which system of law governs the validity of a marriage alleged to be void on account of the absence of the real consent of the parties to the celebration of the marriage ceremony is discussed in DICEY'S CONFLICT OF LAWS, 6th ed., p. 264.

AS TO THE GENERAL PRINCIPLES OF VALIDITY OF MARRIAGE IN ENGLISH LAW, see HALSBURY, Hailsham Edn., Vol. 6, pp. 283-294, paras. 340-348; G and FOR CASES, see DIGEST, Vol. 11, pp. 417-420, Nos. *835-864*, and Digest Supp.]

Cases referred to:

(1) *Nachimson* v. *Nachimson*, [1930] P. 217; 99 L.J.P. 104; 143 L.T. 254; 94 J.P. 211; Digest Supp.

H (2) *Niboyet* v. *Niboyet*, (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 11 Digest 423, *894*.

(3) *Apt.* v. *Apt*, [1947] 2 All E.R. 677; [1948] P. 83; [1948] L.J.R. 539; 177 L.T. 620; 2nd Digest Supp.

(4) *Hyde* v. *Hyde and Woodmansee*, (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 11 Digest 413, *800*.

PETITIONS by four husbands, domiciled in England, for nullity of marriages on the ground that the marriages, which were celebrated in Russia in each case, did not comply with the requirements of Russian law, and, therefore, the ceremonies, which took place before a registrar, did not constitute valid marriages under English law. It was also pleaded that the marriages were void for want of consent. Hodson, J., in a considered judgment, rejected these contentions. The facts appear in the judgment.

Idelson, K.C., and *J. E. S. Simon* for the husbands.
The wives were not represented.

Cur. adv. vult.

Nov. 9. **HODSON, J.**, read the following judgment. In each of these four cases the husband is seeking for a decree of nullity of marriage where a form of marriage has been entered into in the Union of Soviet Socialist Republics. Three of the marriages took place in Russia proper in 1945 and the fourth took place in Georgia in 1942, but the differences of date and place are not material. By their pleadings the husbands claimed that marriage as understood in the U.S.S.R. does not comply with the essentials of marriage according to English law, and that the ceremonies did not in English law constitute valid marriages. In the alternative, they claimed that these marriages were void for want of consent. In the further alternative, they claimed that the marriages had been frustrated.

The first plea was not persisted in, no doubt because of the decision of the Court of Appeal in *Nachimson* v. *Nachimson* (1), which disposes of this contention and is not outdated by any material changes in the Russian law of marriage since that case came before the court. No argument was addressed to me on the doctrine of frustration, which has never been applied to the status of marriage as opposed to a contract to marry. The distinction between the contract and the status created by the contract is clearly drawn in the judgment of Brett, L.J., in *Niboyet* v. *Niboyet* (2) (4 P.D. 11):

> "Marriage is the fulfilment of a contract satisfied by the solemnisation of the marriage, but marriage directly it exists creates by law a relation between the parties and what is called a status of each."

To such a status the doctrine of frustration has no application. The husbands relied on absence of consent and in addition sought to maintain that the marriages were invalid for want of form. This last ground, although not pleaded, has been taken into consideration in this judgment as it is that mainly relied on by the husbands. No useful purpose could have been served by amendment of the pleadings since the wives cannot be served, certainly in three cases. The main petition has been served in one case, that of *Rowley*, but service has been dispensed with in the other three cases. In addition to the claim for nullity already outlined, the husband, Rowley, seeks a divorce on the ground of adultery, but he has not yet been able to procure evidence to put before the court on this ground, and the husband, Way, alleges wilful refusal to consummate the marriage and claims a decree of nullity on this account.

The material facts in the four cases are as follows. Brigadier Way, who was serving in 1941 with the British Military Mission in the Caucasus, was taken by his duties to Tiflis, where he met his wife, then a ballerina and a Russian subject, in December of that year. He was 42 and she was 27 years of age. The husband spoke Russian fluently and the parties eventually agreed to marry although the actual marriage was postponed for some time at the suggestion of the wife. On Sept. 11, 1942, both parties attended at the local bureau, which corresponds to what in England is known as a register office, produced their passports, from which the necessary particulars were taken, and signed the register, and a certificate, which is now on the file of the court, was handed to the husband. No entries were made on his passport and no questions were asked about the health of the parties or their previous marriages, if any, nor was their attention drawn to any portion of the marriage code. After the registration the wife continued to follow her occupation as a ballerina, and went immediately to the Opera House for a rehearsal. The parties slept together that night in the room normally occupied by the wife. The husband got into her bed and manifested his desire to have sexual relations with her. This she refused without giving any reasonable excuse, merely saying it was very hot and that she must get some rest. There was no subsequent change in the wife's demeanour. She continued with her work at the opera house and on the following night she again refused intercourse notwithstanding the husband's urgent representations that he was going away the next day so that consummation would be rendered impossible until after the war. On this night, as on the first night, after a time the husband left the wife's bed. The parties never met after Sept. 13 when the husband left Tiflis on duty.

Mr. Rowley was in Moscow on duty with the British Army in April, 1945, and met a Russian girl, his present wife, in April, 1945. Each spoke a little of the language of the other, and the parties agreed to marry after an acquaintance lasting for several months. They attended at a register office where they both signed the register on Nov. 25, 1945. No entries were made in the husband's passport. No questions as to health or previous marriages were put, nor were references to the civil code made. After the marriage the parties lived together until Jan. 17, 1946, when the husband left Moscow. He subsequently obtained a notarial copy of the marriage certificate.

Mr. Whitehead met his wife, a Russian girl, in May, 1944, when serving with the British Military Mission in Moscow. She spoke fluent English and he spoke virtually no Russian. Early in 1945 marriage was mentioned between them, and in February, 1945, the husband obtained a divorce and told the wife that he was free. She pressed him to marry her, and he agreed about May 12 to do so. On May 19, 1945, the parties attended before the registrar and the procedure was similar to that in the preceding two cases. The register was signed, no entries were made in the husband's passport and no questions put as to health or previous marriage, nor was reference made to the civil code. The parties never lived together because the husband was posted away from Moscow immediately after the registration.

Mr. Kenward was serving with the Royal Navy in Archangel in 1945 and in September of that year met his wife, a Russian girl, who subsequently suggested marriage, to which he agreed. Each spoke very little of the other's language. The parties attended the register office where assistance in interpretation was given by a friend who spoke English, and on Oct. 16, 1945, the registration took place. The husband was asked if this was his first marriage. He did not remember signing the register, but there can be little doubt that both parties did so. The certificate with the petition was a duplicate obtained by the husband. No entry was made in his passport and nothing was said about health or the civil code. Two days later the husband was recalled to his ship and has never seen his wife since.

I propose to deal first with the question of form. This has to be determined in accordance with the law of the place where the marriage was celebrated, namely, the U.S.S.R. According to the evidence, the conception of marriage according to Russian law is that it is brought about by the consent of the parties and at one time might or might not be registered, the registration not being of the essence of the marriage but an incident useful to prove the fact. That is to say, the fact of marriage existed independently of registration just as much as birth and death. This was the position under the marriage Law of 1926. In 1944 the position was altered by an amending Law which established registration of marriage in the interests of the State and society and also to protect the persons and property, rights and interests, of the spouses and children. This Code was brought into force by order of the Presidium of the Supreme Council of the Russian Socialist Federal Soviet Republic of Apr. 16, 1945, and provides that only a registered marriage creates rights and duties in the spouses. Since all these marriages were registered it is not necessary to consider provisions governing the legality of pre-existing unregistered marriages.

The requirements for registration are dealt with by s. 4 of the Law of 1926, which reads as follows :

> "(*a*) Mutual consent to register the marriage. (*b*) The reaching of marriageable age. (*c*) The production of documents indicated in s. 132 of the Code."

No question arises under (*a*) or (*b*), but it is said that (*c*) was not complied with. Section 132 reads as follows :

> "Those registering a marriage are obliged to produce at the time of the declaration documents certifying their identity, and subscribe that no obstacles indicated in ch. 2, div. 1, of the present Code exist, and also that they are mutually aware of the state of their health and particularly with regard to venereal and mental diseases and tuberculosis, and must also indicate into what consecutive marriage, registered or unregistered, each of them enters and how many children he had."

No question arises as to documents of identity, in my opinion, but it is true that, according to the evidence of all the husbands, there was no subscription by them of any document relating to obstacles to the marriage or the health of the spouses or as to the existence of children, nor were there any of these questions raised. By s. 133 of the Code of 1926 it was provided as follows :

> "The responsible official registering the marriage is obliged to read to those contracting marriages sections 4, 5 and 6 of the present Code, and to warn them about their penal responsibility in case of false statements. After this the inscription made in the register is read, signed by them and countersigned by the official."

By s. 133 (1) of the Code, added by the order of the Presidium of the Supreme Council of R.S.F.S.R. on Apr. 16, 1945, it was further provided as follows :

> "In the passports of the spouses an inscription about the registered marriage is made indicating the surname, christian name, patronymic and the year of birth of the spouse and the place and time of the registration of the marriage."

These provisions were not complied with in the case of any of the husbands. In these circumstances it is submitted that the marriages are void for want of formality.

The main difficulty in the way of this argument is that by s. 2 of the Law of 1926, as was proved in the evidence, registration of marriage when acts of civil status are concerned is indisputable evidence of the existence of the marriage. Some reliance was placed on the reported opinion of the Commissar of Justice to the effect that the avoidance of both registered and unregistered marriages can be applied for in courts of law by all government organs, public organisations and third parties interested in such cases when the decision of the main problem depends on the question whether matrimonial relations exist. This opinion, assuming its authoritativeness, does not, to my mind, assist the parties to the marriage or either of them to dispute the existence of a registered marriage since such dispute is forbidden to them by the terms of s. 2 of the Law of 1926. I think this section is conclusive against the argument directed against the validity of the act of registration and it is irrevelant that the registrars omitted to perform some of the duties imposed on them by the Code as a preliminary to the registration itself. The essential feature existed that prior to the registration there was, subject to the argument with which I will deal hereafter regarding "mutual consent to marry." The registration even if no more than a ministerial act, is conclusive as between the parties, at any rate as to matters of form.

The second ground argued, namely, that the marriage is void for want of consent, is, I think, open to the husbands on the footing that questions of consent are to be dealt with by reference to the personal law of the parties rather than by reference to the law of the place where the contract was made. This view is not covered by direct authority, but is, I think, supported by the judgment of LORD MERRIMAN, P., in *Apt* v. *Apt* (3) ([1947] 1 All E.R. 629) :

> " The case might be put as follows. The wife was a domiciled British subject when she gave the power of attorney. This is not expressed to be irrevocable. Although her intention at the time she gave it was to contract a Christian marriage and to acquire the husband's domicil when the marriage was celebrated, she changed her mind and revoked the power of attorney before the celebration, while she was still a British subject. The marriage ceremony, therefore, did not effect a ' voluntary ' union but only a union which is deemed to be voluntary by the law of a country to which she was not subject at the time of the revocation of the power of attorney. That being so, the effect of the revocation should be decided according to English law."

In the same case in the Court of Appeal COHEN, L.J., said ([1947] 2 All E.R. 679) :

> " In our opinion, the method of giving consent as distinct from the fact of consent is essentially a matter for the *lex loci celebrationis* and does not raise a question of capacity . . . "

Marriage is essentially a voluntary union, and, as counsel for the husbands put it, and I cannot improve on the phrase, " consent is an emanation of personality." It is, therefore, I think, justifiable and consistent with authority to apply the matrimonial law of each of the parties.

In the case of these husbands, all of whom are domiciled in England, the law of England, therefore, applies to the question whether or not they consented to their marriages, and the section of the Russian Code as to the conclusiveness of registration does not shut the door against argument directed to want of consent. It is clear that, if there is a mistake as to the identity of the person with whom the contract is made or an erroneous belief as to the ceremony—for example, a belief that the ceremony was one of betrothal not of marriage—the marriage is void for want of consent. No such mistake can be put forward here, but it is said that in these four cases the marriages were entered into in the mistaken belief : (*a*) That the administrative Soviet practice of granting permission to wives of foreigners to leave the Soviet Union with their husbands would continue as it had done before the marriages took place ; (*b*) that they would be permitted to go and see their wives after they had parted from them ; and (*c*) that the marriages entered into imposed a duty on the spouses to live together, whereas in each case, in fact, by s. 9 of the Code no such duty was imposed on them. Section 9 of the Code reads as follows :

> " Both spouses have complete freedom in the choice of occupation and professions. The order of keeping the common household is fixed by mutual agreement between the spouses. A change of place of residence of one of the spouses does not impose on the other a duty to follow the one."

There is no authority for introducing into the law of England mistakes of this kind invalidating marriage. As to (*a*) and (*b*), it is true that the husbands hoped that what might be described as the normal relationship of man and wife would be recognised and observed. It is also true that it shocks the conscience that human relations should be ignored by a government which has, in fact, prevented these wives from joining their husbands. It does not, however, follow that the failure of the Soviet government to act in accordance with international usage will avoid the marriages on the ground of mistake, and I am, in my opinion, bound to hold that it does not. As to (*c*), the rights and duties of spouses to one another will vary according to the law of the domicil of the married pair, and there is no ground for avoiding the marriage on the ground of mistake because the rights and duties imposed on persons domiciled in Russia, who marry, vary from those imposed by other countries. As I indicated earlier in this judgment, no attempt has been made to argue that a Russian marriage ought not to be recognised in this country as not fulfilling the requisites of what has been called a Christian marriage—that is to say, " the voluntary union for life of one man with one woman, to the exclusion of all others," which is the definition given by Sir J. P. Wilde, J.O., in *Hyde* v. *Hyde and Woodmansee* (4), and is the accepted definition of a marriage which is recognised by the law of this country. In my judgment, therefore, the prayer for nullity on the ground that the marriages were in each case void fails.

In the case of *Way*, however, on the facts stated, accepting as I do his evidence, the wife has wilfully refused to consummate the marriage, and the marriage is, accordingly, voidable by English law, which is the law of the matrimonial domicil and the husband is entitled to a decree. In the case of *Rowley* there is an alternative prayer for divorce on the ground of adultery, and the petition will, therefore, on the petitioner's application, be adjourned. In the cases of *Kenward* and *Whitehead* I have been asked to adjourn one petition instead of dismissing both so that, in the event of a successful appeal in one case, it will not be necessary to take steps to appeal in the other. I, accordingly, dismiss the petition in *Kenward's* case and adjourn *Whitehead's* petition with liberty to restore, but this petition will also be dismissed (i) in the event of no appeal being lodged in *Kenward's* case within the time as limited or extended by the Court of Appeal, or (ii) if an appeal is presented, in the event of such appeal being dismissed.

Orders accordingly.

Solicitors : *Boyce, Evans & Sheppard* (for the husbands).

[*Reported by* R. Hendry White, Esq., *Barrister-at-Law.*]

LAKE *v.* BUSHBY AND ANOTHER.

[King's Bench Division (Pritchard, J.), October 27, 28, 31, November 1, 2, 4, 1949.]

Solicitor—Negligence—Damages—Conveyance of building—Vendor's solicitor retained by purchaser—Discovery that plans of building not approved by local authority—Purchaser not informed.

A purchase of property, including a bungalow which had been erected during requisition by the Air Ministry and which he proposed to convert into a dwelling-house, wrote to the vendor's solicitors : " I have negotiated the purchase of a property at . . . belonging to your client, B., [the vendor] through S., estate agent . . . and it would be greatly appreciated if you would act on my behalf in connection with the conveyance and registration of the property and the arranging of the mortgage loan with the present owner, B." The solicitors in reply wrote : " We are obliged for your instructions to act for you in the purchase of this property, and shall be glad to prepare the conveyance and mortgage herein." At the time of this correspondence the solicitors knew of the proposed conversion of the bungalow into a dwelling-house. Without the knowledge of the solicitors the sale had been induced by the fraudulent misrepresentations of the vendor, and the purchaser was awarded damages against the vendor on the basis of the difference between the purchase price and the value of the property as it stood without amenities the existence of which the vendor had represented. In reply to a requisition for the official search in respect of the property the solicitors received a letter from the clerk to the local council stating that " no plans have been approved by the council for the bungalow referred to in your requisition." The solicitors informed the vendor who stated that he personally would obtain the necessary approval and " make it right for " the purchaser, but they did not inform the purchaser and he completed the purchase without knowledge that no plans had been approved for the original erection of the bungalow and that, therefore, the local council might require it to be pulled down. In an action for damages for negligence against the solicitors :

HELD : (i) it was the solicitors' duty to communicate the information to the prospective purchaser and not merely to see that he obtained a good title, and, having failed to do so, they were liable for damages.

(ii) the measure of damages was the difference between the value of the property as it stood with a " secure " building, and its value as diminished by the possibility that the local council might require the building to be pulled down.

[AS TO NEGLIGENCE OF A SOLICITOR IN NON-CONTENTIOUS MATTERS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 134-136, para. 181 ; and FOR CASES, see DIGEST, Vol. 42, pp. 100-107, Nos. *940-1012*.

AS TO DAMAGES IN CONTEMPLATION OF BOTH PARTIES WHEN CONTRACT IS MADE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 97-102, paras. 122-127 ; and FOR CASES, see DIGEST, Vol. 17, pp. 93, 112, Nos. *101*, *230*.]

Cases referred to :

(1) *Pitman* v. *Francis*, (1884), 1 Cab. & El. 355 ; 42 Digest 102, *961*.

(2) *Scholes* v. *Brook*, (1891), 63 L.T. 837 ; *affirmed on other grounds*, 64 L.T. 674 ; 42 Digest 104, *985*.

(3) *Lewis* v. *Collard*, (1853), 14 C.B. 208 ; 2 C.L.R. 1345 ; 23 L.J.C.P. 32 ; 22 L.T.O.S. 135 ; 42 Digest 92, *839*.

(4) *Brinsden* v. *Williams*, [1894] 3 Ch. 185 ; 63 L.J.Ch. 713 ; 71 L.T. 177 ; 42 Digest 104, *987*.

(5) *Barker* v. *Gambrill*, (1932), 76 Sol. Jo. 868.

(6) *Davies* v. *Lock*, (1844), 3 L.T.O.S. 125 ; 42 Digest 108, *1027*.

(7) *Bean* v. *Wade*, (1885), 2 T.L.R. 157 ; 42 Digest 102, *962*.

(8) *Groom* v. *Crocker*, [1938] 2 All E.R. 394 ; [1939] 1 K.B. 194 ; 108 L.J.K.B. 296 ; 158 L.T. 477 ; Digest Supp.

(9) *Victoria Laundry* (*Windsor*), *Ltd.* v. *Newman Industries*, *Ltd.* (*Coulson & Co.*, *Ltd.* (*Third Party*)), [1949] 1 All E.R. 997 ; [1949] 2 K.B. 528.

ACTION for damages against the first defendant for fraudulent misrepresentation, against the second defendants for negligence, and against both defendants for breach of contract.

The plaintiff bought from the first defendant for the sum of £880 two plots of land near Pollington in the West Riding of Yorkshire. One plot was part of a field on which there were six buildings—a brick building, which it was intended to convert into a bungalow, an air raid shelter, and four Nissen huts. The second defendants were a firm of solicitors practising in Harrogate who acted for both the first defendant and the plaintiff in the conveyance of the property. The land had been requisitioned by the Air Ministry during the war and the buildings had been erected to house Royal Air Force personnel. When the land was released from requisition the first defendant accepted the buildings in lieu of compensation, and in March, 1946, he signed a document which stated : " It is also understood that the Air Ministry can give no guarantee that the said huts or structures disposed of out of the services comply with the bye-laws, planning or requirements of the local government authorities or statutory undertaking concerned." The water and electricity supply to the site had been cut off on de-requisition and the first defendant knew that his chances of having those services provided in the future were extremely small. The drains emptied on another field owned by the first defendant. An estate agent acting on behalf of the first defendant, replying to an inquiry from the plaintiff about the property stated that the " bungalow stands on one acre of land and has water, electricity and main drainage laid on." When inspecting the property the plaintiff told the first defendant that he required a place for his wife to live in, and that, having no money with which to buy the bungalow, he would have to sell his own house at Bexhill to put down the necessary purchase price. The first defendant told the plaintiff that " hot and cold water will be on, on putting the internal fittings in, such as boilers and baths," that he had an undertaking that a water supply would be continued by the local authority, that the supply of electricity would be continued by the local electricity undertaking, and that drainage was laid on. The first defendant made these statements knowing them to be untrue and intending the plaintiff to be influenced by them when contemplating buying the property. PRITCHARD, J., held that these were fraudulent misrepresentations, and that the estate agent was acting as the first defendant's agent when making his representations which were untrue to the knowledge of the first defendant.

On Aug. 15, 1946, the plaintiff paid a deposit of £88 to the estate agent and on Sept. 18, a conveyance was executed and a further £352 was paid, the balance of £440 remaining on mortgage with the first defendant. On Nov. 6 the plaintiff accepted an offer for the sale of his house in Bexhill. On Nov. 15 he was informed by the Goole Rural District Council that the plans submitted by him for the conversion of the bungalow into a dwelling-house did not comply with the council's byelaws and that the council were unable to approve the plans, but, in view of the shortage of housing accommodation, they were prepared to allow the conversion for a period of one year, after which, unless the period was extended, the building would have to be pulled down. On Jan. 9, 1947, the plaintiff received a letter informing him that his application for electricity to be supplied to the property had been deferred. On Mar. 2, 1947, the plaintiff was informed by the Goole Rural District Council that the plans for the proposed conversion of the bungalow into a dwelling-house were rejected, primarily because no water supply or means of disposal of sewage were available.

PRITCHARD, J., gave judgment for the plaintiff against the first defendant and awarded him £210 damages as representing the difference between the purchase price of £880 and the value of the property as it stood. He disallowed a claim against the first defendant for damages in respect of £41 4*s*. 9*d*. costs paid by the plaintiff to the second defendants in connection with the conveyance, but he awarded damages amounting to £170 2*s*. and £35 6*s*. 6*d*. expended by the plaintiff for accommodation for his wife and family after leaving Bexhill and for the storage of furniture. The facts with respect to the second defendants, against whom judgment was also given, appear in the judgment.

H. G. Garland for the plaintiff.

Jellinek and *J. A. Peck* for the first defendant.

Heathcote-Williams, K.C., and *S. N. Bernstein* for the second defendants.

PRITCHARD, J. : In 1946 the plaintiff, Horace Travers Lake, bought from the first defendant, George Heads Bushby, for the sum of £880, two plots of land near the village of Pollington in the West Riding of Yorkshire. One of those two plots was part of a field, on which there were six buildings described in the conveyance to the plaintiff as a brick bungalow, an air raid shelter, and four Nissen huts. The plaintiff alleges against the first defendant that he was induced to enter into the contract to buy this property by certain fraudulent misrepresentations made by the first defendant, and by an estate agent called Stacey who, the plaintiff alleges, was acting as the agent of the first defendant, and he claims damages against the first defendant for fraudulent misrepresentation. He does not claim rescission of the contract or conveyance. The second defendants, Atkinson, McCall & Co., are a firm of solicitors practising in Harrogate.

They acted for the first defendant and for the plaintiff in connection with the conveyance of the property. The plaintiff alleges that these solicitors were negligent in their conduct of his affairs and from them he claims damages for negligence.

[His Lordship stated the facts relating to the sale by the first defendant of the property to the plaintiff, held that the sale had been induced by a fraudulent misrepresentation, assessed damages against the first defendant at £415 8*s*. 6*d*., and continued :] I now come to that part of the case which concerns the second defendants, the solicitors, Atkinson, McCall & Co. On Aug. 15, 1946, when the plaintiff confirmed his bargain in the letter which he sent to the estate agent with the deposit of £88, he made the request that the first defendant's solicitors should act for him " in this matter," and on the same day, by letter, he retained the second defendants in the following terms :

> " Dear Sirs, I have negotiated the purchase of a property at Long Lane, Pollington, Yorks., belonging to your client, Mr. Bushby, through Captain N. T. Stacey, estate agent, 1 Cambridge Road, Harrogate, and it would be greatly appreciated if you would act on my behalf in connection with the conveyance and registration of the property and the arranging of the mortgage loan with the present owner, Mr. Bushby."

The plaintiff goes on to say that he understands Mr. Stacey has forwarded to the second defendants a copy of his letter dated Aug. 15, 1946. By a letter dated Aug. 17, the second defendants make it clear that they had received a letter from Mr. Stacey, and by a letter on the same day they accept the plaintiff's retainer in these terms :

> " We are obliged for your instructions to act for you in the purchase of this property, and shall be glad to prepare the conveyance and mortgage herein."

I am satisfied that at that time Mr. McCall (the partner in the defendant firm who was acting in this matter for the plaintiff and for the first defendant) knew the contents of the letter which the plaintiff had written on Aug. 15 to Mr. Stacey, and from Mr. McCall's own evidence I am satisfied that he also learned from Mr. Stacey that the plaintiff proposed to convert into a dwelling-house the building described as a bungalow on the land which the plaintiff was buying. On Aug. 26, 1946, the second defendants sent to the plaintiff a contract for signature. On Aug. 27 the plaintiff signed it, and then there followed, on Sept. 4 and 8, the two letters on which the plaintiff's case is founded. On Sept. 4 the solicitors wrote to the clerk to the Goole Rural District Council enclosing a requisition for the official search in respect of the property and the fee. In reply to that letter, on Sept. 8, 1946, the solicitors received from the clerk to the council the following letter :

> " I enclose herewith receipt and certificate of search under the Land Charges Act, 1925. With reference to field No. 60, no plans have been approved by the council for the bungalow referred to in your requisition."

It is the plaintiff's case that that information was never communicated to him by Mr. McCall, that Mr. McCall's failure to communicate that information amounts to negligence, and that in consequence of that negligence he (the plaintiff) has suffered damage. That, therefore, involves consideration of these three questions.

The first question which I have to decide is whether Mr. McCall communicated that information to the plaintiff ? [His Lordship referred to the evidence and found that Mr. McCall did not communicate the information to the plaintiff.] The next question is : Was it Mr. McCall's duty to communicate that information to the plaintiff ? Counsel for the second defendants contended it was not and that the position was that the bargain was struck by the plaintiff with the first defendant before he retained the second defendants, as appeared from the terms of the retainer itself, which was a retainer merely to convey property which had already been bought. The second defendants' duty, therefore, went no further than to see that their client got a good title, which, it is admitted, he did get. In support of these contentions counsel cited *Pitman* v. *Francis* (1), *Scholes* v. *Brook* (2), *Lewis* v. *Collard* (3), *Brindsen* v. *Williams* (4) and *Barker* v. *Gambrill* (5). I have considered all these cases, the terms of the retainer, the terms in which it was accepted, and the terms in which the second defendants rendered their account for their services. I have also considered what Mr. McCall says he did on receiving information from the rural district council as recorded in a letter of June 9, 1947, from Mr. McCall to the plaintiff's present solicitors. Mr. McCall says that on receiving the information from the clerk to the Goole Rural District Council : A B

> " We immediately got in touch with the vendor and he replied that this might be so but that he personally would obtain the necessary approval and 'make it right for Major Lake,' adding that 'if everything is not exactly as he wants, I will make it right for him '."

Mr. McCall says he did that on Sept. 10 or 11, 1946, immediately after getting the information. In my judgment, after consideration of all those matters and in spite of the decisions and the arguments which counsel for the second defendants put before me, there was a duty on Mr. McCall to communicate this information, not only to the vendor, who was one of his clients, but to the purchaser, the plaintiff, who was the other of his clients, and I think that, by not doing so, he failed in the duty which he owed to the plaintiff. C D

That gives rise to the third question : Has the plaintiff shown that he suffered damage in consequence of this negligence ? That is the part of the case I have found extremely difficult. Counsel for the second defendants cited to me *Davies* v. *Lock* (6), *Bean* v. *Wade* (7) and *Groom* v. *Crocker* (8). These authorities show beyond doubt that the duty which a solicitor owes to his client arises *ex contractu*, and apart from the contract between him and his client the duty does not exist at all. The damages the client is entitled to recover must, therefore, be considered on that basis. In *Victoria Laundry* (*Windsor*), *Ltd.* v. *Newman Industries, Ltd.* (9), ASQUITH, L.J., said ([1949] 1 All E.R. 1002) : E

> " . . . the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach." F

Applying that principle to this case, it seems to me that the loss which resulted from the breach was that the plaintiff completed his contract and thereby suffered the damage which I have held he is entitled to recover against the first defendant, namely, £415 8*s*. 6*d*. If, however, I were to hold that that damage was reasonably foreseeable by Mr. McCall as liable to result from the breach of duty I should, in effect, be holding that Mr. McCall knew, or ought to have known, of the first defendant's fraudulent misrepresentations and that Mr. McCall knew that before the completion date the plaintiff was selling his house at Bexhill, and I am satisfied that Mr. McCall did not know either of those things. Therefore, the damages which may be recoverable against the second defendants must be considered on a wholly different basis from the damages which I have held are recoverable against the first defendant, because the latter are entirely related to the first defendant's fraudulent misrepresentations and to the knowledge which the first defendant had about the plaintiff's project in selling his Bexhill house. Neither of these matters was known to Mr. McCall. G H

The proper way to approach the question of damages for Mr. McCall's breach of contract is this. When Mr. McCall had received the letter of Sept. 8, 1946, from the Goole Rural District Council he ought to have realised that the bungalow was in danger of being pulled down because no plans had been submitted for its erection. He thus had knowledge which I am satisfied the plaintiff did not possess, the plaintiff having been deceived by the first defendant into believing that there was no danger of the bungalow being pulled down on the ground that its original erection had never been authorised. If the plaintiff had been told of the contents of the letter of Sept. 8 he would have appreciated the danger and would not have bought the land. The result is that the plaintiff bought for £880 land plus what I may call a secure building and what he got was land plus a threatened building, and, if it is possible to arrive at a figure which represents his loss calculated in that way, that is the figure which the second defendants ought to pay in respect of the damage occasioned by their breach of duty. In arriving at a figure, I have had regard to these considerations. This building has been said to be worth £200 as it stands. I have tried to assess the chances of its being pulled down. I have in mind the answer which the clerk to the Goole Rural District Council gave to a question which I put to him : " The truth of this matter is that the council did not want any of these buildings occupied at all, did they ? " and the clerk candidly admitted that that was the attitude of the council. They wanted to be rid of these mushroom growths which had sprung up at the instance of the various service authorities during the war years, and, therefore, I think there is considerable chance of this building being pulled down. On the other hand, if it is pulled down, the plaintiff, although he has lost the prospect of a dwelling-house, has also been saved the expense of converting it into a dwelling-house. No one has told me what that would cost. [HIS LORDSHIP then assessed damages against the second defendants at £100.]

Judgment for the plaintiff against both defendants with costs.

Solicitors : *Claude Barker & Partners* (for the plaintiff) ; *Stafford Clark & Co.* (for the first defendant) ; *Chamberlain & Co.* (for the second defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

BELCHER AND OTHERS *v.* READING CORPORATION.

[CHANCERY DIVISION (Romer, J.), October 25, 26, 27, 28, November 15, 1949.]

Housing—House of local authority—Rent—Increase—" Reasonable charges "—Maintenance of balance between ratepayers as a whole and tenants—Duty to consider " rents ordinarily payable by persons of the working classes in the locality "—Housing Act, 1936 (*c.* 51), *s.* 83 (1), *s.* 85 (5).

By the Housing Act, 1936, s. 83 (1) : " The general management, regulation, and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine." By s. 85 (5) : " In fixing rents the authority shall take into consideration the rents ordinarily payable by persons of the working classes in the locality . . . "

Between 1919 and 1939 the local authority built a large number of houses, which were let at varying rentals according to the accommodation and amenities provided. From the tenants' point of view, these rents compared very favourably with the rents paid by tenants of similar houses which were privately owned. On Nov. 14, 1947, the borough treasurer submitted to the authority's housing sub-committee reports showing (*a*) on the basis of the rents then paid by the council tenants, a steadily rising deficiency on the housing repair account from 1948/1949 onwards culminating in a deficit of over £70,000 by Mar. 31, 1953, but, on the basis of a proposed revision of rents, a surplus from 1949/1950 onwards ; (*b*) a future deficit of formidable proportions on the housing revenue account if the rents remained unaltered, but a constantly increasing accumulated surplus from 1948/1949 if a proposed revision of rents was adopted. At a meeting on Nov. 17, 1947, the housing sub-committee agreed with the borough treasurer's recommendations and reported accordingly to the housing A committee, and on Nov. 24, 1947, the housing committee approved and adopted the report of the sub-committee recommending the increases of rent. At each of these meetings the committee, before arriving at their decision, considered the question of the rents paid for similar accommodation in Reading by tenants of privately-owned houses, and discussed the interests of the ratepayers as a whole as well as those of the council tenants. After B meeting deputations, of the tenants, who objected to the increases, the housing committee, at a meeting on Dec. 30, 1947, decided to reduce by one third the increases originally proposed, but the reduced increases were also resisted by the tenants, who contended that the decisions of the local authority, through their housing committee on Nov. 24 and Dec. 30, 1947, were *ultra vires* and void, on the grounds (i) that the increased rents were C not " reasonable," within the meaning of s. 83 (1) of the Act of 1936, in that (*inter alia*) (*a*) certain outgoings had been discharged from the housing revenue account which ought to have been borne by the ratepayers as a whole, with the result that the account was wrongly reduced, and, (*b*) the creation of a surplus in the account ought to be done at the expense of the ratepayers as a whole, and not at the expense of the council tenants ; (ii) D in making the decisions the authority did not apply their minds to the requirements of s. 85 (5) of the Act of 1936.

Held : (i) the question whether the local authority's decision to raise the rents could be impeached, as being in conflict with s. 83 (1) of the Act of 1936, depended not on whether it might have been preferable to charge this or that item against the ratepayers as a whole, or to have apportioned E it in some manner between them and the tenants, but on whether the increased rents were " reasonable," as s. 83 (1) required them to be. In dealing with these matters, it was the authority's duty, so far as possible, to maintain a balance between the interests of the ratepayers as a whole and those of the council tenants, having due regard to any specific requirements of the Housing Acts, and the policy of the local authority did not *per se* support F any suggestion of unreasonableness on their part or any failure to take into account any consideration which they ought to have taken into account for the purpose of maintaining this balance.

(ii) the description " working classes " having a far wider, and less certain, signification than it used to possess, it was immaterial that some of the occupants of privately-owned houses of a similar kind might be G " black-coated workers," and, on the facts, it was clear that the question of the rents payable by members of the " working classes " in the district was considered at the meetings held on Nov. 17 and 24, 1947.

(iii) therefore, (*a*) the obligation imposed by s. 85 (5) of the Act of 1936 was fully observed, and (*b*) the increased rents were " reasonable," as required by s. 83 (1), and, accordingly, the local authority's decisions of H Nov. 24, 1947, and Dec. 30, 1947, to raise the rents were not *ultra vires*, either under s. 83 (1) or under s. 85 (5) of the Act of 1936, or for any other reason.

Per curiam : there was no legal sanction whatsoever, in the Housing Acts or elsewhere, for the view that tenants who had occupied council houses over a period of years were, or should be, immune from any rent increase.

[**EDITORIAL NOTE :** By s. 1 of and sched. I to the Housing Act, 1949, which was enacted on July 30, 1949, references to the "working classes" have been removed from certain provisions of the Housing Act, 1936, "so as to enable account to be taken of the housing conditions and housing needs of all members of the community." As a result of these amendments, a local authority, in fixing rents of council houses, no longer has a duty, under s. 85 (5) of the Act of 1936, to "take into consideration the rents ordinarily payable by persons of the working classes in the locality."

FOR THE HOUSING ACT, 1936, s. 83 (1) and s. 85 (5), see HALSBURY'S STATUTES, Vol. 29, pp. 626, 627.]

Case referred to :

(1) *Green & Sons* v. *Minister of Health* (No. 2), [1947] 2 All E.R. 469 ; [1948] 1 K.B. 34 ; [1948] L.J.R. 1 ; 111 J.P. 530 ; 2nd Digest Supp.

ACTION by five council house tenants of the Reading Corporation, suing on behalf of themselves and some 3,140 other tenants, claiming (*a*) a declaration that two decisions of the corporation, through their housing committee, comprised in resolutions passed on Nov. 24 and Dec. 30, 1947, under which the rents of the council houses were increased, were *ultra vires* and void under the Housing Act, 1936, s. 83 (1) and s. 85 (5), and (*b*) an injunction to restrain the corporation from claiming and collecting the increased rents. ROMER, J., held that the decisions were not *ultra vires*, and gave judgment for the corporation. The facts appear in the judgment.

Raeburn, K.C., and *Millner* for the tenants.
Sir Andrew Clark, K.C., and *Dunbar* for the corporation.
Denys Buckley for the Minister of Health.

Cur. adv. vult.

Nov. 15. **ROMER, J.,** read the following judgment. This action is brought by five council house tenants of the defendant corporation, and they are suing on behalf of themselves and a number of other tenants, some 3,140 in all. They claim that two decisions of the corporation, through their housing committee, under which the rents of the council houses were increased, are *ultra vires* and void.

The houses with which I am concerned were all built between the two great wars. They afford varying degrees of accommodation and amenities, and, accordingly, command varying rentals. On Nov. 14, 1947, the defendants' borough treasurer, Mr. Clifford Jones, submitted to the housing management and rent sub-committee three finance reports dealing respectively with the housing repairs account, the housing revenue account and a review of rents. Mr. Clifford Jones also enclosed with his reports a copy of the borough architect's report on housing repairs. This latter report submitted a reasoned estimate of annual expenditure amounting to £32,050 in relation to the council houses under the headings of internal re-decoration, external re-painting, fencing, paths, renewals of various kinds and odd repairs. The housing sub-committee were meeting on Nov. 17 and it was in anticipation of this meeting that the borough treasurer submitted the reports which I have mentioned. In his report on the housing repairs account, the treasurer, after referring to the statutory provisions relevant thereto and to certain matters of past history, proceeded as follows :

> "3. Expenditure from the account. The expenditure chargeable to the account is the actual cost of repairs executed. The fund must, however, be sufficient to meet long term repairs and replacements, and should have an increasing balance, especially in view of the progressively increasing liability for repairs on older properties. 4. Reading housing repairs account. (i) In 1931, the council decided not to insure their corporation houses in respect of fire risks and a special contribution based on ½ per cent. of gross

> rents has been made to the repairs account since 1931/32 and earmarked for fire insurance purposes. The council has no legal authority to set up a fire insurance fund, and the fire insurance fund is, therefore, an unofficial allocation of the repairs account. This must be the case until local Act powers are obtained. (ii) It will be seen from table I (attached) that the expenditure on the repairs account rose sharply from £14,405 in 1945/46 to £21,848 in 1946/7. This is an increase of £7,443, approximately 52 per cent. of the 1945/6 expenditure, and equivalent to a rise of £144 in A weekly expenditure on repairs. The reasons for the increase in expenditure are explained in the borough architect's report, but may briefly be stated as follows : (*a*) Repairs deferred during war years, which it is estimated will take ten years to complete. (*b*) Increased labour costs. (*c*) Increased cost of materials. 5. Proposed increase in repairs contribution. To cover the B deficiency on the account and to help to re-build the balance, it will be necessary to double the pre-war contributions from housing revenue account. The contributions will then be : non-parlour two bedroom houses, flats and maisonettes, £7 per house, etc., per annum ; non-parlour three bedroom houses, £8 per house per annum ; all other types of houses, £9 per house per annum. Table II shows the effect of the increased contributions over the C next five years. If the repairs contribution is increased from Apr. 1, 1948, the balance of the repairs account at Mar. 31, 1948, would be £7,036 in hand. Of this figure, £5,890 relates to the fire insurance fund."

Table I (attached to the said report) showed, *inter alia*, an excess of expenditure over income on the housing repairs account for the year 1946/7 of £7,967. Table II, which was described as "Estimated position of housing repairs account D 1947/8 to 1952/3," showed, on the basis of the then current contributions, a steadily rising deficiency from 1948/9 onwards, culminating in a deficit of £70,181 by Mar. 31, 1953. On the basis of the proposed revised contributions, however, the table showed a surplus on the account from 1949/50 onwards, and a surplus balance of £13,617 in March, 1953.

The borough treasurer's report on the housing revenue account began by E drawing the housing sub-committee's attention to certain matters affecting the account in the Housing Act, 1936. It then set out a table of expenditure and income for the years 1939/40 to 1946/7 inclusive and of surpluses and deficits. It appeared from this table that the surplus on the account as at Mar. 31, 1947, was £1,294. There then followed an estimate of income and expenditure on the account for 1947/8 to 1950/51 inclusive. This showed a future deficit of formidable F proportions on the account if the rents remained unaltered, but a constantly increasing accumulated surplus from 1948/9 if the proposed revision of rents was adopted. The report then dealt with one of the matters of which complaint is made in this action, *viz.*, the salaries of the technical staff of the borough surveyor's and borough architect's departments. The report said :

> G "Such staff is engaged on architectural, technical and supervisory work, surveys, preparation of plans, etc., in connection with the lay-out and preliminary work on the new housing estates. Unfortunately, the Ministry of Health has ruled, in granting loan sanctions, that 'no part of the salary or wages of the council's permanent staff (including employees) ordinarily charged to revenue account should be defrayed out of loan moneys . . .' The H borough surveyor and borough architect have advised me of the percentages of salaries of their departments which they consider should be charged to housing, and, in view of the Ministry's ruling above, the present position is that no part of the salaries can be financed by loan and the whole amount must, therefore, be financed out of revenue moneys, although it is in respect of capital expenditure."

The amount so charged was £5,200 for the year 1946/7 and was estimated at

£5,300 for each of the three following years. The report then proceeded as follows :

> " 7. Unproductive loan charges. The loan charges on unproductive sites during the next three years are estimated to be as follows : 1947-48, £2,280 ; 1948-49, £1,360 ; 1949-50, £630. This includes loan charges on the basis of the completion of all schemes at present under way with the exception of Emmer Green which is estimated up to the end of October. If work on this site is continued, the amended figures will be as follows : 1947-48 £2,750 ; 1948-49, £3,550 ; 1949-50, £3,220. 8. Methods of covering deficit. The deficit remaining in the revenue account can be met from two sources, *viz.*, general rate fund, or increased rents. If the whole deficit was to be met from rents, the effect is set out in the attached rents schedule (table I). If the increase in repairs account contributions is deferred until 1948-49, the deficit to be borne by general rate fund in 1947-48 will be reduced from £5,607 to £1,000. 9. Alternatives to flat rent increases. If the committee decide that additional contributions should be made from general rate fund in order to ease rent increases, the effects of reducing the rent increases by 1/6th and 1/3rd are shown below. Reduction of proposed rent increases by 1/6th : 1947-48, deficiency for year, £7,833 ; 1948-49, surplus for year, £2,541 ; 1949-50, surplus for year, £7,072 ; 1950-51, surplus for year, £9,198 ; 1951-52, surplus for year, £9,217. Reduction of proposed rent increases by 1/3rd : 1947-48, deficiency for year, £9,907 ; 1948-49, deficiency for year, £4,375 ; 1949-50, deficiency for year, £331 ; 1950-51, surplus for year, £1,642 ; 1951-52, surplus for year, £1,661. 10. Tenants of pre-war houses. The balance on the housing revenue account at Mar. 31, 1945, was £16,759 and this surplus was contributed partially by government grants, statutory rate contributions and by the tenants of the 3,140 dwellings built under pre-war schemes. This surplus has since that date been used on technical staff and unproductive loan charges on post-war housing schemes and, to the extent of £3,800 only, on increased cost of managements, *i.e.*, approximately £12,900 was spent on new schemes."

A table was attached to this report showing in detail the numbers and types of the council houses, the increases in their rents if the whole, alternatively five sixths, alternatively two thirds, of the suggested rent increases of approximately 50 per cent. were brought into operation, and the resulting net rents and inclusive rents. The report also annexed a statement indicating the net rents fixed by neighbouring authorities in comparision with those applying in Reading. Finally, in the report on " Review of Rents," the borough treasurer dealt with the problem of the " pooling " of rents, but it is not necessary for me to notice this in any detail.

At their meeting on Nov 17, 1947, the housing sub-committee, after a discussion which was the subject of oral evidence before me, agreed with the borough treasurer's recommendations and submitted a report to the housing committee, who were meeting on Nov. 24, 1947. This report, after referring to the borough treasurer's report on the housing repairs account and to the borough architect's estimate as aforesaid of £32,050 per annum on the maintenance of council houses, said :

> " We are in agreement with the borough architect's suggestion and recommend that, in future, the expenditure from the housing repairs account be based on the figures mentioned above. In order to cover the estimated deficiency on the account and to re-build a reasonable balance, we are of opinion that it will be necessary to double the pre-war scale of contributions from the housing revenue account and we accordingly recommend that, as from Apr. 1 next, these contributions should be . . . "

as had been suggested in the borough surveyor's report. The housing sub-committee's report then adverted to the housing revenue account and to the borough treasurer's report thereon, and pointed out that the latter :

> " . . . showed that from 1939/40 to 1943/44 there was a continued increase in the accumulated surplus (from £6,250 to £17,054), but that in the past three years this surplus had been reduced to £1,294 and that, if the necessary contribution to the housing repairs account were made to cover the programme outlined in the borough architect's report, there would be a net deficit of £18,203 at the end of the current year which could be met in two ways, namely, (*a*) from the general rate fund or (*b*) by an increase in rents. We have carefully considered the two alternatives and are of the opinion that the deficit should be made up by raising the rents. With a view, however, to mitigating the effect which a substantial increase in rent may have on many of the tenants, we have considered the following suggestions, namely :—(*a*) that a portion of these increases should be met from the rates ; (*b*) that rent rebates might be made in appropriate cases. In regard to (*a*), the borough treasurer has shown that if, for instance, the flat rent increases were reduced by 1/6th or 1/3rd the effect would be as follows . . . "

The report then set out the figures.

> " In regard to (*b*), we are opposed in principle to the granting of any rebates which would have the effect of charging differing rents for houses of the same type. The borough treasurer's report also included a table showing the various rents charged by certain other authorities in the South of England and we noted that the present level of rents in Reading was below the average of the authorities quoted. After carefully considering all the above factors, we have come to the conclusion that a general increase in rents is the method which should be adopted to produce the necessary additional income for the housing revenue account and we accordingly recommend that the rents of the council houses be increased in accordance with the following scale and that the necessary notice be given to the tenants so that such increases can take effect forthwith."

The scale set out was in conformity with the borough treasurer's full suggestion for rent increases and with the resulting figures set forth in his report. The sub-committee's report then continued :

> " The effect of raising the rents in the current year and delaying the commencement of the increased contribution to the housing repairs account until Apr. 1 next will be to produce (*a*) a net deficit in the housing revenue account at the end of the current year amounting to £1,150 which must be met from the rates ; (*b*) a surplus of £8,208 at the end of 1948/49 ; and (*c*) an accumulated surplus increasing thereafter at the rate of approximately £15,000 per annum. This surplus may, however, be required (*a*) to meet a further increased contribution to the housing repairs fund and (*b*) to cover additional charges to the housing revenue account in respect of new schemes and higher costs."

The report then referred to the question of pooling the rents of all the council houses, but recommended that that matter should be deferred for the time being. At their meeting on Nov. 24, 1947, the housing committee resolved (i) that the sub-committee's proceedings and recommendations be approved and adopted, and (ii) that a general review of rents of council houses be undertaken in due course and that the borough treasurer be requested to report thereon to the housing sub-committee as soon as possible.

The decision to increase the rents created considerable resentment and indignation in the minds of the corporation's tenants. Two deputations were received by the corporation on their behalf and the views both of landlords and tenants were exchanged on the subject of the rent increases. These deputations appeared before the housing committee on Dec. 22, 1947, the first of them being led by the plaintiff, Mr. Belcher. Mr. Belcher told the committee that the tenants were convinced that any increase would create a real hardship to the majority of tenants and result in a lowering of their standard of living and that certain charges which had been in part responsible for the council's decision ought properly to be thrown on the ratepayers as a whole and not on the shoulders of the tenants alone. Mr. Belcher also produced what was described as an "average weekly budget for man, wife and two children based on actual rations, points values, and utility prices" and which showed that such a man, receiving £4 18*s.* 8*d.* a week and paying 15*s.* weekly for rent, would have nothing left over for luxuries, or even for such amenities as newspapers, stationery and stamps, holidays, cigarettes, etc., after paying for his own and his family's food and other necessities.

As a result of these dissident views, the housing committee re-considered the position and ultimately met again on Dec. 30, 1947. The following are the minutes of that meeting:

> "Council houses: rents. The committee resumed consideration of the rents of the various council houses and, having had regard to the possible hardships which might be caused by the imposition at the present time of the full increases of rent previously decided upon and to the impending review of rents called for by the committee at their meeting on Nov. 24, 1947, Resolved: (1) That the rents of the council houses be so adjusted: (*a*) that the surplus at present anticipated in the housing revenue account for the year ending Mar. 31, 1949, be not provided, and (*b*) that no provision be made in the housing revenue account to meet the cost of unremunerative loan charges on the purchase of land, the construction of roads and sewers and the erection of buildings during such period as such estates remain unproductive. (2) That the increases of rent authorised by the committee at their meeting on Nov. 24, 1947, be varied as follows: Previous increase authorised, 5*s.* 3*d.* per week; amended increase, 3*s.* 6*d.* Previous increase, 4*s.* 6*d.* per week; amended increase, 3*s.* Previous increase, 4*s.* per week; amended increase, 2*s.* 8*d.* M.A.P. bungalows, 4*s.* per week; amended increase, 1*s.* 4*d.* (3) That the amended increases of rent now authorised take effect from Jan. 19, 1948, and that the town clerk be instructed to inform all corporation tenants accordingly."

The committee, accordingly, departed from the full increases of rent contemplated by the borough treasurer's report, and qualified their previous decision of Nov. 24 by freeing the tenants from the incumbrance of idle loan charges on lands, roads, sewers and buildings and by abandoning the anticipated surplus at Mar. 31, 1949. As a result of these alleviations, the committee was able to reduce by one third the increases of rent originally proposed. These reduced increases, however, did not prove acceptable to the council tenants and they continued with a rent strike which they had already organised in protest against the original decision of Nov. 24. This strike continued until February, 1948, when it was called off. On July 6, 1948, the writ in this action was issued, challenging the validity of both of the decisions to which I have referred.

It would at this point be convenient to refer to the provisions of the Housing Acts which are relevant to the matters in issue. I do not propose to read these provisions in detail, but will give the references to the sections—the Housing Act, 1936, s. 83 (1), s. 85 (1), (5) and (6), s. 114, s. 128, s. 129, s. 131, s. 133, and sched. VIII; the Housing (Financial and Miscellaneous Provisions) Act, 1946, s. 21 (3) and (4); the Housing Act, 1949, s. 1 and sched. I. The case of the tenants, as pleaded and as presented to me in argument, was that the decisions of the corporation, acting through their housing committee, which were comprised in the resolutions passed on Nov. 24 and Dec. 30, 1947, were *ultra vires* and void. It is said that the rent increases effected by these resolutions are not "reasonable," as they are required by s. 83 (1) of the Act of 1936 to be, and it is said also that the corporation, when arriving at their decisions, ignored the requirements of s. 85 (5) of the same statute. I will consider in detail these arguments, and the manner in which they were elaborated, after I have referred to the oral evidence which was called before me.

The only witness called by the tenants was Mr. Percy Belcher himself. He has occupied for many years one of the defendant corporation's council houses, and the result of the resolution of Dec. 30, 1947, was to increase his rent by 3*s.* a A week. He said in evidence that he had done decorative work on his house during the war and many of the other tenants had done the same. He referred also to bad workmanship in the building of his and other council houses and gave particulars of what he had in mind. He also confirmed the accuracy of the budget which he produced at the deputation to the housing committee and to B which I have earlier referred. In cross-examination, he said that his present salary as general secretary of the Tobacco Workers Union is £700 per annum, but that that is far in excess of the wages of the average council house tenant on the corporation's estates, which he estimated at about £4 18*s.* a week. When asked whether the general minimum standard of wages in this country to-day is more than double what it was in 1939, he did not agree and thought that the increase was roughly 78 per cent. C In Mr. Belcher's speech to the housing committee as a member of the deputation which they received he had said :

> "Having carefully considered all the circumstances surrounding your decision to increase our rents, we are here to state that we feel that not only are these increases totally unjustified, but that any increase falls within the same category." D

With regard to this statement, Mr. Belcher was asked in cross-examination :

> "*Q.*—So your attitude is this : I am not interested in whether these figures are reasonable or not ; I say I have an absolute right to have a fixed rent. That was your attitude, was it not ? *A.*—On the basis that the houses were 24 years old and that most of the tenants have been there for 24 years, yes. E
>
> *Q.*—That is your attitude : We are entitled to stay on at the same rent and under no circumstances ought our rent to be increased. That is your attitude ? *A.*—Yes, at that time.
>
> *Q.*—And it is still your attitude ? *A.*—Yes."

At the close of the tenants' case, counsel for the corporation intimated that, F but for one consideration, he would have been content to call no evidence and to argue merely that, in view of the relevant statutory provisions and of such facts as my attention had been drawn to by the tenants, he had no case to answer. The dispute between the corporation and their council house tenants which culminated in these proceedings had, however, attracted much publicity, and the corporation were desirous of making manifest that the decisions at G which they had arrived, and which the tenants were attacking, were entirely in order and reflected their desire, and were in fulfilment of their duty, to preserve a proper balance between their tenants, on the one hand, and the general body of ratepayers, on the other, and they were anxious, therefore, by the production of oral and other evidence, to justify their decisions to the full. Evidence was, accordingly, called. H

The corporation's first witness was their borough treasurer, Mr. Clifford Jones. He said that he was present at the meeting of the housing sub-committee which was held on Nov. 17, 1947, and that he went through the three reports which he had submitted, and which I have previously mentioned, with the sub-committee. He was then asked :

> "*Q.*—Do you remember whether you read to them s. 85 (5) [of the Housing Act, 1936] which, you see, is set out there ? *A.*—I cannot remember

> whether I actually read the extract from the section, but I definitely told them the point.
>
> *Q.*—Would you tell my Lord what you told them ? *A.*—I told them that they must take into consideration rent ordinarily payable by persons of the working classes in the locality.
>
> *Q.*—Had they, to your knowledge, got any information which would enable them to take that into consideration ? *A.*—Yes.
>
> *Q.*—Just tell my Lord, generally speaking, what that was. *A.*—Some of the members know it through their membership of the sub-committee. In dealing with applicants for houses, they often go into the rents they pay. Some of the members are, of course, themselves landlords of their own properties. Others are members of other committees, such as the valuation committee and the assessment committee, which deal with rents, and at that time of the public assistance committee . . . and generally I took the view that they knew rents in various other ways. They know it through membership of the council, because various committees of the council do own properties, which are let, and from time to time the rents come before them."

Mr. Clifford Jones was then asked about the sum of £6,500 which was earmarked in the housing repairs account to fire risk. He said :

> " We pay into that account the fixed contribution per house for the normal repairs and we pay in addition an amount which has been calculated as roughly equivalent to what we would have to pay if we insured outside by way of premium. That amount is also put into this account annually from housing revenue account, and it has been the custom in Reading to keep the accumulated balance of what is called the fire insurance side of the repairs account separately from the other balance of the account. In other words, the balance of the account is shown, but inset we show the sub-division.
>
> *Q.*—How would that money ever be expended ? Could it ever be expended on anything other than repairs to houses ? *A.*—No."

Mr. Clifford Jones then explained that the amount they transferred each year was calculated to be roughly what the premium would be if they effected a fire insurance policy with an outside insurance company, and, if they had done that, it would have made no difference to the deficit of the housing repairs account. He then explained the charges for salaries of staff and also the charge of extra salaries of employees absent on war service and, with regard to the latter, said that they were always charged to the account to which their salary when they were not on war service was charged. The total of these extra salaries amounted to something over £900 in all.

With regard to the meeting of the housing committee on Nov. 24, Mr. Clifford Jones said that he was present at it and that the committee considered and discussed the question of rent increases for about an hour before arriving at their decision. He said that at the meeting on Nov. 17 the sub-committee discussed two rents which were introduced by members of the corporation, and they also frequently discussed at the meeting the points of view of ratepayers who were already paying higher rents than the council house tenants for less satisfactory accommodation. At the meeting on Nov. 24 the committee again discussed these ratepayers' points of view and the waiting list and post-war rents. As to the meeting of the housing committee on Dec. 30, which Mr. Clifford Jones also attended, he said that the committee discussed principally the points put by the delegations and the various angles on the extent to which they could reduce the rent and what reducing the proposed increased rents would mean to the ratepayers.

He was then asked whether, in his capacity of rating and valuation officer for the borough of Reading, he knew anything about the rents of privately-owned working class houses in Reading. He said that he did and that, in the main, the increased council house rents, decided on at the meeting on Dec. 30, 1947, were still below the rents of privately-let estates which were built between the wars. In support of this view, Mr. Clifford Jones produced a statement D.1. (which was supplemented by another statement, D.1A) which he had prepared and which showed that the rents of 2,320 houses built between the wars on the defendant corporation's estates were, with the exception of two groups, below the rents of houses also built between the wars, and having similar accommodation, belonging to private owners. The two exceptions related to non-subsidy houses built on the corporation's Whitley Estate. In cross-examination, Mr. Clifford Jones stated that the corporation are considerate of the position of their tenants and would not raise the rents of their houses merely because the tenants received higher wages than formerly. With regard to his statements D.1. and D.1A, he agreed that many of the council houses shown on it were somewhat older than the privately-owned houses with which they were compared, that the subsidies received by the corporation had to be taken into account as well as the actual rents paid by the tenants, and that some of the privately-owned houses enjoyed amenities which were not enjoyed by the council tenants. In re-examination, Mr. Clifford Jones said that the defendant corporation, in addition to being concerned with the welfare of their tenants, were also very concerned with the ratepayers, the majority of whom are people of comparable means with the tenants of the council houses. With regard to the government subsidies, he said that these are granted to enable the authority to pay off the loans from which the houses are originally built.

The next witness was the borough architect, Mr. Willett, who is responsible (among other things) for the maintenance of existing building estates of the defendant corporation. He told me in evidence that the increase in building costs and wages and materials in 1947 over those prevailing in 1939 has been "rather remarkable." He produced a statement which he had prepared (D.4) to prove it. I need not go into this statement in detail, but it is interesting to note that the cost of external painting in November, 1947, represented an increase of 263.7 per cent. over the cost in August, 1939, whilst with regard to internal re-decoration the comparative percentage increase was nearly 130 for a non-parlour two bedroom house, over 120 for a non-parlour three bedroom house and over 138 for a parlour three bedroom house. Mr. Willett said that he was present at the meeting of the housing sub-committee on Nov. 17, 1947. He was asked :

> "*Q.*—According to your recollection, during the discussions was any mention made of the question of rents paid by members of the working classes in the neighbourhood or in Reading ? *A.*—Yes, it was, and I remember quite clearly that, when the borough treasurer read his report, he drew attention to the necessity for that to be taken into consideration."

He said that he was also present at the meeting of the housing committee on Nov. 24, and that there was, again, a very considerable discussion on the report of the housing management sub-committee, which he thought they had in full, and there was certainly discussion about houses in the neighbourhood of the estates. Mr. Willett was cross-examined with a view to showing that not much had been done for some years past by way of re-decorating some of the council houses, and he said that, principally due to the war, there were some houses which had not been re-decorated (except by the tenants) since 1935 or 1936, but that many hundreds had had something done to them internally. He estimated that over 340 houses had been re-decorated since 1947 and that since the end of the war over 2,000 houses had been re-painted externally, 900 of which had been re-painted since November, 1947. In re-examination Mr. Willett said that, as compared with his budget of estimated annual expenditure (£32,050) in his report, nearly £40,000 was in fact spent last year.

Mr. Porter, the deputy town clerk of Reading, said that he was present at the meeting of the housing sub-committee on Nov. 17, 1947. He said:

> "There was quite a lot of discussion about rents of other houses. In the first instance, when the borough treasurer was submitting his reports, he drew the committee's attention to the provisions of the section dealing with rents and then, while the members were discussing the reports, quite a number of them referred to rents that were paid by people for all types of accommodation—I mean houses, rooms or flats. The impression that I got was that these members had information of the rents and that very often those rents were higher than the rents paid for council houses. These were people who were normally on the corporation's housing list too.
>
> *Q.*—What about the meeting on Nov. 24 of the housing committee? Did you hear any of the discussion? *A.*—I did.
>
> *Q.*—Would you just tell my Lord what you heard there? Was it the same sort of thing? *A.*—It followed exactly the same lines.
>
> *Q.*—Then were you present again at the meeting on Dec. 30? *A.*—Yes.
>
> *Q.*—Did you hear any discussion about this topic there? *A.*—I am not so clear on that."

He adhered to this evidence in cross-examination, though he was unable to enter into any further detail.

The next witness was Mr. Philip Mann, a Fellow of the Royal Institution of Chartered Surveyors and the sole principal of Messrs. Haslam & Son, chartered surveyors, who carry on business in Reading. The firm is a very old-established one and Mr. Mann has been with it for eighteen years. He told me that at the moment he is managing some 530 of what they call artisan dwellings, which are dwellings occupied by the working classes, and since the firm was established they have always had a large weekly rent collection. He said that these dwellings are occupied by exactly the same class of person as those who occupy the corporation's council houses. The houses his firm manages include both pre-1914 houses and houses built between the wars. After describing the pre-1914 houses, he said that most of the between-the-wars houses which he manages were built in 1937 and 1938 and the net rents of the houses are from 11*s.* 6*d.* to 17*s.* 3*d.* Their accommodation comprises in each case a parlour, kitchen, small scullery and three bedrooms, bathroom and w.c. He had prepared a statement (D.7.) setting out particulars of houses from which he collected the rents, and which he knew, and described them according to their blocks. Mr. Mann then said that at the request of the defendant corporation he had inspected some of their council houses and had prepared a statement (D.8.) showing the accommodation and rents of the houses he had seen. He was asked:

> "*Q.*—Would you tell my Lord what you thought of those houses generally as compared with the houses you manage? *A.*—I would say that they struck me as being very much better in every way.
>
> *Q.*—You have told my Lord that your between-the-wars houses were very much better than your pre-1914. How would these houses compare with your between-the-wars houses? *A.*—They are very similar, but the corporation houses have a very great advantage over the private enterprise ones that I look after in that they are properly laid out on an estate. There is a great deal more space on the corporation estates. There is more garden and better outlook and surroundings generally. In some cases the corporation houses are bigger than the private enterprise ones."

Mr. Mann was then asked how the rents of the corporation houses compared with the rents of the houses that he managed, and he said that the pre-1914 houses in some cases let for higher rents than the corporation houses and that, with regard to the between-the-wars houses, the rent of the private enterprise house was the same as, or rising to (he thought) 3*s*. 3*d*. more than, the corporation houses. He then illustrated his meaning by reference to the statements D.7. and D.8., and dealt with the matter in some detail. He was then asked :

> " *Q*.—Generally speaking how would you say the council houses compare with yours on the basis of value for money ? Do you think the council tenants or your tenants are getting the better value for their money ? *A*.—I would say most certainly the council tenants.
>
> *Q*.—Speaking as an estate agent purely, what do you say about these rents that the council are charging ? Do you say that they are fair rents for the type of accommodation offered or would you say they are high or low or how would you describe them ? *A*.—I should describe them as extremely reasonable rents for the accommodation offered."

In cross-examination, after drawing attention to the fact that the owners of the houses which he was managing were able to make little, if any, profit out of them by reason of rent restriction, Mr. Mann turned to the question of repairs and said :

> " In the old pre-war days, pre-1939, we as agents were rather particular about repairs. We endeavoured to paint the outsides of all our properties at regular intervals of not less than five years, and we invariably re-decorated one room per annum in every house. Since the war that is quite impossible with any of these rents I have got here."

Finally Mr. Norman Martin, senior partner in the firm of Martin & Pole, estate agents, of Reading, was called. His evidence followed on the same lines as, and was confirmatory of, the evidence which had been given by Mr. Mann. He had prepared a statement (D.9) giving particulars of the corporation's council houses which he had inspected, and a further statement (D.10) of certain houses which are under the management of his firm and which he thought would be comparable with those corporation houses. He was asked :

> " *Q*.—Speaking as an estate agent, and in quite general terms, how would you describe the rents paid in respect of the council houses shown on (D.9)—do you regard them as high, low or average ? *A*.—I consider them to be very reasonable rents.
>
> *Q*.—Why do you express that opinion ? *A*.—On account of the accommodation that is offered, in comparison with other houses managed by my firm—the amenities and everything that is offered in respect of them.
>
> *Q*.—Are you acquainted with the accommodation offered for working class people in Reading generally, from your experience as an estate agent ? *A*.—Yes.
>
> *Q*.—How would you say that the rents of these council houses compare with the rents paid by artisans generally in Reading in non-council houses ? *A*.—They are lower than the general prices paid by other people."

In cross-examination Mr. Martin agreed, as also Mr. Mann had agreed, that he was unaware of the occupations of the tenants of the privately-owned houses. He was clear, however, that they belonged to the working class. It is right that I should say that I was impressed both by Mr. Mann and by Mr. Martin, and I am satisfied that the evidence of these witnesses was entirely reliable.

I must now consider the arguments which were addressed to me on the facts and evidence which I have summarised above. Before, however, doing so, I think it is desirable that I should express my opinion on the view which Mr.

Belcher intimated to the housing committee when he accompanied the deputation which they received and which he repeated in his evidence before me. This view was in no way urged on me by counsel for the tenants in his able argument, but, as it is, apparently, held by some, at least, of the defendant corporation's council house tenants, and may be shared by corporation tenants in other parts of the country, it is right that I should say a word about it. The view is, in brief, that tenants who have occupied council houses over a period of years are, or should be, immune from any rent increase at all. For this view I am quite unable to find any legal warrant or sanction whatsoever, whether in the Housing Acts or otherwise. Parliament has provided the tenants of council houses with the protection of certain safeguards, and some of these fall to be considered in the present proceedings, but to say, *e.g.*, as Mr. Belcher has said, that tenants of council houses built 24 years ago, who have occupied those houses since the beginning, ought not to have their rents increased in any circumstances is to present a point of view which, in my opinion, has no justification at all.

Turning now to the arguments of counsel for the tenants on the question whether the rent increases were "reasonable," the general background of his case can be summarised as follows. He said that s. 83 (1) of the Act of 1936 casts on a local authority, when fixing charges for the tenancy or occupation of council houses, the duty of seeing that those charges are "reasonable", and this means, not only reasonable in the view of the authority, but reasonable in fact. He said that it was the intention of the Housing Acts that local authorities ought not to make a profit out of the letting of their council houses and that it is principally for this reason that such houses are not subject to the Rent and Mortgage Interest Restrictions Acts. The argument is that it is the essence of the whole conception of council houses that local authorities are to provide accommodation for the working classes at reasonable rents and that the legislature did not intend a normal business relationship to exist between the local authorities and their working class tenants. The scheme of the Housing Acts, it is said, is that there is a class of persons whose means are such that, without the assistance of the legislature, they would be under great difficulties in the payment of the rent of their houses. Accordingly, the phrase "reasonable charges" in s. 83 (1) of the Act of 1936 requires a different interpretation from that which would be justified in relation to privately-owned dwellings. It is argued that council house tenants have, in their domestic budgets, to relate their outgoings to their income and that this is an essential factor which local authorities ought to bear in mind, and which, it is said, the defendant corporation in the present case did not bear in mind, when fixing the rents which are to be paid by their council house tenants. On this background the tenants formed their general complaint against the corporation who, they say, disregarded the considerations to which I have referred and approached the question of council house rents as an ordinary problem of private estate management, and from the purely economic point of view.

The tenants rely on specific instances of what they contend was the corporation's wrong approach to the economic condition of their housing estates. One of the matters which the housing committee had in mind when increasing the rents at their meeting on Nov. 24, 1947, was the desirability of providing a surplus in the housing revenue account for the year ending Mar. 31, 1949, and succeeding years and the resolution of Dec. 30, 1947, only qualified this intention to the extent of abandoning the proposed surplus as at Mar. 31, 1949. This purpose of building up a surplus in the housing revenue account was attacked in two ways. First, it was said that, even assuming that a sound policy of private estate management would require or justify the creation of such a surplus, this ought only to be done, having regard to the considerations already mentioned, at the expense of the ratepayers as a whole and not at the expense of the council tenants. Secondly, it was said that the housing revenue account

would not have needed fortifying or replenishing in this manner but for the fact that it had been wrongly reduced, over a period of years, by bearing charges which ought not to have been imposed on it. This latter objection introduces the tenants' other specific grounds of complaint. Certain outgoings had been discharged from the housing revenue account which, the tenants contend, ought to have been borne by the body of ratepayers as a whole. The first of these was the sums debited against the account under the heading of supervision A
and management. The tenants say that these were incurred, in the main, in relation to unproductive land and not in relation to the completed estates which were in the occupation of the tenants. It is argued that, although, as a matter of account, these charges might properly be debited to the housing revenue account, as arising out of supervision and management of "land" (s. 129 (1) (iii) and s. 128 (*b*) of the Act of 1936), the actual burden of such B
charges, to the extent that they related to unproductive land and were incurred in connection with new schemes, ought to be borne by the ratepayers on the ground that it was the borough as a whole that was getting the benefit of them.

Similar criticisms were made of the debit to the housing revenue account of loan charges on the unproductive sites. The resolution of Dec. 30, 1947, abandoned the earlier intention of continuing to debit these charges in the C
future, but it had been the past practice of the corporation to debit them, and the tenants say that it was wrong and that the housing revenue account would have been in a more prosperous condition had they been charged against the rates. Then, with regard to the war service charges, a non-recurring item of nearly £1,000, they ask why these should be met out of their rents instead of by the ratepayers. Finally, the tenants object to the fire insurance fund, which D
was explained by Mr. Clifford Jones in his evidence. They regard this fund as being a wrongful diversion of part of the housing repairs account which is, under s. 131 (2) of the Act of 1936, properly applicable only to repairs, and they claim that, had the amount not been so diverted, the necessity for a rent increase would *pro tanto* have been diminished.

I have referred specifically to all of the particular matters on which the tenants E
feel they have cause to complain. I do not, however, for a reason which I will shortly state, propose to analyse them further or consider in detail the grounds on which the corporation justify the debits which are impeached. I need only say that, after carefully considering all the documents and the evidence in the case, I am far from satisfied that any of the relevant charges against the housing revenue account can legitimately be criticised, nor do I see anything wrong in F
earmarking to fire risk (in the manner which Mr. Clifford Jones explained) a part of the moneys standing to the credit of the housing repairs account. As to budgeting for a surplus in the rents, whilst it is true that the legislature contemplated a possible deficiency on a local authority's housing revenue account and provides (by sched. VIII to the Act of 1936) that any such deficiency shall be met out of the rates, surpluses on such account were also in contempla- G
tion, and their destination is provided for by s. 130 of the Act of 1936 and s. 21 (3) of the the Act of 1946, whilst a surplus on the housing repairs account is contemplated and provided for by s. 131 (3) of the Act of 1936. And it is to be observed that there is no statutory provision under which a surplus on the housing revenue account can be applied in reduction of the council house tenants' rents. H

The question, however, whether the corporation's decision can be impeached as being in conflict with s. 83 of the Act of 1936 depends, in my judgment, not on whether it might have been preferable to charge this or that item against the ratepayers as a whole or to have apportioned it in some manner between them and the tenants, but on whether the increased rents are "reasonable," as the section requires them to be. What the tenants are seeking to do in these proceedings is to analyse in very considerable detail various items of the corporation's past and contemplated expenditure and say : " This item ought to be borne by the ratepayers," or " That item should have been apportioned between them and us," and " If you do this or had done that, you would not need extra rent, or so much extra rent, from us." If a local authority has indulged, or was proposing to indulge, in some expenditure which had no relation to their housing estates and to raise their tenants' rents in order to pay for it, this kind of approach to the matter might well be both intelligible and permissible. But no such action or intention by the corporation has been proved in the present case and I cannot but think that the tenants' attitude, if accepted, would result in the management and control of corporation estates being largely diverted from the councils, to whom the legislature has entrusted it, to the courts. Much of what I have ventured to describe as the background of the argument of counsel for the tenants on this question I accept. I would, however, point out that the tenants are not the only people whose interests the corporation have to consider, for they have to bear in mind the general body of ratepayers as well. It seems to me that, in solving the economic problems with which councils are confronted to-day, and which arise mainly from the greatly increased cost of materials and labour, they are placed in a position of not inconsiderable difficulty. It is, of course, clear that they have to consider the welfare of their tenants and to remember that those tenants are people of small—sometimes of very small—means. On the other hand, they have also to be mindful of the interests of the ratepayers as a whole—the majority of whom, in Reading, as Mr. Clifford Jones informed me, are people of comparable means with the tenants of the council houses. It is their duty, so far as possible, to maintain a balance between these two sections of the local community, having due regard, of course, to any specific requirements of the Housing Acts. If the council house rents are much below those prevailing in comparable private estates in the locality, then, *prima facie*, a council might be suspected of unduly favouring the tenants, whilst, if they are much in excess of such other rents, the presumption would be the other way round. I have already indicated that, in my opinion, the past policy of the corporation, as established by the evidence, is not deserving of the criticism that has been levelled against it and it does not *per se* support any suggestion of unreasonableness on their part or any failure to take into account any consideration which they ought to have taken into account for the purpose of maintaining the balance to which I have referred.

Bound up with this view and, indeed, an essential element in its formation, is the test suggested by s. 85 (5) of the Act of 1936 to which I will now refer in connection with the alternative way in which the tenants' case of *ultra vires* is presented. For, as I have indicated, the increased rents would *prima facie* require some justification in point of " reasonableness " if they were shown to exceed those that prevailed in comparable privately-owned houses in Reading at the end of 1947. The tenants contend in the first place that the defendant corporation never applied their minds to the requirements of s. 85 (5) of the Act and that their failure to do so in itself vitiates the decisions at which they arrived. It is true that the minutes of the meetings of Nov. 17 and 24, 1947, contain no reference to the subject-matter of the sub-section and that, in the documents before me, it is only mentioned once, namely, in the borough treasurer's report of Nov. 14, 1947, where he intimated that it is one of the considerations which had to be borne in mind in connection with the pooling of rent. It is, however, clear from the evidence of Mr. Clifford Jones and of Mr. Willett and of the deputy town clerk of Reading that the question of the rents payable by members of the working classes in Reading was considered at the meetings which were held on Nov. 17 and 24, 1947. I am satisfied that the obligation imposed by s. 85 (5) of the Act was fully observed. Then, as to the comparison between the increased rents, on the one hand, and the rents for working class dwelling-houses prevailing in the locality, on the other, the principal criticism by counsel for the tenants of the evidence of Mr. Mann and Mr. Martin was that they did not know the nature of the occupations of the tenants who inhabited the houses which these witnesses, or their firms, respectively managed. They might be black-coated workers, counsel suggested, or, at all events, persons of greater affluence than is commonly the case amongst members of the working classes. As to this I may say that, in the light of modern conditions, I share the difficulty which Denning, J., felt and expressed in *Green & Sons* v. *Ministry of Health* (1), with regard to the question who does, and who does not, belong to the working classes. It does not appear to me that this description is the prerogative nowadays of any particular section of the British people. The phrase has a far wider and far less certain signification than it used to possess, and it is to be observed that, possibly for this reason, it has now been jettisoned from s. 85 (5) by the Housing Act, 1949, s. 1 and sched. I.

In so far as the phrase, the working class, is still capable of definition, there is no doubt but that it can properly and fairly be applied to the tenants of the privately-owned houses in and near Reading of which Mr. Mann and Mr. Martin gave me particulars in their evidence. Counsel for the tenants further submitted that these houses do not afford a reliable comparison with the council houses in the matter of rentals, in that the latter carry—or usually carry—the additional advantage of government subsidies, and also because of the profit margin which is presumably present in the rents of private estates. Notwithstanding these considerations, the evidence of Mr. Mann and of Mr. Martin, and the material on which that evidence was based, leave me in no doubt that the view, which they both expressed, that the increased council house rents compare very favourably, from the point of view of the tenants, with those payable in respect of similar but privately-owned dwellings in the district was justified. It is further to be observed that the tenants adduced no evidence to establish the contrary view. I would add, though this is perhaps immaterial, that such rents do not compare unfavourably with rents for similar accommodation belonging to the other local authorities in southern England whom the defendant corporation approached for information.

The conclusions at which I have arrived are, accordingly, that the decisions of the corporation which the tenants seek to impeach in these proceedings were not *ultra vires*, whether from the point of view of s. 83 of the Act of 1936, or of s. 85 (5), or for any other reason. The defendant corporation has, in my judgment, carefully and conscientiously observed its duties to its tenants to the best of its ability without losing sight of the duties which it also owes to the ratepayers of the borough as a whole. The increases which it has felt itself compelled to make in the rents of its council houses are, doubtless, and understandably, unwelcome to the tenants. The latter must, however, realise that these increases are due, not to any unreasonable disregard by the council of their interests, but to the economic pressure of existing conditions, a pressure from which no one to-day is free.

Having regard to the views which I have expressed, I need do no more than mention a point which arose out of s. 129 of the Act of 1936, and which emerged from the "further defence" of the corporation which was delivered shortly before the trial. By their statement of claim the tenants attacked, as hereinbefore appears, the propriety or validity of certain debits which the corporation had made in their housing revenue account. The corporation, accordingly, applied to the Minister of Health for a direction with regard to these debits under s. 129 (5) of the Act of 1936. The Minister intimated that, in his view, some of such debits ought not in strictness to have been made, but he gave the direction required in order to regularise the position. The corporation, as an alternative defence, accordingly relied on this direction, but counsel for the tenants in opening the case before me, said that he was proposing to contend that the direction was not authorised by s. 129, or otherwise, and was, accordingly, invalid. It did not appear to me to be right that this point, which was one of wide importance, should be debated or decided without giving the Minister an opportunity, if he so desired, of being represented before me. He was, accordingly, communicated with and, as a result, Mr. *Buckley* appeared as *amicus curiae* on their behalf. The point was argued both by *Sir Andrew Clark*, for the corporation, and by Mr. *Buckley*, on the one side, and by Mr. *Raeburn*, for the tenants, on the other. In view of my conclusions on the main issue, however, the question does not fall to be decided and in these circumstances it is better that I should say no more about it. It, accordingly, only remains for me to say that the action fails and must be dismissed.

Judgment for the defendant corporation with costs. Taxation of costs as between solicitor and client.

Solicitors : *W. H. Thompson* (for the tenants) ; *Sharpe, Pritchard & Co.*, agents for *G. F. Darlow*, town clerk, Reading (for the corporation) ; *Solicitor, Ministry of Health* (for the Minister of Health).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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plied. *Re* COULTHURST'S WILL
USTS. [1951] 1 All E.R. 774.

GIBSON AND ANOTHER *v.* SOUTH AMERICAN STORES (GATH & CHAVES), LTD., AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Asquith, L.J., and Wynn-Parry, J.), November 14, 15, 16, 1949.]

Charitable Purpose—Relief of poverty—Requirement of public element—Employees' health and relief fund—Funds provided by company for assistance of necessitous employees and their dependants—Right of company to revoke trust deed and hold fund freed from trust—Application of cy-près doctrine.

The articles of association of a public limited company, incorporated in 1912 and conducting chain stores in the Argentine Republic and elsewhere, provided that the board of directors should set aside every year two per cent. of its profits for the Employees' Savings and Insurance Fund, later called "the Employees' Health and Relief Fund." On Apr. 14, 1918, a trust deed was executed in order to define and declare the trusts on which the fund was and should be held and the terms on which it was and should be administered, and it provided : "(3) The fund shall both as to capital and income and accumulations of income be used and applied at such times and in such manner in all respects for the benefit of such members of the class of beneficiaries hereinafter designated as the [board] shall from time to time direct and (without prejudice to the generality of the discretion intended to be hereby reposed in the [board]) may be used and applied in or towards the granting of gratuities pensions or allowances of such respective amounts to be paid to such persons (being members of the said class of beneficiaries) upon such terms and subject to such conditions as the [board] shall from time to time think proper to prescribe. (4) The class of beneficiaries for whose benefit the fund may be used or applied as aforesaid shall include all persons who in the opinion of the [board] are or shall be necessitous and deserving and who for the time being are or have been in the company's employ or the employ of any agents of the company or in the employ of [a subsidiary company] and the wives widows husbands widowers children parents and other dependants of any person who for the time being is or would if living have been himself or herself a member of the class of beneficiaries." The trust deed further provided, by cl. 12, that, in the event of the liquidation of the company otherwise than by reconstruction, the fund should be distributed among the "members of the said class of beneficiaries including members then in receipt of any gratuities pensions allowances or other benefits"; and by cl. 15: "The company may at any time or times with the sanction of a special resolution of the company in general meeting rescind alter or modify the provisions of these presents or any of them." Until 1948, when the articles were amended by deleting the direction to the board, the appropriate amount was set aside each year and the sum in the hands of the trustees of the fund rose to £105,000. The fund was employed in accordance with cl. 3 and cl. 4 of the deed and from time to time gratuities, pensions or allowances were granted to employees and their dependants, including employees in the Argentine, France and Chile. The calls on the fund were much less than its income, and they appeared to be decreasing, and the company desired to wind-up the fund, using part of it to contribute to a new pensions scheme and returning the rest to the ordinary funds of the company free from the trusts.

Held: (i) on the true construction of the trust deed all members of the class of beneficiaries defined in cl. 4 thereof must satisfy the requirement of being necessitous and deserving; cl. 15 did not empower the company in general meeting to specify other persons as members of the class; and the trust was, therefore, apart from the consideration of its public character, charitable until the company thought fit to revoke it.

Re Peel's (*Sir Robert*) *School, Tamworth* (1868) (3 Ch. App. 543), *applied.*

(ii) the question whether the trust in this case was of sufficiently public character to be charitable was concluded in the affirmative by the decision of the Court of Appeal in *Re Laidlaw's* (*Sir Robert*) *Will Trusts* (1935) (unreported), in which case, although no note of the judgment was available, it was clear that the identical question must have been involved, and that, although the grounds of the decision were not apparent, the question must have been answered in the affirmative.

(iii) the trust deed disclosed an intention to make provision only for the company's own employees and families for a period limited by cl. 12 and cl. 15, and no general charitable intention, and the surplus trust funds should not, therefore, be applied *cy-près*, but, subject to the execution of the trusts contained in cl. 3 and cl. 4, the trust funds would revert to the company.

Re Talbot ([1933] Ch. 895), *applied.*

Decision of Harman, J. (*ante*, p. 18) *affirmed in part and reversed in part.*

[As to How Far "Private" Charities are Legal Charities, see HALSBURY, Hailsham Edn., Vol. 4, pp. 127-136, paras. 169-176; and for Cases, see DIGEST, Vol. 8, pp. 261-263, Nos. *240-252*.]

Cases referred to:

(1) *Re Peel's* (*Sir Robert*) *School, Tamworth, Ex. p. Charity Comrs.*, (1868), 3 Ch. App. 543; 32 J.P. 707; *sub nom., Re Charitable Trusts Act*, 1853 and *Charitable Trusts Amendment Act*, 1855, *Ex p. Charity Comrs.*, *Tamworth School Case*, 37 L.J.Ch. 473; *sub nom., Re Charity Comrs., Re Tamworth School*, 18 L.T. 541; 8 Digest 380, *1934*.

(2) *Morice* v. *Durham* (*Bp.*), (1805), 10 Ves. 522; 43 Digest 582, *305*.

(3) *Gilmour* v. *Coats*, [1949] 1 All E.R. 848; [1949] A.C. 426; [1949] L.J.R. 1034.

(4) *Re Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest 244, *28*.

(5) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.

(6) *Spiller* v. *Maude*, (1881), 32 Ch.D. 158, *n*; 8 Digest 262, *245*.

(7) *Pease* v. *Pattinson*, (1886), 32 Ch.D. 154 ; 55 L.J.Ch. 617 ; 54 L.T. 209 ; 8 Digest 262, *244*.

(8) *Re Gosling*, (1900), 48 W.R. 300 ; 8 Digest 244, *27*.

(9) *Re Buck*, [1896] 2 Ch. 727 ; 65 L.J.Ch. 881 ; 75 L.T. 312 ; 60 J.P. 775 ; 8 Digest 262, *246*.

(10) *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, [1946] 1 All E.R. 501 ; [1946] Ch. 194 ; 115 L.J.Ch. 158 ; 174 L.T. 428 ; 2nd Digest Supp.

(11) *Isaac* v. *Defriez*, (1754), Amb. 595 ; 17 Ves. 373, *n.* ; 44 Digest 890, *7479*.

(12) *Re Sir Robert Laidlaw's Will Trusts*, (1935) (unreported).

(13) *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293 ; [1944] K.B. 718 ; 113 L.J.K.B. 513 ; 171 L.T. 113 ; 37 B.W.C.C. 51 ; *affmd.*, [1946] 1 All E.R. 98 ; [1946] A.C. 163 ; 115 L.J.K.B. 63 ; 174 L.T. 39 ; 2nd Digest Supp.

(14) *Re Taylor*, (1888), 58 L.T. 538 ; 8 Digest 299, *765*.

(15) *Burgess' Trustees* v. *Crawford*, 1912 S.C. 387 ; 8 Digest 350, *1454 ii*.

(16) *Clark* v. *Taylor*, (1853), 1 Drew. 642 ; 1 Eq. Rep. 435 ; 21 L.T.O.S. 287 ; 8 Digest 311, *922*.

(17) *Re Peel's Release*, [1921] 2 Ch. 218 ; 90 L.J.Ch. 369 ; 8 Digest 328, *1109*.

(18) *Re Talbot*, [1933] Ch. 895 ; 102 L.J.Ch. 362 ; 149 L.T. 401 ; Digest Supp.

(19) *Re Bowen*, [1893] 2 Ch. 491 ; 62 L.J.Ch. 681 ; 68 L.T. 789 ; 8 Digest 327, *1102*.

(20) *Re Blunt's Trusts*, [1904] 2 Ch. 767 ; 74 L.J.Ch. 33 ; 91 L.T. 687 ; 68 J.P. 571 ; 8 Digest 323, *1055*.

(21) *Re Randell*, (1888), 38 Ch.D. 213 ; 57 L.J.Ch. 899 ; 58 L.T. 626 ; 8 Digest 323, *1054*.

Appeal by South American Stores, Ltd., from an order of Harman, J., dated May 12, 1949, and reported *ante*, p. 18. An application was made by originating summons to determine *inter alia* whether a fund provided by the company for the benefit of necessitous employees and their dependants was the subject of a charitable trust, and, if so, whether there was power in the company to revoke that trust. Harman, J., found that the trust deed set up a valid charitable trust, and that there was a general charitable intent, and he directed the application of surplus funds *cy-près*. The Court of Appeal found that the trust was for the relief of poverty, and that the question whether the trust satisfied the requirement of public character in a charitable trust was concluded affirmatively so far as the Court of Appeal was concerned by an unreported decision of the Court of Appeal in 1935, *Re Laidlaw's* (*Sir Robert*) *Will Trusts*. The court held, however, that there was no general charitable intent, and, therefore, that the surplus funds, whether arising by operation of a deed of revocation (provided for by the trust deed) or by operation of law, would revert to the company. The facts are set out in the judgment of Sir Raymond Evershed, M.R., and are summarised in the headnote.

Milner Holland, K.C., and *E. B. Stamp* for the company.

Pascoe Hayward, K.C., and *R. H. Walton* for one of the beneficiaries under the trust deed.

Lindner for the trustees of the trust deed.

Denys B. Buckley for the Attorney-General.

SIR RAYMOND EVERSHED, M.R. : This case comes to this court on appeal from Harman, J., and it raises two distinct points at least : (i) a question of construction of the deed which is the subject-matter of the action, and (ii) a question of general law, the rule in regard to public character in its application to charities for the relief of poverty.

The deed was made on Nov. 14, 1918, between the South American Stores

(Gath and Chaves), Ltd., of the one part, and two persons described as, and thereinafter called, the trustees, of the other part. Before turning to the language of the deed, it is right that I should make a brief reference to certain earlier facts, part of the history of the case. The company is one which, ever since its incorporation in 1912, had thought it proper to make provision for the company's servants. For the first six years of the company's existence under the articles of association of the company the form the provision took was the setting A aside of a percentage of the company's profits to a fund called at first "Employees Savings and Insurance Fund," and later "Employees Help and Relief Fund." When the document of 1918 came to be executed, the sums so set aside amounted to £21,000, or thereabouts. It is conceded that up to the date of this document in 1918, notwithstanding the labels attached from time to time to the fund, it remained part of the company's assets, the company's own B property, and would have been available, if the worst had come to the worst, for the company's creditors. Counsel for the company has invited us to form the view that on its proper construction the deed of 1918 did not alter that substantial result, but I cannot accept that argument. The first question, indeed, which counsel has posed is: Was the document of 1918 a document which effectively created any trusts at all? On that point, I confess I feel little difficulty. The C third recital to the document, the parties to which I have already described, was in this form:

> "And whereas it is considered expedient to define and declare the trusts upon which the fund [the accumulated £21,000] is and shall be held and the terms upon which the same is being and shall be administered . . ."

It is true that many of the discretions which would normally be found vested D in the trustees appointed under such a document are, under the terms of this deed, exercisable by the board of directors of the London company, but that still leaves in my mind no doubt that this document did create and establish trusts as it certainly stated that it did. I do not propose on this point, with all respect to counsel, to travel through the document. Suffice it to say that by cl. 3 it was provided that the fund "*shall* both as to capital and income and E accumulations of income be used and applied" as therein set forth, and that in other clauses, such as cl. 11 and cl. 13, provisions were made which in terms make it, to my mind, almost beyond argument that this document did create a trust.

That leaves for solution the question, which has been more difficult: What was the nature of the trust which it created? Was it a charitable trust? I F want at this stage to guard myself in two respects. I have already indicated that there remains still for our consideration a substantial problem of law, namely, whether the requirement of public interest is applicable to the same extent in cases of charities for the relief of poverty as it is in other cases, and, in posing the question: "Did this document, according to its construction, constitute a charitable trust?", I am assuming that the charitable nature is not defeated G by the fact that the class to be benefited is one defined by reference to service in a company or series of companies. There is a second reservation I must also make. It is possible that the charitable trusts were, on their proper interpretation, confined to the specific purposes described in the deed, without there being any general charitable intention. I have to make that reservation, because on the evidence, as we are informed, it now appears that the objects stated, assuming H them to be charitable within the phrase I have hitherto used, are not sufficiently numerous to exhaust the uses to which the fund can be put, and it was on that ground that the learned judge, having decided adversely to the company, directed application *cy-près*. I want at this stage to keep that matter open. More accurately, I think it would be proper to express the question to which I am about to apply myself: What was the precise nature of the trust which was declared by the document? I should finally interpolate that the question has arisen because the company desires, in exercise of a power expressly reserved to it by cl. 15 of the deed, to revoke these trusts, not, it must be said in all fairness to the company, to appropriate to itself and the shareholders the £21,000 or greater figure which is, or was at the date of revocation, in the names of the trustees, but because it is thought that a more appropriate provision can be made in other ways for the servants of the company. The only question is the technical one : In the circumstances can they do it in this way ?

A The most material clauses of the deed, for present purposes, are cl. 3 and cl. 4. It is, I think, proper that I should read them. Clause 3, of which I have already referred to the opening words, is as follows :

> "The fund shall both as to capital and income and accumulations of income be used and applied at such times and in such manner in all respects
> B for the benefit of such members of the class of beneficiaries hereinafter designated as the London board shall from time to time direct and (without prejudice to the generality of the discretion intended to be hereby reposed in the London board) may be used and applied in or towards the granting of gratuities pensions or allowances of such respective amounts to be paid to such persons (being members of the said class of beneficiaries) upon such
> C terms and subject to such conditions as the London board shall from time to time think proper to prescribe."

That clause indicates that the definition of the class of beneficiaries will follow, but it is, I think, plain that the beneficiaries under the trust are to be persons selected—true, it is selected by the London board, but nevertheless selected —from the class of beneficiaries to be later defined. I wish to draw attention to
D the fact that, although that is expressed to be without prejudice to the generality of the earlier discretion, the fund is to be used in the granting of gratuities, pensions or allowances, and that phrase, I observe, is also to be found in cl. 12. Clause 12 directs that, in the event of the liquidation of the company otherwise than by re-construction, the fund shall then be distributed among the "members of the said class of beneficiaries including members then in
E receipt of any gratuities pensions allowances or other benefits."

I now return to cl. 4 round which the argument before us has ranged. That clause begins :

> "The class of beneficiaries for whose benefit the fund may be used or applied as aforesaid shall include . . ."

F I pause there to dispose of one point. It was suggested that the use of the word "include" imported necessarily that the class of beneficiaries should extend to some much wider and unspecified class than that which is then next defined. I do not so read it. I think "include" means there "cover." Clause 4 proceeds :

> ". . . shall include all persons who in the opinion of the London board are or shall be necessitous and deserving and who for the time being are or
> G have been in the company's employ or the employ of any agents of the company or in the employ of Gath & Chave Sociedad Anonima and the wives widows husbands widowers children parents and other dependants of any person who for the time being is or would if living have been himself or herself a member of the class of beneficiaries."

It is not very difficult as a matter of English to criticise that clause. Most of
H the difficulty in practice has arisen from the last part of it. It is a matter of note that it uses the plural "and the wives, widows, husbands" etc., then goes back to the singular "of any person," which might be suggested to mean that the person had several wives. I only mention that to show that one has, I think, to approach this clause without any assumption that it is as a matter of English and syntax precisely, carefully, or accurately drawn.

The first point that arises—and again I think I can dispose of this quite briefly—is in regard to the effect of the words "in the opinion of the London board," for it is said that that is a discretion without limit and the result is that the class is not people who are, in truth, necessitous and deserving, but people who the London board may—and, it is suggested, may by the most extravagant process of thought—regard as covered by those two words. I do not think that such an extended meaning can be given to that phrase. I think that to begin with the discretion is a fiduciary one. A member of the class must be both necessitous and deserving. One can well imagine difficulties might arise, whether A it could be said that a particular individual qualified under both heads. I take this provision to mean that in the event of doubt the opinion, which must be *bona fide* given in the exercise, as I say, of a fiduciary discretion of the London board, is to be taken as conclusive. I do not think, therefore, that extends the class so as to make it cease to be a gift for the relief of poverty.

That qualification, however, is not the sole one. The persons must be, not B only necessitous and deserving in the opinion of the board, but also persons who are or have been in the company's employ. To simplify the matter, I will leave out the reference to the agents of the company or to the South American company mentioned. So far, as it seems, there is no great difficulty. Then come the added words " and the wives," etc. As a matter of strict English, and if you can, as I have said, apply with any conscientiousness very strict C rules of syntax to this sentence, the words " and the wives " seem to relate back to " include all persons," so that the class would be, first, all persons who in the opinion of the London board are necessitous and deserving and are employees or ex-employees, and the wives, widows, husbands, widowers, etc., of any person in the primary class, but without imposing on the wives, etc., the necessity of themselves being necessitous and deserving. That result is, I think, surprising if it be D right, when one considers the general scope and obvious purpose of this document. The difficulties do not end there. It postulates that the wife, to take the case of a living employee, may herself be affluent, but the employee must be within the class, *i.e.*, he must, in the opinion of the board, be necessitous. That, as a matter of fact, is on the face of it absurd. Further difficulties are presented, and I am not suggesting that I shall be able, or find it necessary, to try to solve them all, E but in the case of a deceased employee, if he is to be within the class strictly, it has to be postulated of him that he, if living, would have been necessitous. Again, it is very difficult to see how, with any pretence of accuracy, such a hypothesis can be dealt with, but the only test, one would suppose, which could have been intended was by reference to the condition of the widow or other dependant whose circumstances were under consideration. I think myself that F the emphasis in the words " himself or herself " adds to or tends towards what I think to be the right solution. The phrase is " of any person who for the time being is or would if living have been himself or herself a member of the class," which means himself or herself *prima facie* necessitous and deserving. The whole tenor of this clause makes it clear to my mind that the intention was that the fund, in so far as it is not used for " employees or ex-employees," should be G used for the relief of the necessitous condition of wives, etc., of employees and ex-employees.

Finally, I add to that by way of corroboration the reference I have already made to gratuities, pensions, or allowances as an indication in the deed of the kind of benefit contemplated, the sort of language that one would use to describe a benefit for the relief of necessitous circumstances. What, then, is the solution ? H To my mind, it involves substituting for " and " the word " or." I think if that is done, it will solve the difficulty. Written out more in full, I think it should read " or who are the wives, etc." The words " who are," which have been used earlier, I think might be imported even though the word " and " remains, but it does, I agree, do the least violence to the language that one should read for the word " and " the slightly longer phrase " or who are." I agree with counsel for the company that one should not start to construe this document with any prejudice or bias in favour of giving it a charitable effect, but I believe I have not done so. I think that to give it sensible effect one must read those words in the way that I have suggested. In other words, I agree with and adopt what Harman, J., says (*ante*, p. 21) :

> " In my judgment, the class of beneficiaries defined in cl. 4 must all satisfy the requirement of being necessitous and deserving, that is to say, that poverty is a necessary element to qualify a person for benefit. It was suggested to me that, though employees or ex-employees must necessarily be poor, yet that qualification did not extend to their dependants. I cannot so construe the deed. In my judgment, dependants must be necessitous and deserving just as a member of the primary class of employees or ex-employees must himself or herself be."

Out of respect for the argument, I have dealt at greater length than did the learned judge with this point, but I think that that statement of his is correct and I adopt it for the purposes of this judgment.

There, however, remains outstanding one further point. I have already said that there is in cl. 15 of this deed a power of revocation :

> " The company may at any time or times with the sanction of a special resolution of the company in general meeting rescind, alter or modify the provisions of these presents or any of them."

It is said by counsel for the company that that must be read as being a qualification of each clause, and that when the class of beneficiaries is defined in cl. 4, the effect is as though it read : " The class of beneficiaries shall include all persons therein named, or such other persons as might from time to time be specified by the company in general meeting." I do not myself think that that is the fair way to construe these clauses together. I think that cl. 15 is what it purports to be, a revocation clause, and, of course, power to alter or rescind is power partially to revoke. I think it likely, and it is not necessary to express a concluded opinion about it, that the clause is invalid as offending against the rule against perpetuity, but I am content to assume for the purpose of dealing with this point that it is at the moment an operative clause, *i.e.*, in considering this as a matter of construction, I will leave out of account the question of the invalidity of cl. 15 by reference to the rule against perpetuity. As I have already indicated, however, I do not think you can read cl. 4 and cl. 15 together so as to secure the result that a benefit was intended for a charitable class or some other class of persons to be specified thereafter.

I think that that conclusion really follows from the judgments of this court in *Re Peel's School, Tamworth* (1). It is true that that case was primarily concerned with the powers of the Charity Commissioners and whether Sir Robert Peel, who at the material date was the sole trustee under the trust established in the circumstances I will mention in a moment, was entitled to refuse to supply them with certain accounts in respect of the management of the school and whether by so refusing he was guilty of contempt of court. For present purposes, however, the point emerges in this way, that the father of the Sir Robert Peel in question had established a fund for the support of a school at Tamworth for the education of poor boys in that town. Apparently, the management was vested in the Sir Robert Peel concerned in the case as sole trustee at the material date. By a codicil the father had provided that, if the person responsible for the management (as it turned out, Sir Robert Peel) should be dissatisfied with the management or discipline of the school or of opinion that the school was not of public utility, or should for any reason be desirous to alter, vary and change the management, regulations, objects and purposes of the school, then Sir Robert Peel or other managers should be at liberty to alter, vary or change the management, regulations, objects and purposes of the school, or to revoke or abolish and absolutely discontinue and dissolve the same entirely, and thereupon to appropriate, dispose of and apply the sum of money as he thought fit. Sir Robert Peel had not purported to exercise his powers, but it was argued on his behalf that the Charity Commissioners had no power to make the demands they had made on him because there was here no charity in truth, and that point depended on the effect of this power of revocation which it was sought to use in the same way that counsel for the company has used cl. 15 here. I cannot put the answer to the point better than by reading one passage from the judgment of SIR WILLIAM PAGE-WOOD, V.-C. (3 Ch. App. 549) : A

> " SIR *Roundell Palmer* further argued that this, according to *Morice* v. *Bishop of Durham* (2), was not a charity. The decision in that case turned upon the fact that the trusts declared were either for charitable objects or for other purposes, so that the court could not tell how much was intended for charitable objects, and therefore could not fix the property with B charitable purposes at all. That cannot be applied to a case where the testator has definitely marked out the charitable purposes, and has not left it optional with the trustees to apply the fund for the charitable purposes or for other purposes, but has directed them to apply it for the charitable purpose until the managing body of the charity think fit to revoke the trusts." C

It seems to me that that language, assuming as I do that cl. 15 is not wholly invalid, applies here. As I construe cl. 3 and cl. 4, the company has directed the trustees to apply the fund for charitable purposes, and, making always the assumption that the purposes which I have defined are charitable, until the company by special resolution thinks fit to revoke those trusts. The fund has been dedicated to it, and, in my judgment, therefore, in view of that decision, it is D not open to argue that the case must be treated as though there were here a direction to apply the fund for these charitable purposes or for other purposes and so bring the case within the disqualification to which SIR WILLIAM PAGE-WOOD refers.

I think I have now covered the points which were raised on construction, and, deciding as I do that HARMAN, J., was quite right in the conclusion to which E he came, we now have, after my brethren have delivered their judgment, to proceed to the problem of law which I have already indicated.

ASQUITH, L.J. : At one stage I was greatly impressed by the argument for the company founded on the presence in the deed of cl. 15, but, in my view, a complete answer to that argument is afforded by the principle on which the F court proceeded in *Re Peel's School, Tamworth* (1) (L.R. 3 Ch. App. 549). I entirely agree with the conclusions that the Master of the Rolls has reached on the construction of this document, and with the reasoning on which these conclusions are formed.

WYNN-PARRY, J. : I agree. The question is one of construction which has been most fully dealt with already, and I should only be guilty of unwelcome G repetition if I were to add any conclusions of my own.

[There followed argument on the question of law with regard to the requirement of public character in relation to gifts for the relief of poverty having otherwise charitable nature.]

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SIR RAYMOND EVERSHED, M.R. : At the end of the argument on the first point raised in this case, namely, the problem on the construction of the terms of the relevant deed of the class of persons intended to benefit, the court expressed its conclusion, agreeing with the learned judge in the court below, that the trusts established in cl. 3 and cl. 4 were limited to necessitous beneficiaries. That left as the next point for discussion what, it appeared, might well be a question of law of great difficulty and no little importance. The question may, I think, be put thus: Under the law as it has now been established, and in the light of several recent decisions, both in this court and in the House of Lords, is a trust for a class of poor persons defined by reference to the fact that they are employed by some person, firm, or company, a good charitable gift, a good charitable trust, or does it fail of that qualification through the absence of the necessary public element?

A There is, I think, no doubt that the emphasis which has been placed in recent years on the need for that public characteristic had to some degree been lost sight of in earlier cases, and its emphatic affirmation (the last case I have in mind is *Gilmour* v. *Coats* (3)) undoubtedly raises the question whether certain decisions of courts of first instance on trusts in favour of poor persons of various categories are now consistent with the principles which have been stated. In B *Re Drummond* (4), EVE, J., had to consider whether a trust established for the purpose of providing holidays for employees of a particular company was a good charitable trust, and he answered that question negatively, saying that it was a trust, not for the public or a section of the public, but for private individuals, albeit a fluctuating body of such individuals. It is to be observed that there was no poverty qualification in that case. In the absence, therefore, of poverty, the C case appeared to decide that employees of a particular company were not a section of the community so as to give to the trust in their favour the necessary public quality. In the later case in this court of *Re Compton* (5) when LORD GREENE, M.R., in what may be, perhaps, regarded now as a classic judgment, dealt fully with this problem of public character, *Re Drummond* (4) was expressly affirmed. It must, therefore, now be taken to be concluded, so far as this court D is concerned, that where there is no poverty element, where there is no trust for the relief of poverty, the employees of a particular undertaking are not a section of the community so that a trust in their favour will qualify as a charity.

The question, however, arises that counsel for the company invited us to answer negatively: Is the same true when the trust is one for the relief of poverty? In this court it was apprehended, when the matter came before E HARMAN, J., that there was no decision one way or the other on that problem, but there have been three cases in which at first instance that problem, or a problem sufficiently closely related to be regarded as the same problem, did arise. Those three cases are (i) *Spiller* v. *Maude* (6), reported in a note to *Pease* v. *Pattinson* (7). That was a decision of SIR GEORGE JESSEL, M.R., sitting at first instance, in which the class intended to be benefited were the members of a F theatrical society established in the city of York; (ii) in *Re Gosling* (8), where the class was old and worn out clerks of a banking firm, which was a decision of BYRNE, J.; and (iii) *Re Buck* (9), where the class concerned were members of a certain friendly society and their dependants, a case which was determined by KEKEWICH, J. Beyond doubt in each of those cases (and more particularly the second) the decisions appear to have involved the conclusion that the class G of persons whom I have stated in each case did form a section of the public. It is, however, true that the emphasis may have been laid more on the poverty element, and LORD GREENE, M.R., said of the first of them in his judgment in *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (10), presently mentioned ([1946] 1 All E.R. 508):

> "I must confess . . . that seems to me to be a very extreme decision,
> H because the whole arrangement was of a personal nature. However, it was saved by the fact of poverty . . ."

Had the point which counsel for the company has raised in this case been argued in the three cases I have mentioned as fully as here and had the judges had the advantage of the guidance given by the later cases, their decisions must have involved the question which is here involved, namely, whether the servants of this company form a section of the community, or whether, because this is a trust for the relief of poverty, it is not necessary that they should.

I think that counsel for the company was perfectly entitled to say that, if those three cases are considered in the light of the observations of this court in *Re Compton* (5), and in the later case, in some ways more significant for present purposes, of *Re Hobourn Aero Components, Ltd.'s Fund* (10), there would at the very least be grounds for saying that they are inconsistent with those observations. I think also that one may fairly add that, in considering whether a trust is (within the somewhat technical meaning of the term) a charity and as such A entitled to enjoy the privileges in regard to income tax and the rule against perpetuities which charities enjoy, one may put to oneself the question, as a commonsense matter, and say : Looking at this trust and applying the ordinary usages of our language, is it a charity as ordinary men and women would understand it ? Putting that question in relation to this case, it might have been answered : No, this is a domestic affair of a particular company designed for B the advantage and promotion of the interests of its own servants. On the authorities, as I have so far stated them, there was, obviously, a serious and substantial case for the consideration of this court and of HARMAN, J., whether this trust was charitable. The matter was dealt with in this way by HARMAN, J. Faced as he was, on the one hand, with the decisions in regard to poor relations, properly so called, and also with the three cases to which I have alluded, *Spiller* C v. *Maude* (6), *Re Gosling* (8) and *Re Buck* (9), and, on the other hand, with the emphatic insistence on the need for the public element and the decision of *Re Drummond* (4), the learned judge concluded that consistency could only be achieved by treating the relief of poverty as in itself supplying the necessary public element. HARMAN, J., said (*ante*, p. 23) :

> " It seems to me that a public object is always necessary to make a trust D legally charitable, and that the explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other categories."

Proceeding from that statement of principle, and after referring to the three cases at first instance which I have already mentioned, the learned judge came to the conclusion that there was here a charitable object—in other words, that this E trust was a charitable trust. Counsel for the company in this court said that we were free, as HARMAN, J., was not, or, at any rate, that we were less restricted than was he, in regard to the three instances directly in point, and that it was open to us to say that, in the light of later decisions, they should be treated now as wrongly decided. On the other hand, they have all of them stood for some time. In *Re Compton* (5), when LORD GREENE, M.R., had referred to the poor F relations cases, he said ([1945] 1 All E.R. 206) :

> " If the question of the validity of gifts of this character had come up for the first time in modern days I think that it would very likely have been decided differently since I should have thought that their purpose was a private family purpose lacking the necessary public character. But it is G in my view quite impossible for this court to overrule these cases. Many trusts of this description have been carried on for generations upon the faith that they were charitable and many testators have no doubt been guided by these decisions. The cases must at this date be regarded as good law although they are, perhaps, anomalous."

Without going further into the matter, because, as will presently appear, I H think it is unnecessary, it would, I think, be impossible for the court, in the light of that observation, to treat now as wrongly decided the poor relations cases, properly so called, and it is true that the learned Master of the Rolls earlier in the judgment had said that the explanation of them might be—not was, but might be—that relief of poverty in itself supplied the necessary public characteristic. *Spiller* v. *Maude* (6), *Re Gosling* (8) and *Re Buck* (9), have also stood for some time, so that, again, it might be said that the anomaly ought now to be treated as extending in any case to them also, because many persons would have regulated their affairs in accordance with the guidance which those decisions give and that a parity of reasoning should apply to them as to the poor relations cases founded on *Isaac* v. *Defriez* (11).

I have mentioned these matters because they are of great importance and because, as it seems to me, they present a somewhat nicely balanced problem for consideration. If in this case, or in some other case, the question of the charitable qualification of trusts in favour of employees of companies or businesses (which under modern conditions might include such classes as the whole of the coalminers of England, or the whole of the railway servants of England) the House of Lords may well consider some new formulation of the proper principle applicable, but, so far as this court is concerned, it seems to me that the matter has already been concluded. It has before been observed to be a peculiar and unfortunate characteristic of our system that, though in the great majority of cases which come before it this court is the final court of appeal for England, there is no provision whatever made for taking a note or making a record of the judgments of the court. It appears that on Jan. 11, 1935, there came before this court, which we are told consisted of LORD HANWORTH, M.R., ROMER, L.J., and SLESSER, L.J., *Re Sir Robert Laidlaw's Will Trusts* (12). Counsel for the Attorney-General has been good enough to supply the court with such material as the vagaries of our reporting system have left for posterity.* It includes, fortunately, an extract from the relevant part of the will of Sir Robert Laidlaw, and the terms of the will were :

> "The sum of £2,000 to the trustees for the time being of the provident fund which has been established in connection with the business of Whiteaway, Laidlaw & Co., Ltd., which company was constituted to take over and took over the business of my former firm [which he names] upon trust to invest the same in any investments in which they can invest money forming part of such provident fund and to apply the income of the said sum and the investments for the time being representing the same in their uncontrolled discretion for the relief of poor members or former members of the staff of the said company or their families."

I think for practical purposes it is clear, and counsel for the company has conceded, that the point raised in the present case was inevitably and directly involved also in *Laidlaw's* case (12), for there was a trust on the face of it established in perpetuity to provide for poor employees of a particular business concern. In the court of first instance the decision had, apparently, been given, in favour of the testator's next of kin or residuary legatees, that the terms I have read did not constitute a valid charitable trust, and an appeal was brought to this court after the Attorney-General had been added as a party. Again, we are indebted to counsel for the Attorney-General, who has seen the instructions which were laid before Mr. *Andrewes Uthwatt* then counsel for the Attorney-General. Those instructions make it clear that the attention of the Attorney-General was specifically drawn to the cases, on the one hand, of *Re Gosling* (8), and, on the other, of *Re Drummond* (4), so that, at least, the point was clearly in the mind of the Attorney-General. In this court, however, the Attorney-General does not appear to have been called on to argue. As I have already stated, no note exists of the terms of the judgment, but the appeal was allowed and the order was, so far as relevant, that the legacy was "a valid charitable legacy for the benefit of the persons who shall from time to time and for the time being be poor members or poor former members of the staff" of this company.

Faced with that decision, counsel for the company was obviously in very considerable difficulty. Reference was made to the recent decision of the full

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* The *All England Law Reports* first appeared in Feb., 1936.

Court of Appeal in *Young* v. *Bristol Aeroplane Co., Ltd.* (13), which has laid down that this court is bound by the decisions of the Court of Appeal save in certain precise and fairly well defined exceptions. Only one exception could be invoked by counsel for the company, and that was that in *Re Laidlaw's Will Trusts* (12), the decision must be taken to have been given *per incuriam.* In the first place, I think myself that it would be for counsel for the company to show that (if it was so) the decision was given *per incuriam.* In other words, A the onus would be on him, for *prima facie* one must, I think, assume that in a case in which the point is directly raised the judges of this court will have considered it, more particularly where they reverse the decision of the court below which had decided against the validity of the charity. Following, therefore, *Young* v. *Bristol Aeroplane Co., Ltd.* (13), I conclude that we are here bound to treat this particular trust as a valid charitable trust. B

The result on this part of the case is, therefore, again that I think the decision of HARMAN, J., was correct. I have thought it right to deal somewhat fully with the matter, because the particular ground on which I must rely for my conclusion was not put to the learned judge. *Re Laidlaw's Will Trusts* (12) had not then emerged from the fifteen years' obscurity in which it appears to have remained until today. It does not appear on what precise ground the case was determined, C and, therefore, I feel it right, if the matter shall hereafter be considered in a higher court, to say that I must not be taken to accept the view that the ground for justifying such decisions as the poor relations cases is, as HARMAN, J., expressed it (*ante*, p. 23) :

> " . . . the explanation of the poverty cases is that a much narrower object may in them be considered to work a public benefit than in the other D categories."

I think, as LORD GREENE, M.R., stated in *Re Compton* (5), that may be an explanation. On the other hand, it may be that they simply must be regarded now as a well established anomaly. I find it unnecessary in the circumstances to say any more or to express a view one way or another whether the principle HARMAN, J., found should be treated as well established, or whether the three E cases, *Spiller* v. *Maude* (6), *Re Gosling* (8), and *Re Buck* (9), ought now to be regarded as rightly decided. I think, so far as I am concerned, this question has been determined by *Re Laidlaw's Will Trusts* (12) on grounds which are not apparent, and I follow them without affirming or disaffirming any of the grounds relied on by HARMAN, J.

That, *prima facie*, would be the end of the case, but earlier in the argument, F when counsel for the company addressed the court on the matter of construction, he indicated another argument which those he represents desire to put before the court, namely, that, assuming there was here a valid charitable trust, nevertheless there was no general charitable intention. That point was not argued before HARMAN, J., at all, so far as I understand it. The learned judge having decided the two main points, one, that of the construction of the deed, and, two, G the point of law with which I have dealt, then proceeded without any discouragement from any of the counsel present to direct that on the evidence it would be necessary for a scheme to be prepared for the *cy-près* administration of the fund. That was, on the hypothesis that there is here a general charitable intention, undoubtedly necessary. The prosperity of the company since 1918, and I suppose of its employees, having been such that the fund now subject of the deed amounts H to over £100,000, it is proved clearly that there are not at the moment available necessitous servants or ex-servants or members of their families in sufficient numbers to absorb anything like the whole income of the fund. It must also be assumed that in the foreseeable future there is no prospect or likelihood of there being so. On that basis, therefore, what should now be done ? The answer to that question depends on whether there is or is not here a general charitable intention. The question whether in any case there is to be found a general charitable intention is, as has been said more than once, a question for which it is not easy to formulate precisely the principles of the answer. In Tudor on Charities, 5th ed., p. 145, I find that, after stating that the notion of the general intention of charity is hardly susceptible of accurate definition, two quotations are then given by way of illustration. The first is from Kay, J., in *Re Taylor* (14) :

> " If upon the whole scope and intent of the will you discern the paramount intention of the testator was not to benefit a particular institution, but to effect a particular form of charity independently of any special intention or mode, then . . . if the particular mode for any reason fails, the court, if it sees a sufficient expression of a general intention of charity, will, to use the phrase familiar to us, execute that *cy-près*."

The second quotation is from a Scottish case in the Court of Session, *Burgess's Trustees* v. *Crawford* (15), and is by Lord Johnston :

> " If this bequest is to be carried out *cy-près* . . . it is necessary that we should be able to find that the testator has evinced expressly or by implication an intention to dedicate his money to charity independently of the particular *modus* in which he has directed it to be applied. But . . . with this qualification that by charity I mean . . . not charitable purposes generally, but some charitable purpose in the concrete, definitely, however generally, defined."

Those two passages, taken alone, seem to indicate that there is, so to speak, an onus, and not a slight onus, to show it on those who allege a general charitable intention, but I think that the statements I have cited should, perhaps, be further qualified.

Counsel for the Attorney-General referred to the same edition of Tudor, at p. 141, where he cited this passage :

> " There is an exception to this rule [that the *cy-près* principle is confined to property given with a general intention] concerning property given absolutely and perpetually to charity, and which has vested in the charity : in such circumstances, a rule of convenience has grown up that on the subsequent failure of the trusts, the fund can be applied *cy-près* irrespective of the donor's intention."

Counsel himself formulated his proposition in these terms. If, he said, property has been effectively devoted to a charitable purpose with the contemplation that it will continue indefinitely and without any contemplation of reverter, then, once that effective devotion has occurred, there is sufficient element of general charitable intention. In other words, as he also put it, where you can see on the face of the document that the donor has divested himself in favour of the particular charitable object without reserving or contemplating any executory right of reverter, then, whether as a rule of convenience or otherwise, you should infer a general charitable intention. I will assume in counsel's favour that he has, as he commonly does, formulated correctly the proposition to be applied. Nevertheless, when I examine again this deed in the light of properly admissible surrounding circumstances, I conclude that there is here no general charitable intention. In the first place, I observe that the source of the fund is a percentage of the profits of the trade of the company accumulated over a number of years, and, in the second, that the objects of the trust are the servants and ex-servants of that company (or of associated companies) and their families, so that you start with what I have already described as something which is, on the face of it, of a domestic character. Certainly, as Wynn-Parry, J., pointed out, the last beneficiaries that one would expect the company ever to have contemplated would be employees of similar companies, namely, of this company's competitors in trade. It may well be, however, that it would be wrong to over-emphasise that, because, as counsel for the Attorney-General points out, when the *cy-près* doctrine has to be applied the result might well surprise and even disappoint the original donor. However, the matter does not end there. As I have said, the objects of the fund are confined to servants of this company and associated companies and families of those servants. By cl. 12 provision is made for what is to happen if the company ceases as a trading concern to exist altogether, *i.e.*, is wound-up. That, of course, it might be said, would raise very clearly the question : Was there a general charitable intention ?, and, in so far as cl. 12 answers the question, it answers it by saying that in that event the whole fund is to be distributed among the members of the class then in existence or such of them as a committee therein specified select. It is, therefore, clearly contemplated at the least that, if the trading concern ceases to exist, there is to be a final winding-up of this charitable trust, or, put another way, it emphasises the domestic character of the trust by saying that it is at least limited not only to the servants of the company, etc., but also to the business life of the company.

Finally, cl. 15 provides that :

> " the company may at any time or times with the sanction of a special resolution of the company in general meeting rescind alter or modify the provisions of these presents or any of them."

On an authority to which I will refer in a moment it is clear, I think, that the court is entitled, in construing this deed and in arriving at a conclusion whether there is a general intention in favour of charity, to take account of that clause, even though it is (if it be) invalid as being an infringement of the rule against perpetuities. If the proper construction of cl. 15 (which, as I have indicated, relates to " provisions of these presents or any of them ") is to read into each clause a proviso to the effect that the company may at any time rescind or alter it, I venture to think that the case becomes very near to the type of case where there is a particular trust established (limited as I have indicated) with an express provision that, if the donor or some other person comes to the conclusion that the trust is no longer workable or desirable, he may revoke it. Counsel for the Attorney-General, I agree, distinguishes the two. He says that a power to revoke without any indication of the grounds on which the company would act differs from the other type of case where there is a power to put an end to the trusts if the originally expressed intention ceases to be capable of being exactly carried out. In any case, what we are here concerned with is a matter not expressly mentioned at all. We are concerned with what is to happen, not when the trusts fail to be effective through bad management or undesirability, but when they have failed through lack of sufficient objects of benefaction. Nevertheless, taking this clause together with the earlier cl. 12 and in the light of the other circumstances, and finding, as I find, no express indication of intended perpetuity, I feel myself compelled to conclude that there was never here a general charitable intention, but only an intention to make this particular provision for this company's (and its associated companies') own employees and their families.

I cannot leave the matter without one brief reference to the authorities. Counsel for the company, in the earlier argument to which I alluded, drew our attention to *Clark* v. *Taylor* (16). There a testator had made a benefaction in favour of a school for orphan girls associated with the name of a Mrs. Enderby, and it appeared that Mrs. Enderby discontinued the school within a month after the testator's death. On the construction of that will Sir Robert Kindersley, V.-C., came to the conclusion that there was no general charitable intention. That is an illustration of the kind of case. There have been other and later cases, which may not be altogether easy to relate together, cases for the most part in which use was sought to be made of rights of reverter, express rights, which were found to be invalid as infringing the rule against perpetuity. One of them, and it is a case on which counsel for the Attorney-General relied, was *Re Peel's Release* (17), a case which, I think, related to the same charity as that which was the subject of the earlier case of *Re Peel's School, Tamworth* (1). That was a case in which there is found, on the one hand, an express provision that the property granted in 1837 should be " for-ever thereafter " applied to the charitable use indicated, but there is found also a right, which in 1921 Sir Robert Peel sought to exercise, of putting an end to the trust if, in his view, the management was unsatisfactory, and so on. That case, together with three others, one somewhat parallel and two different in certain vital respects, was considered by MAUGHAM, J., in *Re Talbot* (18). In *Re Talbot* (18) the main problem arose by reason of the effect of the Methodist Church Union Act, 1929, s. 18, on certain trusts which an earlier testator had established. In *Re Talbot* (18) the form of the trust had not contained any express indication of perpetuity, such as the words " for-ever thereafter," which are found in *Re Peel's Release* (17). There was a provision that if the chapel connected therewith should, in the opinion of the trustees, cease to be used for preaching the particular doctrines which the testator was obviously concerned to advance, there was to be a right to put an end to the trust. That clause was held to be void because of the perpetuity rule, but the learned judge considered the various cases, and, as I follow his judgment, he came to the conclusion that they were reconcilable on this principle. He said, first ([1933] Ch. 902)—and this is a point which I had anticipated earlier :

> " In considering whether there is or is not a general charitable intent, a thing which is not capable of exact definition, the court, I think, has to consider the whole scope and effect of the will and may rely on a proviso of the nature of a defeasance clause, whether or not such a clause is open to objection on the ground of perpetuity."

Applying that principle the learned judge, as I have said, reconciled the cases somewhat on this fashion. In *Re Peel's Release* (17) and in *Re Bowen* (19), there was express language indicating perpetuity. I have already mentioned the words in *Re Peel's Release* (17), " for-ever thereafter." In each of the other cases which appeared to produce a different result, *Re Blunt's Trust* (20), and *Re Randell* (21), there was on the face of the document concerned apparently an intention that it should only exist for a limited period, namely, so long as certain conditions subsisted. In the particular case of *Re Talbot* (18), MAUGHAM, J., would have come to the conclusion that it fell in the latter class, but in fact he held that the original trusts must be taken to have been altered by s. 18 of the Act of 1929, and, therefore, given an element of perpetuity or at least a new lease of life which produced the result that they could not be treated as having come to an end.

Applying the reasoning of *Re Talbot* (18) to the present case, it seems to me, for the reasons which I have tried to indicate, that here you have a trust which seems on the face of it to be intended for a domestic purpose and for a limited period, namely, the period during which these conditions essential for its being carried into effect should persist. One condition would obviously be the continuance of the company, but another is the continuance of a sufficient number of persons belonging to the class of beneficiaries defined. I, therefore, think that there is here no sufficient ground for saying that a general charitable intention has been shown. The result is that in so far as the funds are not now required, or may not be required, for carrying out the trusts imposed by the deed, they would not be applied *cy-près* to other charitable objects, but would revert to the company. That result is, of course, unaffected by the circumstance that the express power of revocation, which I gather has, in fact, been exercised, is, or may be invalid according to the rule against perpetuity. In the circumstances, it is not necessary to decide whether it is valid or invalid, because I understand the company do not seek to withdraw from the deed, and have not by their deed of revocation sought to withdraw from the trust funds which are required for carrying out the original express trust, so that the result is the same whether the deed of revocation operates or whether it comes back to the company by the operation of law and not the execution of the deed. For the reasons which I have indicated, I conclude that there is here no general charitable intention, so that, subject to the due execution of the specific trusts of cl. 3 and cl. 4, the property would revert to the company.

A **ASQUITH, L.J.** : I agree entirely with the judgment of the Master of the Rolls, which appears to me to cover the whole ground, and I have nothing to add.

WYNN-PARRY, J. : I also agree with all that has fallen from the Master of the Rolls. It is true that we are differing from the order made by Harman, J., as regards the direction that the fund should be administered *cy-près*, and, but B for the circumstance that this point was not argued before the learned judge, I should have felt bound to have added a few words. However, the ground has been so fully covered by the Master of the Rolls, that, having regard to that circumstance and the circumstance that the point was not argued before the learned judge, I shall not be thought discourteous if I add nothing for myself.

Appeal allowed. Costs of all parties as between solicitor and client to be paid C *out of the fund.*

Solicitors : *Slaughter & May* (for all parties except the Attorney-General) ; *Treasury Solicitor.*

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

D

ATTORNEY-GENERAL *v.* ANTOINE.

[Kings' Bench Division (Croom-Johnson, J.), November 2, 1949.] E

Income Tax—P.A.Y.E. ("*Pay-as-you-earn*") *system—Deduction by employer of tax from wages—Money deducted by employer set aside and stolen—Liability of employer—Income Tax* (*Employments*) *Act,* 1943 (*c.* 45), *s.* 2 (1) (*a*)*—Income Tax* (*Employments*) *Regulations,* 1944 (*S.R. & O.,* 1944, *No.* 251), *reg.* 27 (1).

F By s. 2 (1) of the Income Tax (Employments) Act, 1943, the Commissioners of Inland Revenue are empowered to make regulations which include provision for rendering persons, who, by s. 1 (1) of the Act, are required to make deductions of tax from emoluments payable to their employees, "accountable to" the commissioners in respect of those deductions. In pursuance of this power, the commissioners made the Income Tax (Employments) Regulations, 1944, which, by reg. 27 (1), provide that : "Within G fourteen days of the end of every income tax month the employer shall pay to the collector all amounts of tax which he was liable under these regulations to deduct from emoluments . . ."

An employer deducted tax from wages which she paid to employees and set aside in cash the sums so deducted, which were kept in a bag in a locked safe. The money so set aside was stolen and was not recovered. H

Held : the money deducted and placed in the bag remained the property of the employer and at her risk, and she was liable for the payment of it to the collector.

[For the Income Tax (Employments) Act, 1943, s. 2 (1), see HALSBURY'S STATUTES, Vol. 36, pp. 151, 152 ; and for the Income Tax (Employments) Regulations, 1944, reg. 27 (1), see HALSBURY'S STATUTES, Vol. 36, p. 168.]

Case referred to :

(1) *A.-G.* v. *Wilts. United Dairies, Ltd.*, (1922), 91 L.J.K.B. 897 ; 127 L.T. 822 ; *affg.*, (1921), 37 T.L.R. 884 ; 25 Digest 132, *519*.

Information laid by the Attorney-General.

The Attorney-General claimed from the defendant, an employer, money which she had deducted from wages or emoluments payable to her employees in respect of income tax under the Income Tax (Employments) Act, 1943, s. 1 (1). The employer, having deducted certain sums, placed the money in a safe which was broken into by thieves the money being stolen. Croom-Johnson, J., held that the money was at the risk of the employer and that she was liable to account for it to the revenue authorities.

The Solicitor-General (*Sir Frank Soskice, K.C.*) and *R. P. Hills* for the Attorney-General.

Winn for the employer.

CROOM-JOHNSON, J. : The employer employed persons who were liable *prima facie* to pay income tax under the provisions of the Income Tax (Employments) Act, 1943. Pursuant to that statute and to the Income Tax (Employments) Regulations, 1944, made by the Commissioners of Inland Revenue under s. 2 (1) of it, she deducted from the wages of her servants, who were weekly servants, the appropriate sums of money week by week for the amount of tax which, having regard to their code numbers, had to be deducted in accordance with the tables prepared by the commissioners and circulated by them to persons in the position of the employer. She put the money which she so deducted, totalling £32 13*s*., in a bag to be kept until the time when she had to send in a return to the collector of taxes of what she had deducted, and she put the bag in the safe at her business premises with other bags containing sums of money connected with her business. The £32 13*s*. in question consisted of Treasury notes and coins, and the bag containing that amount was specially marked. On the night of January 25/26, 1946, thieves broke in and stole the money in the safe including the money in this specially marked bag.

The question for determination is, first, at whose risk was the money in the bag ? If it were at the risk of the revenue authorities, the employer would not be liable for the loss which has occurred, because none of the money has been recovered. If the money were at her risk, then comes the question whether she is liable to account to the revenue authorities for that sum and to pay it out of her own money. Difficulty has arisen owing to a confusion between two things :—(i) whether the bag of money was the money of the Treasury or at the risk of the revenue authorities, which it was not, and (ii) whether the bag of money was her own money, which it was. There was nothing to prevent her, at any moment she chose to do so, going to that bag, and using the money in it. In so doing, she would have committed no offence. She was entitled to take money from the bag for any purpose.

It is not suggested that the regulations of 1944 are *ultra vires* the statute. Under the Income Tax (Employments) Act, 1943, this P.A.Y.E. system is set up. Section 2 (1) which gives the Commissioners of Inland Revenue power to make regulations is in these terms :

> " The Commissioners of Inland Revenue shall make regulations with respect to the assessment, charge, collection and recovery of income tax in respect of emoluments to which this Act applies . . . and those regulations may, in particular, include provision—(*a*) for requiring any person making any payment of, or on account of, any such emoluments, when he makes the payment, to make a deduction or repayment of tax calculated by reference to tax tables prepared by the Commissioners of Inland Revenue and for rendering persons who are required to make any such deduction or repayment accountable to, or, as the case may be, entitled to repayment

> from, those commissioners . . . and any such regulations shall have effect notwithstanding anything in the Income Tax Acts."

Then there is a proviso concerning the right of appeal to the General or other Commissioners "which a person would have apart from the regulations." That refers to the wage earner whose tax is being collected from him by this system. Regulation 27 of the Income Tax (Employments) Regulations, 1944, provides : A

> "(1) Within fourteen days of the end of every income tax month the employer shall pay to the collector all amounts of tax which he was liable under these regulations to deduct from emoluments paid by him during that income tax month . . ."

By reg. 27 (2) the collector shall give the employer a receipt on the prescribed B form for the total amount so paid. There are also other references in the regulations which relate to the liability to pay.

It is said that to make the employer liable for the money which has been lost is to impose on her an obligation to pay a tax which is not authorised by Parliament, for, as she has deducted the money and put it in the bag ready for the collector, to hold that she is liable to pay out of her own money the C amount of the tax which has been lost from the bag would, in effect, be to tax her in respect of the wages of her employees. In support of that ingenious contention reference was made, not as a binding authority, but as indicative of the sort of principle which I ought to apply, to the observations (37 T.L.R. 886) of SCRUTTON, L.J., and ATKIN, L.J., in *A.-G.* v. *Wilts. United Dairies, Ltd.* (1). In those judgments is enshrined the well known constitutional proposition D that there can be no tax without the authority of Parliament. The trouble I have in seeking to apply that proposition is to be certain that I am not falling into the error of confusing two things : (i) a tax which is demanded of the employer, which this is not, and (ii) a liability to account for moneys which, pursuant to her duty under the Act of Parliament, she has deducted from the wages of her employees, which this is. Once it is made clear that there is a E duty to account laid down in terms by Parliament so that the constitutional point is so far satisfied, and once it is shown that the employer has not accounted, she becomes liable under the regulations to pay over the sums which she has deducted and which, by reason of what occurred, she has not paid.

In the answer to the Attorney-General's information, which is referred to as part of the agreed statement of facts, it is suggested that the employer F had fully and truly accounted for the said sum of money in a letter of Feb. 1, 1946, in which she stated what sums of money she had deducted from her employees' wages and put in the bag in the safe along with other money, that the premises had been burgled, and that the amount she had deducted had been lost. That is not to account for the money within the meaning of s. 2 (1). The letter merely states how much has been deducted with an intimation, in G effect, that she is not going to pay it. The employer's only authority for not paying her employees in full is the statute and the regulations made under it. What she did with the money deducted and how she dealt with it is neither here nor there. She was not obliged to set aside actual money or to keep it in specie. She might have drawn from the bank such a sum as would have enabled her to pay her employees the net amount of their weekly wages, *i.e.*, H the full wages less the appropriate deduction for tax, and to have paid them that sum. In these circumstances, I am at a loss to understand the argument that the total of the deductions in any one week could be said to be at the risk of the revenue authorities because the employer chose to put the relevant amount of money in a bag and put the bag in a safe. It is not suggested that the revenue authorities knew anything about this procedure, or that they were parties in any way to this method of dealing with the money. It was not money earmarked or held in such a way that it would be a breach of the employer's duty to them if she used the money for her own purposes. She was just as free to deal with it as an old lady, who had put her Church collection money in one purse and the money for the butcher or baker in another, would have been free to use the contents of either of those purses. It seems to me idle to suggest that this money was ever at the risk of the revenue authorities. This is no more a tax on the employer than any other deduction which is made under the Income Tax Acts. If a person who is liable to pay interest on an annuity and so is under a duty to deduct tax at the source chooses to put the money in a bureau or any other receptacle and the money is lost, it is absurd for him to say that the money is at the risk of the revenue authorities. There is no real foundation for the point which has been raised, and the result is that there will be judgment for the Attorney-General for £32 13*s.*, reduced by the deduction of sums which the employer was entitled to deduct by virtue of certain necessary adjustments to £28 17*s.*

Judgment for the Attorney-General for £28 17*s.* *No order as to costs.*

Solicitors : *Solicitor of Inland Revenue* (for the Attorney-General) ; *Rawlinson & Son* (for the employer).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

Re REES' WILL TRUSTS. WILLIAMS *v.* HOPKINS AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ.), November 11, 22, 1949.]

Will—Gift to " my trustees absolutely they well knowing my wishes concerning the same "—Gift of estate on trust and not gift conditional on discharge of testator's wishes.

By his will, a testator appointed his friend H. and his solicitor W. to be executors and trustees thereof (thereinafter referred to as " my trustees"), and he devised and bequeathed all his property, subject to the payment of his funeral and testamentary expenses and debts, to " my trustees absolutely they well knowing my wishes concerning the same." The will proceeded : " [I] direct them to permit my brother L.J.R. to have and receive the rents and profits of my property at V. during his lifetime." L.J.R. pre-deceased the testator.

HELD : on its true construction the will gave to the trustees an estate on trust and not a gift conditional on their discharging the wishes communicated to them ; oral evidence to the contrary was inadmissible ; and, therefore, the trustees were not beneficially entitled to the residue.

Observations of SARGANT, J., in *Re Foord* ([1922] 2 Ch. 522), *applied.*

Decision of VAISEY, J. ([1949] 1 All E.R. 609), *affirmed.*

[AS TO EVIDENCE TO VARY TERMS OF WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 169, 170, para. 221 ; and FOR CASES, see DIGEST, Vol. 44, pp. 617-621, Nos. *4447-4509.*]

Cases referred to :

(1) *Irvine* v. *Sullivan*, (1869), L.R. 8 Eq. 673 ; 38 L.J.Ch. 635 ; 43 Digest 572, *208.*

(2) *Croome* v. *Croome*, (1889), 61 L.T. 814 ; *affg.* 59 L.T. 582 ; 43 Digest 718, *1565.*

(3) *Re Foord*, [1922] 2 Ch. 519 ; 92 L.J.Ch. 46 ; 128 L.T. 501 ; 43 Digest 718, *1566*.

(4) *King* v. *Denison*, (1813), 1 Ves. & B. 260 ; 43 Digest 558, *93*.

APPEAL of the plaintiff, a surviving executor, against a decision of VAISEY, J., dated Feb. 25, 1949, and reported [1949] 1 All E.R. 609, on an adjourned summons to determine whether, on the true construction of the will of Thomas Richard Rees, an absolute gift to trustees (as such) imported a gift to them beneficially of a surplus fund remaining after certain wishes communicated to them by the testator during his lifetime had been complied with. VAISEY, J., held that there was no gift beneficially to the trustees. The Court of Appeal now affirmed this decision. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

Milner Holland, K.C., and *Michael Bowles* for the plaintiff, the surviving executor, and the first and second defendants, personal representatives of a deceased executor.

Ungoed-Thomas, K.C., and *Rowe Harding* for the third and remaining defendants, entitled on intestacy.

SIR RAYMOND EVERSHED, M.R. : By his will, dated July 29, 1936, the Rev. Thomas Richard Rees, by cl. 1 revoked former wills and testamentary instruments. By cl. 2 he appointed his friend, Thomas Hopkins, a farmer, and his solicitor, Roger Williams, executors and trustees of his will. Clause 3 was as follows :

> "I devise and bequeath all my estate and effects whatsoever and wheresoever of or to which I may be possessed or entitled at my death (subject to payment of my funeral and testamentary expenses and debts) unto my trustees absolutely they well knowing my wishes concerning the same and direct them to permit my brother Lewis John Rees to have and receive the rents and profits of my property at Vardre Clydach in the county of Glamorgan during his lifetime."

Clause 4 was what is known as a charging clause enabling a professional executor or trustee to charge for his professional services.

Mr. Rees died in September, 1944. His brother, Lewis John Rees, predeceased him by over four years, having died in 1940. Thomas Hopkins, the executor and trustee, survived the testator by about one year. In those circumstances the question has arisen whether, under the terms of the will and having regard to properly admissible evidence, Mr. Roger Williams, the plaintiff and surviving executor and trustee, can, either alone or with the representatives of Mr. Hopkins, claim beneficially the residue of the testator's property which has turned out to be considerable. His claim to do so rests, first, on the fact that the wishes concerning the estate mentioned in cl. 3 of the will have been proved to consist of communications made both to Mr. Williams and Mr. Hopkins regarding various payments to a number of persons and those payments alone do not anything like exhaust the residue. In addition, Mr. Williams says that the testator informed him—though it does not appear that the information was given also to Mr. Hopkins—that the residue left after discharging these various payments was to belong beneficially to Mr. Hopkins and Mr. Williams.

VAISEY, J., answered the question which I have posed negatively, and I agree with him. There are two distinct points. The first is one of the construction of the will. On its true interpretation does cl. 3 confer on the persons named as trustees an interest in the property on trust only or does it give the property to those two persons conditionally on their discharging the wishes communicated to them ? The second point which arises, if the first is decided adversely to the plaintiff trustee, is this. Although the form of the will on its proper reading creates only a trust estate in the trustees, can they, nevertheless, by oral evidence, prove that they held it on trust, having discharged the several payments to which I have already alluded, for the two trustees beneficially or the survivor of them ?

On the question of construction the learned judge cited three cases, *Irvine* v. *Sullivan* (1), *Croome* v. *Croome* (2), a case in this court, and the decision of SARGANT, J., in *Re Foord* (3). All those cases were, as VAISEY, J., observed, very different from the present on their facts, but they indicate the principle properly applicable in cases of this kind. I need not refer to all of them. It is sufficient to make two references to the judgment of SARGANT, J., in *Re Foord* (3). That was a case of a will of a very untechnical character, but it is of special significance in the present case because in that will the testator used the word "absolutely" in reference to the vital bequest. In approaching the problem SARGANT, J., cited a passage from the judgment of LORD ELDON, L.C. (1 Ves. & B. 272) in *King* v. *Denison* (4) (which was also cited in the Court of Appeal in *Croome* v. *Croome* (2)), and said ([1922] 2 Ch. 521) :

> " 'If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more ; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose : the latter is a devise for a particular purpose ; with no intention to give him any beneficial interest.' "

The question in the present case, as it was in *Foord's* case (3), is : Which of the two alternatives here apply ? It is right to say that, as SARGANT, J., observed, the cases show that slight indications may well suffice to persuade the court that the intention of the testator was not to create a trust estate in the devisee, but to give him a conditional gift. With regard to "absolutely," I will cite one other passage from the judgment of SARGANT, J., where, referring to the argument, he said (*ibid.*, 522) :

> "First, there is the use of the word 'absolutely.' No doubt it might, especially if used by some one acquainted with legal language, be construed as describing the extent of the interest in the property given—namely, the fee simple in freehold property and the absolute interest in personal property. But I think in this extremely untechnical will the testator must have used it to mean 'out and out,' and that it therefore carried not merely the full legal interest but the beneficial interest also."

I approach the construction of the present document in the light of that statement of principle by LORD ELDON which SARGANT, J., applied in *Re Foord* (3). First, this will, far from being an untechnical document, is manifestly a lawyer's document. Secondly, I think that in this will the word "absolutely" should be construed, not as conferring a beneficial interest, but as defining the extent of the interest in the property given, so as to confer on the trustees the property given to them—and I borrow the language used by COHEN, L.J., during the argument—free of any fetter which would prevent their carrying out his express wishes. If that be the right conclusion, it goes far to answering the question raised, for counsel for the plaintiff candidly admitted that the construction he sought to place on the word "absolutely" was the linchpin of his argument and that without it his case would wear a somewhat pale complexion.

The matter does not end there, however, because, after referring to his wishes, the next phrase is, "and direct them to permit my brother . . . to have and receive the rents." Counsel for the plaintiff said that the use of the word "permit" indicated something less than the obligation of a trust, but the phrase is not merely "to permit" but "I direct them to permit." I think that is pre-eminently language which is apt to impose the obligation of trusteeship. During the argument the point emerged that the brother, Lewis John Rees, to whom the benefit of the property was given, would, had he survived, have been the sole statutory next-of-kin of the testator. It was suggested that that was a relevant circumstance, because, if there was here a trust in favour of the next-of-kin so far as it was not exhausted by the express wishes, then the surprising conclusion would be reached that the person to benefit would be the same person as he to whom a limited interest had been given in part of the property. That seemed to me at first sight a not inconsiderable argument, and it was one which I gather was not put to the learned judge in the court below. I have come to the conclusion, however, that, on the whole, it is insufficient to tip the balance away from the trust in favour of the conditional gift. One should not assume that the testator appreciated that, if Lewis John Rees survived him, as in fact he did not, he would be the person who, under the statute, would take beneficially the whole of his estate. In any case, if so far the balance be a nice one between the two alternatives, we then have to consider the effect of cl. 4 which is the longest individual clause in the will. I do not want to over-emphasise the significance of it. I have already said that this is pre-eminently a lawyer's will and none but a lawyer would have put in a clause in this language. It goes somewhat further than that, however, for, on the construction of counsel for the plaintiff, the only possible effect that this substantial clause, occupying about a third of the whole document, could have would be to enable Mr. Williams, the solicitor, to throw on his co-trustee and co-beneficiary, Thomas Hopkins, one half of the costs which Mr. Williams' firm would charge for carrying out the duties imposed on them, a result which I conceive would be the last thing that either Mr. Williams as he drew the will or the testator could have intended. I, therefore, come to the conclusion, agreeing with the learned judge on the first point, that this will properly interpreted gives to the two trustees an estate on trust and not a conditional gift.

On the second question, as I have already indicated, I agree with the learned judge that to admit evidence to the effect that the testator informed one executor, or, I will assume in favour of counsel for the plaintiff, both the executors, that he intended them to take beneficial interests and that his wishes included that intention would be to conflict with the terms of the will as I have construed them, for the inevitable result of admitting that evidence and giving effect to it would be that the will would be regarded, not as conferring a trust estate only on Messrs. Hopkins and Williams, but as giving them a conditional gift which on construction is the thing which, if I am right, it does not do. Counsel for the plaintiff answers that once you admit the "wishes concerning the same" so far as they relate to third parties, then there is no inconsistency, for this, after all, is part of the wishes. According to the evidence, I think that is not entirely clear, but I assume it in counsel's favour. Still, that does not get over the difficulty. The admission of this evidence would involve that the trustees took, not a trust estate, but a conditional gift. The point was put by COHEN, L.J., during the argument that, supposing the express wishes were contained in some document and that the document stated that, subject to satisfaction of these various gifts, the residue should belong to the two named persons absolutely, what would then be the situation ? My first answer to that would be that that does not happen to be the fact in this case, but, if it were so and such a document were referred to in the will, it seems to me that *prima facie* that document would have to be included in the probate (THEOBALD ON WILLS, 10th ed., p. 66) and the question would be one of the construction of the two documents, the will and the memorandum, together.

I, therefore, agree with the learned judge also on this point, and I venture to cite from his judgment one short passage which seems to me to put the point concisely and forcibly. Having said what the nature of the evidence was, he continues :

> "Nor do I think that [Mr. Hopkins and Mr. Williams], having satisfied

> the primary purposes indicated to them by the testator [*i.e.*, the gifts to third parties], can turn round and say : 'We are no longer trustees ; we take beneficially,' any more than they can say : 'We are trustees for ourselves.' "

The learned judge in the next sentence expressed some regret at having come to a conclusion which probably defeated the wishes of the testator. I also am not insensible of that feeling. At the same time my own regrets are moderated to this extent. In the general public interest it is not to be forgotten that Parliament has laid it down that *prima facie* a will disposing of the property of a deceased person must follow certain strict forms. These courts, moreover, have been very insistent on the importance of the principle that those who assume the office of trustees should not, so far as they can prevent it, allow themselves to be in a position in which their interests and their duties conflict. This is a case in which the will was drawn by a solicitor, and the claim is that that solicitor is entitled, either absolutely or jointly with another, to the whole beneficial interest. In the general public interest it seems to me desirable that, if a testator wishes his property to go to his solicitor and the solicitor prepares the will, that intention on the part of the testator should appear plainly in the will and should not be arrived at by the more oblique method of what is sometimes called a secret trust. Having said that, however, it is only right that I should make it quite plain that in this case I am making no kind of reflection on the good faith and propriety of the solicitor, Mr. Williams. The learned judge expressed the view that there was here no sort of case for suggesting any impropriety on the part of the solicitor, and I do not want it to be thought, having said what I have said, to be casting any doubt on the justice of those observations. For the reasons I have given, I think that the claim here fails, and that the appeal should be dismissed.

COHEN, L.J. : I agree.

ASQUITH, L.J. : I also agree.

Appeal dismissed with costs.

Solicitors : *Chamberlain & Co.*, agents for *Beor, Wilson & Lloyd*, Swansea (for the plaintiff) ; *Barlow, Lyde & Gilbert*, agents for *Rutter & Senior*, Bromyard, Herefordshire (for the first and second defendants) ; *J. T. Lewis & Woods*, agents for *Alexander & Thomas*, Ystalyfera (for the third defendant) ; *D. Myles Griffiths & Co.*, agents for *John O. Morgan*, Pontardawe (for the remaining defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* LONDON STADIUMS, LTD.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), November 17, 1949.]

Company—Stamp duty—Exemption—Capital duty—Transfer duty—Amalgamation of companies—Transfer of undertaking in return for shares in transferee company—Sale by "existing" company of part of shareholding within two years of amalgamation—Finance Act, 1927 (*c.* 10), *s.* 55 (6) (*b*).

By the Finance Act, 1927, s. 55, where a company (called "the transferee company") has increased its capital with a view to the acquisition of the undertaking of an existing company, the transferee company is entitled to exemption from stamp duty on the increase and on the instrument of transfer of the undertaking in consideration of the issue of shares of the transferee company to the existing company, but it is provided by sub-s. (6) that if " (*b*) . . . the existing company within a period of two years from the date . . . of the authority for the increase of the capital of the transferee company ceases, otherwise than in consequence of reconstruction, amalgamation or liquidation, to be the beneficial owner of the shares so issued to it . . . the exemption shall be deemed not to have been allowed, and an amount equal to the duty remitted shall become payable forthwith, and shall be recoverable from the transferee company . . . "

A L.S. Ltd., increased its capital from £100 to £750,000 with a view to acquiring the undertaking of three existing companies, and it acquired the beneficial ownership of those undertakings under a declaration of trust in consideration of its own shares which it issued to the existing companies. It applied for and obtained exemption from capital duty on the increase and of transfer stamp duty on the conveyance of the beneficial ownership of the undertaking to it. B Within six months the existing companies sold a large portion of the shares so issued to them to a firm of stockbrokers with a view to their being offered for sale to the public, and the Revenue claimed from L.S. Ltd., payment of the capital duty and transfer duty remitted, together with interest.

HELD: by ceasing to be beneficial owners of a portion of the shares issued to them, the existing companies ceased to be beneficial owners of " the shares " within the meaning of s. 55 (6) (*b*), and, therefore, L.S. Ltd., lost C the exemption from duty which had been granted to it.

Decision of LORD GODDARD, C.J. (*ante*, p. 362), *affirmed.*

[FOR THE FINANCE ACT, 1927, s. 55, see HALSBURY'S STATUTES, Vol. 16, pp. 983-986.]

D Cases referred to:

(1) *Lumsden* v. *Inland Revenue Comrs.*, [1914] A.C. 877; 84 L.J.K.B. 45; 111 L.T. 993; *affg.*, [1913] 3 K.B. 809; 42 Digest 623, *238.*

(2) *Lever Bros., Ltd.* v. *Inland Revenue Comrs.*, [1938] 2 All E.R. 808; [1938] 2 K.B. 518; 107 L.J.K.B. 669; 159 L.T. 136; Digest Supp.

APPEAL by London Stadiums, Ltd., from an order of LORD GODDARD, C.J., made on July 11, 1949, reported *ante*, p. 362, in which he held that by reason E of the sale (within two years of the allotment) by " existing companies " of shares in London Stadiums, Ltd. (the " transferee company "), allotted to them on the acquisition of their undertakings by the " transferee company," the exemption from duty under the Finance Act, 1927, s. 55 (1), had, having regard to s. 55 (6) (*b*), been lost. The Court of Appeal affirmed that decision. The facts appear in the judgment of TUCKER, L.J. F

Tucker, K.C., and *J. Clements* for the company.

Pennycuick, K.C., and *J. H. Stamp* for the Attorney-General.

TUCKER, L.J.: This is an appeal from a judgment of LORD GODDARD, C.J., in an action which was brought by the Attorney-General against the G defendant company, London Stadiums, Ltd., to recover a sum of money which it was contended was due from the defendant company by virtue of the provisions of the Finance Act, 1927, s. 55 (1). The decision was given on a preliminary point on the pleadings, and we have been told that that decision, subject to questions of amount, in effect disposes of the point at issue between the parties.

The company was incorporated on Apr. 29, 1946, with a nominal capital of H £100 divided into 1,000 shares of 2*s*. each. It was established with the object, *inter alia*, of acquiring and taking over the undertakings of three other companies, known as the Wandsworth Stadium, Ltd., which is referred to as " the Wandsworth company," the Park Royal Stadium, Ltd., referred to as " the Park Royal company," and the Charlton Stadium (1936), Ltd., referred to as " the Charlton company." On June 5, 1946, an agreement for sale for effectuating the amalgamation was made between the three companies, which are hereafter referred to as " the existing companies," and the defendant company, which is what is referred to in s. 55 (1) as a "transferee company." By that agreement the defendant company agreed to purchase as at May 1, 1946, the goodwill and business of the existing companies, their freehold and leasehold hereditaments, their totalisators, plant, furniture, fixtures, etc., and the benefit of all pending contracts, engagements and orders, and all other property to which they were entitled in connection with their businesses, with certain specified exceptions. It was provided that the total consideration for the sale should be the sum of £749,000, payable in certain specified proportions, and that that sum should be satisfied by the allotment of 7,490,000 fully paid shares in the defendant company of 2*s.* each, 2,740,000 of those shares to be allotted to the Wandsworth company, 2,250,000 to the Park Royal company, and 2,500,000 to the Charlton company. On June 6, 1946, the capital of the defendant company was increased to £750,000 by the creation of new shares, and the consideration shares referred to under the agreement were duly allotted by the defendant company in due course. On June 17, 1946, a deed of declaration of trust was made between the three existing companies and the defendant company, whereby it was declared that those companies held their freehold and leasehold hereditaments in trust for the defendant company. That agreement and declaration of trust were duly presented for adjudication to the Inland Revenue Commissioners for stamp duty. The commissioners decided that there was 10*s.* deed duty payable on the agreement and that the declaration of trust was not chargeable with any duty, and the instruments were so adjudicated accordingly. On Nov. 4, 1946, resolutions were passed by the defendant company which resulted in 3,000,000 of the fully paid 2*s.* shares being sub-divided into 6,000,000 fully paid 1*s.* shares, and the remaining 4,500,000 fully paid shares being consolidated in such manner that every ten of such existing shares should constitute one fully paid £1 share and that the resulting 450,000 shares of £1 each be re-numbered accordingly. On or about Nov. 5, 1946, by an agreement entered into by the three existing companies and R. Edwards, Chandler & Co., the latter company agreed to purchase 2,000,000 ordinary shares of 1*s.* each in the capital of the defendant company for 9*s.* 2½*d.* a share, and on or about Nov. 8 an offer for sale to the public of 2,000,000 ordinary shares of 1*s.* each of the defendant company was made by Messrs. Edwards, Chandler & Co. All the shares included in the offer were taken up, and before the end of 1946 2,000,000 fully paid ordinary shares of 1*s.* each in the defendant company, part of the issue made in effecting the amalgamation of the three existing companies, were sold and transferred by them respectively as follows:—750,000 1*s.* shares by the Wandsworth company, 500,000 shares by the Park Royal company, and 750,000 shares by the Charlton company.

The matters at issue between the parties arise, as I have said, under the Finance Act, 1927, s. 55. That section provides :

> "(1) If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions, that is to say . . . (*b*) that the company (in this section referred to as 'the transferee company') is to be registered . . . with a view to the acquisition either of the undertaking of, or of not less than ninety per cent. of the issued share capital of, any particular existing company ; (*c*) that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per cent. thereof—(i) where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company ; or (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing

> company ; then, subject to the provisions of this section . . . (B) stamp duty under the heading ‘ Conveyance or Transfer on Sale ’ in sched. I to the Stamp Act, 1891, shall not be chargeable on any instrument made for the purposes of or in connection with the transfer of the undertaking or shares . . . nor shall any such duty be chargeable under s. 12 of the Finance Act, 1895, on a copy of any Act of Parliament, or on any instrument vesting, or relating to the vesting of, the undertaking or shares in the transferee company : Provided that . . . (*b*) in the case of an instrument made for the purposes of or in connection with a transfer to a company within the meaning of the Companies (Consolidation) Act, 1908, the provisions of paragraph (B) of this sub-section shall not apply unless the instrument is either—(i) executed within a period of twelve months from the date of the registration of the transferee company or the date of the resolution for the increase of the nominal share capital of the transferee company, as the case may be ; or (ii) made for the purpose of effecting a conveyance or transfer in pursuance of an agreement which has been filed, or particulars of which have been filed, with the registrar of companies within the said period of twelve months.”

It is not disputed that all the requirements of that section were fulfilled so as to enable the company to obtain the exemption from stamp duty which is therein provided, but the section goes on to provide that, notwithstanding that exemption, the company may be required to pay the duty in respect of which exemption was obtained in certain circumstances. Those circumstances are set out in sub-s. (6), and it is with regard to the language of that sub-section that this action is concerned. It provides :

> “ If . . . (*b*) where shares in the transferee company have been issued to the existing company in consideration of the acquisition, the existing company within a period of two years from the date, as the case may be, of the registration or incorporation, or of the authority for the increase of the capital, of the transferee company ceases, otherwise than in consequence of reconstruction, amalgamation or liquidation, to be the beneficial owner of the shares so issued to it, . . . the exemption shall be deemed not to have been allowed, and an amount equal to the duty remitted shall become payable forthwith, and shall be recoverable from the transferee company as a debt due to His Majesty, together with interest thereon . . . ”

By reason of the sale of the shares to which I have referred by the three existing companies which took place in November, 1946, and represented, so far as the Wandsworth company were concerned, a sale of some fourteen per cent. of its original one hundred per cent. consideration, in the case of the Park Royal company some eleven per cent., and in the case of the Charlton company some fifteen per cent., it was contended on behalf of the Crown that the existing companies within a period of two years have ceased to be the beneficial owners of the shares so issued to them, and, accordingly, the Crown is entitled to the payment of this duty.

The case turns on the proper construction to be put on the words “ beneficial owner of the shares so issued to it.” It is said on behalf of the Crown that, if the existing company ceases to be the beneficial owner of any single share forming part of the shares originally issued to it, the circumstances contemplated in the sub-section take effect and the duty is payable, and they contend that that is the natural and proper interpretation to be put on the words “ the shares so issued to it.” On the other hand, it is contended by the company that “ the shares so issued ” means the totality of the shares, and that, therefore, so long as the existing companies retain one share out of those issued to them, the conditions prescribed by the sub-section are not fulfilled. This is purely a question of the construction of the language of the sub-section, and, although we have been quite properly referred to certain authorities, I can derive no assistance from them, with one possible exception, subject only to this, that we have been reminded by counsel for the company that in general terms the proper approach to questions of this kind has been stated on many occasions, and, in particular, was set out by VISCOUNT HALDANE, L.C., in *Lumsden* v. *Inland Revenue Comrs.* (1). LORD HALDANE said ([1914] A.C. 887) :

> " My Lords, this appeal raises a question of much difficulty which has been the subject of elaborate argument at the Bar. But the real point lies within narrow limits, and turns on the proper construction of a few words in a statute, the Finance (1909-10) Act, 1910."

Having said that the subject was so novel and so complicated that it was inevitable that questions should arise on which the meaning of the legislature has not been made wholly free from ambiguity, he proceeded (*ibid.*) :

> " The duty of a court of construction in such cases is not to speculate on what was likely to have been said if those who framed the statute had thought of the point which has arisen ; but, recognising that the words leave the intention obscure, to construe them as they stand, with only such extraneous light as is reflected from within the four corners of the statute itself, read as a whole."

Then he said (*ibid.*, 892) :

> " My Lords, it is no doubt true that there are cases of construction where the natural meaning of the words of a statute is rejected, and another meaning not expressed by the words taken in their ordinary sense is read in. That occurs where the context and scheme of the statute requires that this should be done in order that the language of the statute as a whole may be read as consistent. But a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used if they be literally interpreted is no sufficient reason for departing from the literal interpretation."

Finally, he said (*ibid.*, 896) :

> " . . . I said at the beginning that the duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation."

I take it that this is the manner in which we should approach the construction of this sub-section. I think there can be no doubt about that, but I go further. I am prepared to assume, without deciding, that in interpreting this section we should apply the rule that where there is any real ambiguity in the meaning, this being a taxing statute, it should be resolved in favour of the taxpayer. I say that I am prepared to assume that without deciding it, because we have not thought it necessary to hear argument on behalf of the Attorney-General in this case, and s. 55 deals with the conditions which are required in order that a special exemption which has previously been given shall continue to avail the taxpayer who has received it. I am prepared to assume that those principles of construction should apply to a case of this kind, but that only arises if I should be of opinion that the language of the sub-section is ambiguous. I do not so think. I think the language of the section in its context is reasonably plain, and, without speculating as to the ultimate intentions of the legislature, whether they sought to achieve a certain permanence of amalgamation or not—it seems to me clear from the whole structure of the section that they intended to preserve the *status quo* in this matter as it existed at the time when exemption was given for the period of two years, and that, if there were any alteration in the *status quo* by means of the beneficial ownership of any part of the shares issued ceasing to remain in the existing companies, then payment under the provisions of the sub-section should become effective. To give the words any other meaning would render the whole of this part of the scheme—this sub-section, at any rate—purely nugatory. If, by retaining one share out of hundreds of thousands, possibly, of shares issued, the company could retain the benefit of the exemption, it is difficult to see what purpose could possibly have been achieved by the insertion of the sub-section.

A It is pressed on us by counsel for the company that there may have been a slip by the draftsman of s. 55, and that, therefore, the remedy of the Crown lies with Parliament and not with us. I do not so read these words. It is true that a pleader dealing with a matter of this kind, to make that which was clear, or tolerably clear, manifest beyond all dispute, might have used the words "or any of them," but it seems to me that the words "the shares so issued," having regard to the structure of the section as a whole, mean, and clearly mean, B "the shares or any of them."

That is the view at which LORD GODDARD, C.J., arrived in this case. He said (*ante*, p. 364):

> "I have simply to see what is the true construction of the words, 'the beneficial owner of the shares so issued to it.' It seems to me that, if one looks at the object of the section, which deals with what I may C call a genuine amalgamation of companies, it contemplates that, if the transferee company is to get the substantial benefit that is given in the shape of relief from stamp duty, the existing companies must keep those shares and not market them to the public or elsewhere for a period of at least two years. The section was not meant to facilitate the creation of a market in shares. It was meant to facilitate the genuine amalgamation of D businesses which were to remain amalgamated for at least two years . . . I think it is impossible to say that, where a person parts with some of the shares that have been issued to him, he remains the beneficial owner of the shares so issued."

That that is the proper interpretation to be given to the language of this sub-section is further reinforced by the words of SIR WILFRID GREENE, M.R., E although, it is true, they were only *obiter*, in *Lever Brothers, Ltd.* v. *Inland Revenue Comrs.* (2). He was there dealing, not with para. (*b*) but with para. (*c*) of sub-s. (6), where exactly the same words occur, and he said ([1938] 2 All E.R. 811):

> "There is one other provision in the section which appears to me to point F strongly in the same direction. Under s. 55 (6), provisions are put in for what I may, for the sake of brevity, call ensuring some degree of permanence in the amalgamation which is to be carried through. Obviously, the legislature would not be willing to grant exemption from stamp duties unless it were in connection with something which was not merely in form an amalgamation, but an amalgamation to which an end was not going to be G put within a few weeks, or something of that kind, by disposing of the shares which had been acquired. It would have been a curious result if the benefit of a provision which was obviously enacted to encourage, or, at any rate, to prevent discouragement of, amalgamation could be obtained without ensuring that there should be an effective amalgamation with, at any rate, some degree of permanence in it. With a view to that, sub-s. (6) H provides, among other matters, that, where the acquiring company has acquired shares in the other company (if it is that type of amalgamation), if the shares are sold, or if any of the shares are sold, or got rid of, within two years, then the benefit of the exemption which has been granted shall be taken back, and the duty must be paid."

He there uses the words "if the shares . . . or . . . any of the shares are sold."

In that passage SIR WILFRID GREENE, M.R., as, indeed, did LORD GODDARD in the present case, expressed the view that the object of the section was to achieve a certain permanence of amalgamation. It was argued by counsel for the company that a view of this legislation as a whole showed that that result did not necessarily follow. I express no view about that. There are those two very weighty expressions of opinion with regard to it. I think it is sufficient to say that the intention of the legislature was to preserve the *status quo*, whatever may have been the ultimate object aimed at.

There is only one other matter to which I should refer before passing from this question, in justice to the argument of counsel for the company. He emphasised the fact that in para. (*b*) of sub-s. (6) occur the words " otherwise than in consequence of reconstruction, amalgamation or liquidation," and he said that those three excepted operations, which might result in a cesser of the beneficial ownership, necessarily involved a one hundred per cent. cesser. Be that as it may, in my view it is not sufficient to put a different meaning on the words which follow. The fact that in certain events the cesser may be one hundred per cent., does not, in my view, prevent the section operating when in other circumstances the cesser is only partial. For these reasons, I think that this appeal fails.

SINGLETON, L.J. : I agree.

JENKINS, L.J. : I agree, and I will venture to add only a very few words of my own on the construction of s. 55 (6) (*b*). For my part, I think " the shares so issued to it " means " all the shares so issued to it." Further, I think " the beneficial owner of the shares so issued to it " means " the person who owns beneficially all the shares so issued to it." The company to which the shares in question were issued clearly ceases to be " the beneficial owner of all the shares so issued to it " when it parts with any of those shares. I think the argument of counsel for the company proceeds on a wrong construction, which consists of taking the words " ceases to be the beneficial owner of " together and treating them, as it were, as a compound verb equivalent to " parts with the beneficial ownership of." If one so construes those words, one does get an ambiguity, but, in my judgment, there is no ground for so construing them, and I think, on the true construction of this paragraph, the words " ceases to be " qualify the phrase " the beneficial owner of the shares so issued to it." The event referred to is the event of the existing company ceasing to occupy the position of being the beneficial owner of, or, in other words, the person who owns beneficially, all the shares issued to it. If there were any ambiguity in the language of sub-s. (6) (*b*), taken by itself, I entirely agree with my Lord that, when the section is looked at as a whole, it is abundantly plain that the result must be as he has stated. I, therefore, agree that the appeal fails.

Appeal dismissed with costs.

Solicitors : *Kenneth Brown, Baker, Baker* (for the company) ; *Solicitor of Inland Revenue.*

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

MONA OIL EQUIPMENT & SUPPLY CO., LTD. *v.* RHODESIA RAILWAYS, LTD.

[King's Bench Division (Devlin, J.), November 1, 2, 3, 18, 1949.]

Contract—Prevention of performance—Need for breach of term of contract—Implied condition to co-operate—Misunderstanding not removed—Obstruction by defendants' agent—Liability of defendants.

As the sellers required immediate payment in order to be able to carry out a contract for the sale of seventy-five oil tanks, a term in the contract provided : " As an alternative against bill of lading payment may be made against signed confirmation by T. & Co. [the buyers' shipping agents] that the tanks are now at the disposal of " the buyers. The sellers' representative called on T. & Co. who knew of the arrangement but refused to act until written instructions were received. On complaint by the sellers' representative that T. & Co. (whose attitude he had misunderstood) were refusing to act at all, the buyers did not ask T. & Co. about the complaint or tell them of the misconception that had arisen, nor did they inform the sellers' representative that they were that day (as they, in fact, were) sending instructions to T. & Co. In consequence, the sellers' representative did not again approach T. & Co. on the matter. The contract not having been performed, the sellers brought an action for damages for breach of contract, alleging breach of an implied duty on the buyers' part to do nothing to prevent or obstruct the performance of the condition of payment on which the contract depended.

Held : (i) except possibly in the rare case of a wrongful act independent of the contract, an act preventing or obstructing the performance of a condition by the other party to a contract to be actionable must be such as itself to constitute a breach of an express or implied term of the contract and should be so pleaded.

(ii) by instructing T. & Co., the buyers had done all that they were legally required to do to make the contract effective. The removal of the misunderstanding which had arisen between the sellers' representative and T. & Co. was not the subject of any implied contractual obligation ; and, therefore, the lack of co-operation which the buyers had evinced in not removing that misunderstanding was not a breach of an implied term of the contract.

[As to the Duty of Parties to carry out Contracts according to the Expressed or Manifest intention, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322-326, paras. 451, 452 ; and for Cases, see DIGEST, Vol. 12, pp. 431-433, Nos. *3489-3507* and First Supplement.]

Cases referred to :

(1) *Leyland (Frederick), Ltd.* v. *Compagna Panamena*, (1943), 76 Ll. L.R. 113; *affmd.*, [1947] A.C. 428 ; [1947] L.J.R. 716 ; 176 L.T. 524 ; 2nd Digest Supp.

(2) *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] 1 All E.R. 33 ; [1941] A.C. 108 ; 110 L.J.K.B. 131 ; 164 L.T. 313 ; 2nd Digest Supp.

(3) *Inchbald* v. *Western Neilgherry Coffee, Tea & Cinchona Plantation Co., Ltd.*, (1864), 17 C.B.N.S. 733 ; 5 New Rep. 52 ; 34 L.J.C.P. 15 ; 11 L.T. 345 ; 1 Digest 542, *1952*.

(4) *Trollope (George) & Sons* v. *Martyn Bros.*, [1934] 2 K.B. 436 ; 103 L.J.K.B. 634 ; 152 L.T. 88 ; Digest Supp.

(5) *Mackay* v. *Dick*, (1881), 6 App. Cas. 251 ; 39 Digest 647, *2424*.

(6) *Colley* v. *Overseas Exporters*, [1921] 3 K.B. 302 ; 90 L.J.K.B. 1301 ; 126 L.T. 58 ; 39 Digest 547, *1569*.

Action for damages for breach of a contract of sale of seventy-five oil tanks.

The defendants instructed their buying agency in London to buy seventy-five oil tanks from the plaintiffs at £150 f.o.b. each for the earliest possible shipment to Rhodesia. The plaintiffs, who had not the tanks in their possession though they were in a position to buy them, made it clear to the agency that they could not themselves finance the deal and would require immediate cash, and on Feb. 17, 1949, the contract was signed. It contained *inter alia* the condition : " Immediately the goods have passed inspection and are ready for shipment, invoices are to be sent direct to the [defendant] company." At the foot of the contract the defendants' agent wrote " Payment against invoices." By mutual agreement the contract was varied later the same day, and instead of the cash payment a letter of credit in the usual form providing for payment against documents was substituted. At the same time the following further clause was inserted in the contract : " As an alternative against bill of lading payment may be made against signed confirmation by Messrs. Turnbull, Gibson and Co. [the defendants' shipping agents] that the tanks are now at the disposal of Rhodesia Railways, Ltd." The plaintiffs placed their order for the tanks with their suppliers on Feb. 17, and arranged for the necessary credit, and on Feb. 21 their representatives interviewed Messrs. Turnbull, Gibson & Co. Though aware of the general arrangements, that firm had not received written instructions and they refused to act until they received them. There was a misunderstanding about the effect of the interview, as the result of which the plaintiffs' representative was convinced that Turnbull, Gibson & Co. was refusing to act at all, and he at once complained of this attitude to the defendants' agents. On the same day the defendants' agents had sent the written instructions to Messrs. Turnbull, Gibson & Co., but the plaintiffs' representative was not so informed nor was anything said then or later to remove the misunderstanding. Accordingly, the plaintiffs did not call again on the buying agents or take up the matter with them. On Mar. 3 the plaintiffs wrote to the agents saying that as the arrangement for payment on the letter of credit depended on Messrs. Turnbull, Gibson & Co. and as they " are unwilling to give their services in this matter . . . we must ask for payment to be made in accordance with the contract of Feb. 17. The tanks have already been invoiced to you and we shall be glad to receive your cheque in due course." To that letter the defendants' agents replied that their consulting engineers would inspect the tanks, and, if they reported that they were available and in good condition, the contract would be dealt with forthwith (meaning, according to the evidence, that payment would be made). The tanks were to be delivered in parts, and parts for about 150 tanks were held for disposal by the plaintiffs' suppliers. After inspection the engineers reported that the material appeared to be generally in serviceable condition, but it would be advisable to consider certain individual items, some plates and bolts of the tanks being corroded. The plaintiffs gave an assurance that only really good parts would be dispatched, and by Mar. 14 they had arranged with their suppliers for a written assurance to be given that they held seventy-five tanks at the plaintiffs' disposal. In a letter dated Mar. 14 the plaintiffs offered to hand this document to the defendants against cash. On Mar. 16 the defendants wrote in effect refusing to pay until the parts to be appropriated to the contract had been segregated, inspected again, and held to their order. On Mar. 17 the plaintiffs' suppliers cancelled the contract for the tanks and the plaintiffs issued a writ against the defendants. The plaintiffs contended that the term of the contract that payment would be made against signed confirmation by Messrs. Turnbull, Gibson & Co., impliedly cast on the defendants the duty of procuring their agents to take all reasonable steps to ascertain whether the tanks were at the disposal of the defendants and also of doing nothing to prevent or obstruct the performance of the condition of payment, and they alleged a breach of this duty. The defendants denied a breach, and contended alternatively that any breach, if breach there was, gave rise to only nominal damages. DEVLIN, J., gave judgment for the defendants with costs.

Salmon, K.C., and *S. B. R. Cooke* for the plaintiffs.

H. L. Parker for the defendants.

Cur. adv. vult.

Nov. 18. **DEVLIN, J.,** read a judgment in which he reviewed the evidence; found the facts as stated; held that the clause in the letter of credit imposed on Messrs. Turnbull, Gibson & Co. no duty to take the initiative or to prepare a draft of any document, but only a duty to confirm the effect of material, documentary in character, such as a delivery order, to be put before them; and continued: I can now consider whether the terms alleged by the plaintiffs can properly be implied, and, if so, whether they have been broken. The first term alleged is that the defendants would procure their agents, Messrs. Turnbull, Gibson & Co., to take, and that the agents would take, all reasonable steps to ascertain whether the tanks were at the disposal of the defendants. It is conceded by the defendants, I think rightly, that there was a duty on them to instruct Messrs. Turnbull, Gibson & Co. to act. This they did by the letter of Feb. 21. It is not suggested that these instructions were not given with reasonable promptitude or that they were in any way deficient. On the construction which I have given to the clause the duty of Messrs. Turnbull, Gibson & Co. did not require them to take any steps until some material was placed before them. No material was ever placed before them. I find that Turnbull, Gibson & Co. were properly instructed and that they were not lacking in their duty. The word "procure" in the alleged term is wider than "instruct." In support of the contention that there was a wider duty I was referred to *Frederick Leyland, Ltd.* v. *Compagna Panamena* (1) and particularly to the *dictum* of GODDARD, L.J. (76 Ll. L.R. 127), which was subsequently approved by LORD THANKERTON in the House of Lords ([1947] A.C. 428). It was there held that where a surveyor, invested with the power to certify, misconceived his function and refused to act it was the duty of his employers to put him right or dismiss him and appoint another. I need not consider the application of this principle, for, on my view, Messrs. Turnbull, Gibson & Co. did not refuse to act, and there is nothing to show that they misconceived their function.

The second term alleged is that the defendants would do nothing to prevent or obstruct the performance of the condition of payment in the Messrs. Turnbull, Gibson & Co. clause. This is a common form of allegation, but I venture to think that in the light of the decision in *Luxor (Eastbourne), Ltd.* v. *Cooper* (2) its use could now with advantage be restricted to the exceptional case. It is generally regarded as originating from the *dictum* of WILLES, J., in *Inchbald* v. *Neilgherry Coffee, Tea & Cinchona Plantation Co., Ltd.* (3). It was applied in *Trollope (George) & Sons* v. *Martyn Bros.* (4) but with the qualification that the prevention must be "without just cause or excuse." In *Luxor (Eastbourne), Ltd.* v. *Cooper* (2) the right qualification was said by LORD WRIGHT to be that the prevention must be wrongful. LORD WRIGHT explains what this means in the following passage ([1941] 1 All E.R. 60):

> "When a defendant is charged by a plaintiff with having prevented the plaintiff from fulfilling a condition on which his right to payment depends, it must, in my opinion, be shown that the defendant's act which prevented was wrongful. The wrong would be generally a breach of the contract. Thus, in *Mackay* v. *Dick* (5), the maker of an excavating machine was required by the contract to send the machine for the purpose of being tested to the railway cutting which the buyer was engaged in constructing, and the buyer was only to be liable to pay for it if it there, in working, satisfied the test. This House held that the buyers had prevented fulfilment of the condition because they held that, it being the buyer's duty under the contract to provide the necessary facilities, they had failed to do so. Hence their default

> prevented the seller from satisfying the condition. The seller could therefore say that he had done all that lay on him to fulfil the condition and was to be taken to have implemented it. The test was only not satisfied because of the buyer's default. Thus, when it is said in the present case that the appellants prevented the respondents from completing the contract, it must be shown that the appellants broke some term of the contract between them and the respondents. The appellants cannot be held liable on the ground of prevention where all that happened was that they did, or omitted to do, something which, as between themselves or the respondents, they were free to do or to omit to do. I question if there is any exception to this principle, but I am clear that there is no exception material to this case."

This shows that, except possibly in the rare cases where the wrongful act alleged is independent of the contract, the allegation of prevention is only circumlocution. Where the wrongful act is a breach of the contract, it can stand alone. There is no advantage in alleging an implied term not to break another term. Indeed, it is absurd, since it is implicit in this form of allegation that the breach of the second term is objectionable only if it prevents the performance of a condition. Plainly no pleader would allow himself to get involved in this form of allegation if the second term was express, so that the proposition of law on which this form of pleading rests may be stated thus: "It is an implied term of a contract that a party will not by breaking a second implied term prevent the other party from fulfilling a third term." Clearly, everything except the central allegation of breach is confusing verbiage. It is confusing because it distracts attention from the heart of the matter, which is to ascertain whether there is a proper basis for the implication of the second term. It suggests that the principal, if not the only, criterion by which this implication should be judged, is whether, in the absence of the proposed term, the performance of a condition by the other party, generally the one involving his right to payment, could be prevented with impunity. In truth, the proposed term, like all other implied terms, must be judged by the test whether or not it is necessary for the business efficacy of the contract. The fact that an act, if not prohibited by the contract, is one which would result in a party being robbed of the benefits which otherwise the contract would give him is certainly an important matter to be considered in relation to the business efficacy of the contract, but it is not necessarily the most important, and it is certainly not the only matter. There are many decided cases in which it has not prevailed.

Mackay v. *Dick* (5), cited by LORD WRIGHT in the passage I have quoted above, contains two separate and independent propositions, one enunciated by LORD BLACKBURN, and the other by LORD WATSON, and there is a danger of misunderstanding them if, as in the headnote to the case, they are combined into one. The first is set out in the words of LORD BLACKBURN (6 App. Cas. 263) :

> " . . . where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."

It will be observed that LORD BLACKBURN says nothing about prevention. The principle he enunciates may be put succinctly, as VISCOUNT SIMON, L.C., put it in *Luxor (Eastbourne), Ltd.* v. *Cooper* (2) ([1941] 1 All E.R. 39), saying that where co-operation is necessary, it is implied that it is forthcoming. If the matter rested there, the plaintiff's normal remedy for breach of the implied term would be damages. The second proposition, based on the opinion of LORD WATSON, advances a stage further and gives the plaintiff in appropriate cases an additional form of relief. If the breach of the implied term prevents the plaintiff from performing a condition binding on him, he is to be taken as having fulfilled that condition, and, if the condition is one on which his right to payment depends, he may sue for payment instead of damages. That these propositions are distinct is shown by the fact that Lord Blackburn's reasoning does not involve the second at all. His construction of the contract does not require it. He says (6 App. Cas. 264):

> " . . . . the defender, having had the machine delivered to him, was by his contract to keep it, unless on a fair test according to the contract it failed to do the stipulated quantity of work, in which case he would be entitled to call on the pursuers to remove it. And by his own default he can now never be in a position to call upon the pursuers to take back the machine, on the ground that the test had not been satisfied, he must, as far as regards that, keep, and consequently pay for it."

On this view there was no question of the defender preventing the pursuers from claiming payment. He prevented himself from escaping from the liability to pay. The point is developed in the judgment of McCardie, J., in *Colley* v. *Overseas Exporters* (6).

Lord Watson (6 App. Cas. 270) proceeded on a different construction of the contract and so invoked the principle I have stated. He rested it on well established doctrine (see also the authorities cited by McCardie, J., in *Colley* v. *Overseas Exporters* (6)) and not on any implication in the contract. The formulation of the implied term in cases of this class depends, in my judgment, on the necessity for co-operation. Without co-operation the contract would lack business efficacy, and this class of case is, therefore, simply an exemplification of the general principle. This analysis of the term pleaded (in which I intend no disrespect to the pleader in this case, for, as I have said, it is common form) is, I hope, not too elaborate, since it enables me, if it is right, to reach a speedy conclusion on the facts. I do not need to inquire whether the defendants' actions prevented or obstructed the plaintiffs from getting payment. I can ask myself whether there can be implied in this contract any term (none is specifically pleaded) prohibiting the acts complained of in the amended statement of claim in so far as I have found them proved. I can think of no term that can properly be implied other than one based on the necessity for co-operation. It is, no doubt, true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a limited degree—to the extent that is necessary to make the contract workable. For any higher degree of co-operation the parties must rely on the desire that both of them usually have that the business should get done. Unfortunately for the plaintiffs, the desire of Mr. Chamberlain [the defendants' representative] to do business with them evaporated after Feb. 17. I think it can properly be implied in this contract that the defendants should instruct Messrs. Turnbull, Gibson & Co. to act as otherwise the relevant clause would be unworkable. This was done. The plaintiffs failed to take advantage of the clause through their own misunderstanding, which Mr. Chamberlain did nothing to remove and which his behaviour probably confirmed, but the removal of misunderstanding is quite beyond the reach of implied contractual obligation. Since *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper* (2) it is clear that the court cannot by means of an implied term prohibit arbitrary behaviour or acts done "without just cause or excuse," for the reason that such matters are not capable of sufficiently precise definition. For the same reason the court cannot by such means exact a higher degree of co-operation than that which can be defined by reference to the necessities of the contract. There will be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *Evill & Coleman* (for the plaintiffs); *Coward, Chance & Co.* (for the defendants).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

GRAY AND OTHERS *v.* SOUTHOUSE AND ANOTHER.

[KING'S BENCH DIVISION (Devlin, J.), November 16, 17, 18, 1949.]

Contract—Failure of consideration—Recovery of money paid—Premium paid for grant of sub-tenancy of premises subject to the Rent Acts—Payment of premiums prohibited—Tenant a statutory tenant and so unable to sublet—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), *s.* 8 (1) (2), *as amended by the Rent and Mortgage Interest Restrictions Act,* 1939 (c. 71), *sched. I.*

In the course of negotiations for a sub-tenancy of a flat subject to the Rent Restrictions Acts the prospective sub-tenants paid a premium to the tenant notwithstanding the prohibition of any such payment by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8 (1), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sched. I. The sub-tenants were aware that they were doing that which was prohibited by law and they lent themselves to a scheme for the disguising of the payment by representing it as money paid for the cost of the re-decoration of the flat. The tenant, being a statutory tenant, was unable to grant the sub-tenancy. In an action by the sub-tenants for recovery of the sums paid on the ground that they had been paid for a consideration which had failed,

HELD : although, in general, as a matter of public policy, the court would not assist a party to recover money paid by him in the course of the commission of an illegal act, it was not contrary to public policy in this particular class of case for a person who had paid a premium to be allowed to recover it, and the sub-tenants were entitled to recover the premium as money paid for a consideration that had wholly failed.

[AS TO MONEY PAID IN PURSUANCE OF AN ILLEGAL CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 174-176, para. 249 ; and FOR CASES, see DIGEST, Vol. 12, pp. 281-289, Nos. *2307-2375.*]

Case referred to :

(1) *Browning* v. *Morris*, (1778), 2 Cowp. 790 ; 12 Digest 288, *2363.*

ACTION for the recovery of money paid under a contract, the consideration for which, it was alleged, had wholly failed.

The plaintiffs sought to recover sums amounting to £169 8*s.* 6*d.*, which they had paid to one Hunt, the second defendant, as the agent of the first defendant in negotiations for a sub-lease of a flat at 71, Perham Road, London, W.14, as a premium to the first defendant, the tenant. During the negotiations it appeared that the first defendant was a statutory tenant and, therefore, was unable to grant a sub-tenancy, and the present claim was made, but the question arose whether it was not contrary to public policy for the court to assist the plaintiffs to recover money the payment of which they had been aware was forbidden by the law. DEVLIN, J., held that the plaintiffs were entitled to recover the premium.

Alan Fletcher for the plaintiffs.
Harold Brown for the first defendant.
The second defendant did not appear.

DEVLIN, J., reviewed the evidence, found as a fact that the second defendant was the agent of the first defendant, and that the first defendant was liable to repay the premium subject to the question of public policy, and continued : With regard to this question, it was made plain that the plaintiffs knew that, in paying a premium of £150, they were doing something which the law forbade. The ordinary rule is that the court will not assist any party who comes before it to recover money if it is necessary for the party presenting the cause of action to rely on the commission by him of an illegal act. The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sched. I, provides :

> "(1) A person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or other like sum, A or the giving of any pecuniary consideration, in addition to the rent, and, where any such payment or consideration has been made or given in respect of any such dwelling-house under an agreement made after Sep. 1, 1939, the amount or value thereof shall be recoverable by the person by whom it was made or given . . . (2) A person requiring any payment or the giving of any consideration in contravention of this section, shall be liable B on summary conviction to a fine not exceeding £100 . . ."

The Act, therefore, prohibits the requiring of a payment to be made to the landlord, and it is possible that, if a tenant pays a premium, he is guilty of aiding and abetting the criminal offence for which the section provides, and since the plaintiffs appear to have lent themselves to a scheme for disguising the matter by representing their payment as one made for the cost of re-decorations C I shall assume for the purposes of this case that the plaintiffs are so guilty. The main point on which counsel for the plaintiffs has relied is the provision in the section under which the premium shall be recoverable by the person by whom it was made or given. If that is given its full effect, it would mean, if this were a case under the Act, which it is not, that the plaintiffs would be able to recover the premium which they had paid. D

At first sight it seems curious, when the rule is so clearly defined that a court will not assist a plaintiff to recover money which is paid as part of an illegal scheme connived at by him, that Parliament should provide that, although the tenant is *particeps criminis*, he be entitled to get his money back. I have, therefore, felt it necessary to consider whether that provision ought not to be restricted to tenants who were not *participes criminis*, and was merely intended E as a procedural means provided by the statute whereby they might get their money back. On the whole, however, I think that that is not the right meaning of the provision. It is necessary to remember that when matters of this sort come before the courts the criminal offence is over. There could be no question of anything that the court does furthering the commission of a crime. The question that the court has to consider in this type of case is what is to happen F to property which has been disposed of in one way or another in the course of the crime. The broad rule is that the court will assist neither side, and that the loss lies where it falls. Like all broad rules it produces hard cases. It often happens that the less guilty of the two parties is the loser, and, therefore, there is nothing inherently immoral in the idea of Parliament considering that in a particular class of case it is desirable that the money should go to one side rather G than to the other.

The Rent Acts are Acts for the protection of tenants, and Parliament might very well have had it in mind that, unless it altered the common law rule, the result would be that the landlord, who would generally be far the more guilty party of the two, would be left in possession of the fruits of his illegality. That is the proper view of the statute, and it is reinforced by *Browning* v. *Morris* (1), H where LORD MANSFIELD, C.J., in his judgment says (2 Cowp. 792) :

> "But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men ; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other ; *there*, the parties are *not in pari delicto* ; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract."

Accordingly, I hold that there is no need to restrict the full meaning of the provision on which counsel for the plaintiffs relies. On the contrary, if Parliament had intended the benefit of the provision to be limited to innocent persons, it would be surprising that it used such unqualified language. After all, by 1939, when the section I am considering was before Parliament, it was widely known to all classes of the community that the giving of " key money " or premiums for tenancies of controlled dwelling-houses was illegal. The cases of innocent tenants must be very rare, and I can hardly believe that Parliament intended the wide words of the statute to be restricted to those exceptional cases. This is not a claim made under the Act, and the Act is not pleaded in support of it. All I have to do, therefore, is to satisfy myself that it is not contrary to public policy in this particular class of case that the plaintiffs should recover the sums for which they sue. I am satisfied that public policy puts no impediment in the way of their obtaining judgment.

Judgment for the plaintiffs with costs.

Solicitors : *Cardew-Smith & Ross* (for the plaintiffs) ; *Burton, Yeates & Hart*, agents for *Charles, Malcolm & Wilson*, Worthing (for the first defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MARRIAGE *v.* EAST NORFOLK RIVERS CATCHMENT BOARD.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), November 1, 2, 3, 4, 24, 1949.]

Land Drainage—Catchment board—Cleansing watercourse—Damage to plaintiff's bridge—Dredgings deposited on bank—Diversion of flood waters—Action for nuisance, alternatively, negligence, by plaintiff—Competence—Land Drainage Act, 1930 (*c.* 44), *s.* 34 (1), (3), *s.* 38 (1).

By the Land Drainage Act, 1930, s. 34 (1), a catchment board were empowered to maintain and improve existing works and to construct new works, and by s. 38 (1) they were allowed to deposit on the banks of a watercourse any matter removed in the course of dredging that watercourse. By s. 34 (3) : " Where injury is sustained by any person by reason of the exercise by a drainage board of any of its powers under this section, the board shall be liable to make full compensation to the injured person, and in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Lands Clauses Acts."

In pursuance of their statutory powers a catchment board deposited on the south bank of a river dredgings taken from the river, thereby raising the bank from one to two feet, this work being completed on Jan. 6, 1944. In December, 1946, the river flooded, and, as the flood waters were prevented by the deposited dredgings from escaping over the south bank as they had formerly done, they ran through a by-pass on the north of the river and swept away a bridge leading across it to a mill. The owner of the bridge brought an action against the board, claiming damages for nuisance in the loss of the bridge :

HELD : (i) where a statute empowering the execution of a variety of works gave to the statutory authority wide powers, which necessarily involved the possibility of interference with the rights of others, and expressly provided a remedy by way of compensation, a person who sustained injury through the carrying out of operations authorised by the statute had no right of action for nuisance ; and, therefore, as the injury sustained by the plaintiff was occasioned by a normal drainage operation, carried out in the usual way, under the powers given to the catchment board by s. 34 (1) of the Land Drainage Act, 1930, the plaintiff's only remedy for the injury of which he complained was to claim compensation under s. 34 (3) of the Act.

(ii) under s. 34 (3), it was for the arbitrator to decide not merely the *quantum* of the compensation, but also whether the plaintiff was entitled to compensation.

East and West India Docks and Birmingham Junction Ry. Co. v. *Gattke* (1851) (20 L.J.Ch. 217), *applied.*

Decision of BYRNE, J. (*ante*, p. 50), *affirmed.*

[FOR THE LAND DRAINAGE ACT, 1930, s. 34, see HALSBURY'S STATUTES, Vol. 23, p. 554.]

Cases referred to :

(1) *Caledonian Ry. Co.* v. *Walker's Trustees*, (1882), 7 App. Cas. 259 ; 46 L.T. 826 ; 46 J.P. 676 ; 11 Digest 140, *259*.

(2) *Hammersmith and City Ry. Co.* v. *Brand*, (1869), L.R. 4 H.L. 171 ; 38 L.J.Q.B. 265 ; 21 L.T. 238 ; 34 J.P. 36 ; 38 Digest 24, *132*.

(3) *Metropolitan Asylum District* v. *Hill*, (1881), 6 App. Cas. 193 ; 50 L.J.Q.B. 353 ; 44 L.T. 653 ; 45 J.P. 664 ; 13 Digest 401, *1230*.

(4) *East and West India Docks and Birmingham Junction Ry. Co.* v. *Gattke*, (1851), 3 Mac. & G. 155 ; 6 Ry. and Can. Cas. 371 ; 20 L.J.Ch. 217 ; 17 L.T.O.S. 85 ; 11 Digest 132, *202*.

(5) *Geddis* v. *Bann Reservoir Proprietors*, (1878), 3 App. Cas. 430 ; 38 Digest 25, *137*.

(6) *Manchester Corpn.* v. *Farnworth*, [1930] A.C. 171 ; 99 L.J.K.B. 83 ; *sub nom., Farnworth* v. *Manchester Corpn.* 142 L.T. 145 ; Digest Supp.

(7) *East Suffolk Rivers Catchment Board* v. *Kent*, [1940] 4 All E.R. 527 ; [1941] A.C. 74 ; 110 L.J.K.B. 252 ; 165 L.T. 65 ; 105 J.P. 129 ; *revsg.* [1939] 4 All E.R. 174 ; [1940] 1 K.B. 319 ; 109 L.J.K.B. 80 ; 161 L.T. 341 ; 104 J.P. 1 ; 2nd Digest Supp.

(8) *Clowes* v. *Staffordshire Potteries Waterworks Co.*, (1872), 8 Ch. App. 125 ; 42 L.J.Ch. 107 ; 27 L.T. 521 ; 36 J.P. 760 ; 38 Digest 29, *165*.

(9) *Cutler* v. *Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544 ; [1949] A.C. 398 ; [1949] L.J.R. 824.

(10) *Raleigh Corpn.* v. *Williams*, (1893), A.C. 540 ; 63 L.J.P.C. 1 ; 69 L.T. 506 ; 38 Digest 57, *335*.

(11) *Colac* (*President, etc.*) v. *Summerfield*, [1893] A.C. 187 ; 11 Digest 149, *323 i*.

(12) *Rhodes* v. *Airedale Drainage Comrs.*, (1876), 1 C.P.D. 402 ; 45 L.J.Q.B. 861 ; 35 L.T. 46 ; 11 Digest 193, *727*.

(13) *Hall* v. *Bristol Corpn.*, (1867), L.R. 2 C.P. 322 ; 36 L.J.C.P. 110 ; 15 L.T. 572 ; 31 J.P. 376 ; 11 Digest 291, *2185*.

(14) *Menzies* v. *Breadalbane*, (1828), 3 Bli. N.S. 414 ; 44 Digest 29, *218*.

(15) *Bickett* v. *Morris*, (1866), L.R. 1 Sc. & Div. 47 ; 14 L.T. 835 ; 30 J.P. 532 ; 44 Digest 14, *65*.

(16) *Gerrard* v. *Crowe*, [1921] 1 A.C. 395 ; 90 L.J.P.C. 42 ; 124 L.T. 486 ; 44 Digest 84, *652*.

(17) *R.* v. *Pagham Sussex Sewers Comrs.*, (1828), 8 B. & C. 355 ; 2 Man. & Ry. K.B. 468 ; *sub nom., R.* v. *Bognor Sewers Comrs.*, 6 L.J.O.S.K.B. 338 ; 44 Digest 81, *625*.

(18) *R.* v. *Trafford*, (1831), 1 B. & Ad. 874 ; *revsd.*, (1832), 8 Bing. 204 ; 2 Cr. & J. 265 ; 1 Mov. & S. 401 ; 2 Tyr. 201 ; 1 L.J.Ex. 90 ; 38 Digest 408, *985*.

APPEAL by the plaintiff from an order of BYRNE, J., dated May 12, 1949, and reported *ante*, p. 50.

The plaintiff was a miller who owned Limbourne Mill on the River Waveney at Wortwell, near Harleston, in the county of Norfolk, and also a bridge leading to the mill across a by-pass channel on the north side of the river below a weir. The defendants were the East Norfolk Rivers Catchment Board, a public authority whose area included the River Waveney. In December, 1946, when the river was in flood, the plaintiff's bridge collapsed, and the plaintiff brought an action claiming damages for nuisance, the writ in the action being issued on Nov. 5, 1947. BYRNE, J., found as a fact that the collapse occurred because, from Oct. 1, 1943, until Jan. 6, 1944, the catchment board, while engaged in dredging the river, had deposited the dredgings on the south bank, thereby raising it from one to two feet, with the result that the flood waters were unable to escape over the south bank, as they had done in previous years, and ran instead through the by-pass channel, scouring the channel and undermining the buttresses of the bridge. The catchment board contended that the plaintiff's sole remedy was a claim for compensation under the Land Drainage Act, 1930, s. 34 (3), and that, in any event, the action was statute-barred under the Limitation Act, 1939, s. 21 (1), as it was an action against a public authority commenced more than one year after the cause of action arose. BYRNE, J., gave judgment for the catchment board on both issues. From this decision the plaintiff appealed, and during the appeal he was allowed to amend the statement of claim by adding an allegation of negligence on the terms that he was confined to the particulars already delivered. The Court of Appeal now held that the evidence did not establish negligence, and they upheld the decision of the learned judge that the plaintiff's action was not maintainable. In view of their decision they considered it unnecessary to decide the question arising under the Limitation Act, 1939, s. 21 (1).

Marshall, K.C., and *Fortune* for the plaintiff.
Diplock, K.C., and *R. A. Macdonald* for the catchment board.

Cur. adv. vult.

Nov. 24. The following judgments were read.

TUCKER, L.J. : This is an appeal from a decision of BYRNE, J., by which he gave judgment for the defendants, the catchment board, in an action for damages for nuisance, brought against them by the plaintiff, who at all material times was the owner and occupier of a mill known as Wortwell Mill, situate on the River Waveney, which is a main river within the defendant board's area under the Land Drainage Act, 1930. The material facts can be stated quite shortly. On Oct. 1, 1943, the board, under the powers conferred on them by the aforementioned Act, began dredging operations in the Waveney just above the plaintiff's mill. The dredging continued up stream for nearly a mile and was completed by Jan. 6, 1944. The spoil from the dredging operations was all placed on the south bank of the river, which the learned judge has found to have been slightly lower than the north bank before the dredging. The result of the deposit of spoil was to raise the south bank so that it was between one foot and two feet higher than the north bank. The judge has further found that there were certain defined natural channels on the south side of the river which in times of flood carried the flood water which would otherwise have flooded the fields to the south. The operations, which were completed by Jan. 6, 1944, did not affect the plaintiff until December, 1946, when a flood occurred. As a result of the level of the bank on the south side having been raised, the fields on the north side became flooded and the volume of water in a by-pass channel of the river which flowed under a bridge on the plaintiff's property to the north of the mill was greatly increased. The flood waters scoured the by-pass channel and undermined the buttresses of the bridge causing its collapse. It was for this damage, agreed at £205 19*s.*, that the action was brought.

There were issues at the trial as to whether the damage complained of was due to the defendants' dredging operations or was caused by a turbine erected by the plaintiff across the mouth of the by-pass channel and/or a crest board which the plaintiff was alleged to have installed on the overflow weir. Both these issues were decided favourably to the plaintiff, and the judge stated that he preferred the plaintiff's evidence to that of the board's engineer at all points where they were at variance. The learned judge found as a fact that by the operations described above the board diverted the ordinary flood course of A the river and thus did an act which, if done by a riparian owner, would have been actionable at the suit of another riparian owner. For the purposes of this judgment I am content to assume that the learned judge's findings in regard to the diversion of the river were justified on the evidence. Counsel for the board was prepared to argue that on examination of the evidence it would be found that the necessary elements to found an action by a riparian owner were not B present, but he submitted that in any event the plaintiff's only remedy was to claim compensation under the Land Drainage Act, 1930, s. 34 (3). As I accept the latter contention, I have not examined the evidence on this point as fully as would otherwise have been necessary, nor have we heard argument thereon.

In the circumstances the question for decision is whether on these findings the learned judge was right in holding that the plaintiff's only remedy was to C claim compensation. This is purely a question of construction of the Land Drainage Act, 1930. The following are the relevant sections of the Act. Section 1 (3) provides :

> " Subject to the provisions of this Act, a drainage board shall exercise a general supervision over all matters relating to the drainage of land within its district and shall have such other powers and perform such other duties D as are conferred or imposed on drainage boards by this Act."

Section 6 (1) provides :

> " The powers conferred by this Act on drainage boards shall, so far as concerns the main river, including the banks thereof, and drainage works in connection with the main river, be exercisable solely by the catchment board." E

Section 12 (1) gives the Minister of Agriculture power to give directions with respect to the performance of their duties by the catchment board. Then comes s. 34, which is the all-important section for present purposes, except for sub-s. (2), which is not material. The section provides :

> " (1) Every drainage board acting within its district shall have power : F (*a*) to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work : (*b*) to improve any existing works, that is to say, to deepen, widen, straighten or otherwise improve any existing watercourse, or remove mill dams, weirs or other obstructions to watercourses, or raise, widen, or otherwise improve any existing drainage work : (*c*) to construct new works, G that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act not hereinbefore referred to, required for the drainage of the area comprised within their district : Provided that a catchment board shall not, by virtue only of this sub-section, be taken to be authorised to do any work otherwise than in relation to the main river. (3) Where injury is sustained by any person by reason of the exercise by a H drainage board of any of its powers under this section, the board shall be liable to make full compensation to the injured person, and in case of dispute the amount of the compensation shall be determined in the manner in which disputed compensation for land is required to be determined by the Lands Clauses Acts. (4) It is hereby declared that nothing in this section authorises any person to enter on the land of any person except for the purpose of maintaining existing works."

Section 38 (1) provides :

> " A drainage board, without making payment therefor or giving compensation in respect thereof, may appropriate and dispose of any shingle, sand, clay, gravel, stone, rock or other matter removed in the course of the execution of any work for widening, deepening or dredging any watercourse, and may deposit any matter so removed on the banks of the watercourse or use it in any other manner for the maintenance or improvement of those banks or for the purposes of the execution of any other work which the drainage board have power to execute."

It is, I think, clear that the powers conferred by s. 34 (1) necessarily involve the possibility of violation of the legal rights of riparian owners and that the exercise of such powers and the manner in which they are to be exercised are matters within the discretion of the board. If a riparian owner becomes aware that a catchment board is intending to carry out an operation within the scope of the powers conferred on them by s. 34 (1), which operation will necessarily or probably involve a violation of his legal rights, can he come to the court and claim an injunction ? I think clearly not. To hold otherwise would be to substitute the decision of the court for that of the board in a matter which the legislature has placed in the discretion of the board and for which it has expressly provided compensation. It is well settled that under language such as is used in s. 34 (3), a claimant for compensation must prove that the act complained of is one which, but for the authorisation of the statute, would have been actionable. Indeed, it was not disputed by counsel for the plaintiff that that is the meaning of the word " injury " in s. 34 (3). It is sufficient to cite the language of LORD BLACKBURN (7 App. Cas. 293) in *Caledonian Ry. Co.* v. *Walker's Trustees* (1) :

> " Some things, I think, are now no longer open to discussion. No action can be maintained for anything which is done under the authority of the legislature, though the Act is one which if unauthorised by the legislature, would be injurious and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the legislature has thought fit to give him (see *Hammersmith Ry. Co.* v. *Brand* (2). The Lands and Railways Clauses Acts of 1845 give some compensation. I do not think that there is in this respect any difference between the legislation for England and for Scotland. And it must now be considered settled that on the construction of these Acts, compensation is confined to damage arising from that which would, if done without authority from the legislature, have given rise to a cause of action."

The importance of the existence of a compensation clause in determining the intention of the legislature is emphasised by LORD BLACKBURN in *Metropolitan Asylum District* v. *Hill* (3), where he says (6 App. Cas. 203) :

> " The legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured ; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others. What was the intention of the legislature in any particular Act is a question of the construction of the Act."

It has been decided that, where there is such a compensation clause and the provisions of the Lands Clauses Consolidation Act, 1845, s. 68, apply, it is for the arbitrator to decide whether actionable damage has been proved : see *East and West India Docks and Birmingham Junction Ry. Co.* v. *Gattke* (4). It is not disputed that a diversion of the course of a river by one riparian owner is actionable at the suit of another.

It follows, in my view, on the construction of this Act that the plaintiff's remedy for the actionable wrong found by the learned judge consists only in his right to receive compensation under the provisions of s. 34 (3) of the Act of 1930. In arriving at this decision I have given careful consideration to the arguments of counsel for the plaintiff to the contrary, with which I will now deal. He submits that, although the remedy for the violation of a legal right is in general to be found in s. 34 (3), this sub-section has no application to a case where the damage suffered is caused by a nuisance unnecessarily created by the defendants in the exercise of their statutory powers or to negligence on their part and that, in order to invoke the protection of the Act, the *onus* is on the defendants to prove that they acted without negligence and that the nuisance created was necessary to the proper performance of the powers conferred on them by statute. In support of this contention he relies on the well known words of LORD BLACKBURN in *Geddis* v. *Bann Reservoir Proprietors* (5) and of VISCOUNT DUNEDIN in *Manchester Corporation* v. *Farnworth* (6). In *Geddis*' case (5) LORD BLACKBURN said (3 App. Cas. 455) :

> " For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone ; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, ' negligence ' not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law."

In *Manchester Corporation* v. *Farnworth* (6) VISCOUNT DUNEDIN said ([1930] A.C. 183) :

> " The *onus* of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense."

In neither of those cases, nor in others where similar language is used, was the court concerned with a compensation clause. Where there is no such clause and where the legislature has authorised the execution of specific works, the court will be vigilant to see that an injured party is not deprived of his remedy, unless the language of the statute and the nature of the works authorised necessitate such a conclusion. In my view, quite different considerations arise in cases like the present, where the statute to be construed is not dealing with specific works, but is conferring a wide discretion on a statutory authority, necessarily involving interference with the legal rights of riparian owners, and is expressly providing a remedy by way of compensation for such interference.

It is not necessary for present purposes to attach any limitation to the word " injury " in s. 34 (3). It is sufficient to say that, in my view, it includes damage to property suffered by a riparian owner. Nor is it necessary to consider whether the sub-section would, on the proper construction of this statute, preclude an action based on allegations of negligence in the carrying out of works lawfully undertaken by the board in the exercise of its discretion under its statutory powers. The statement of claim alleged that what the defendants did was done " wrongfully and without right or title." Negligence was not an issue at the trial. During the course of the appeal we allowed the plaintiff to amend his statement of claim by adding the word " negligently " on the terms that he was confined to the particulars already delivered. These particulars do not, in my view, disclose a case of negligence in the execution of the works such as was envisaged in *East Suffolk Rivers Catchment Board* v. *Kent* (7) as affording a cause of action to an injured party. In that case no point was taken that the claim, based as it was solely on negligence, could only be maintained under s. 34 (3), although DU PARCQ, L.J., in the Court of Appeal made a passing reference to the sub-section and dismissed it as irrelevant ([1939] 4 All E.R. 182). In my view, the addition of the word " negligently " in the statement of claim does not alter the nature of the plaintiff's case as originally pleaded and as dealt with by the trial judge. It would, I think, be wrong for us on the material available, and without any finding by the learned judge, to hold that the operation decided on by the board in its discretion had been negligently carried out. I am, accordingly, of opinion that the learned judge was right in holding that the plaintiff's action was not maintainable.

Having regard to the conclusion at which I have arrived as to the effect of s. 34 (3) on the plaintiff's claim, it is unnecessary to decide whether, if the plaintiff's claim was maintainable, the board could have successfully relied on the Public Authorities Protection Act, 1893, as amended by the Limitation Act, 1939, s. 21 (1). The submission of the board was to the effect that the cause of action found by the learned judge consisted in the diversion of the course of the river and it was said that such a cause of action accrues at the moment of diversion and that damage is not a necessary ingredient therein. Accordingly, it was argued that, as no complaint is made of any act or default since January, 1944, the plaintiff's claim is statute barred. As to that I would only observe that, if this is the result, it adds one more to the many instances of injustice often resulting from this Act. For the reasons stated, I would dismiss this appeal.

SINGLETON, L.J. : The defendants are the catchment board for an area which includes the River Waveney. Between October, 1943, and Jan. 1, 1944, they carried out certain dredging and cleansing work in the river and they deposited the gravel, clay, etc., removed from the bed of the river on to the south bank. The plaintiff was the owner of a mill on the river and of a bridge which gave access to the mill from the north. In December, 1946, there came a flood and the bridge was washed away. The plaintiff alleged that the damage to his bridge was caused by the wrongful deposit by the board of large quantities of soil on the south bank, which prevented overflow water from the river safely escaping in time of flood. His action was based on nuisance. The board admit the deposit of soil and plead that the acts were done by them in the exercise of the powers conferred on them by the Land Drainage Act, 1930. They plead in para. 4 of the defence that the statement of claim discloses no cause of action, and in para. 5 they rely on the Limitation Act, 1939, s. 21 (1). The claim for an injunction was abandoned at an early stage. The damages claimed amounted to £200, but the hearing of the action before BYRNE, J., took more than three days and the argument in this court occupied most of four days.

BYRNE, J., accepted the evidence of the plaintiff in preference to that of the board's engineer. He found that the south side was the side of the river which was always regarded as the safety valve in time of flood—that was the side which flooded first and took off most of the flood water—and he drew attention to the channels on the low ground on that side. He was satisfied that the bridge collapsed because the flood waters scoured the by-pass channel and undermined the buttresses and that the flood water did that because the south bank had been raised between one foot and two feet by the dredgings taken from the river by the catchment board. The learned judge added (*ante*, p. 53) :

> " On the facts I have come to the conclusion that the catchment board, by their act, diverted the ordinary flood course of the river, and thus did an act which, had it been done by a riparian owner, would have rendered that riparian owner liable to an action, but, having regard to the terms of the

> statute, I am of opinion that no action based on nuisance will lie against the board, and that the plaintiff's only remedy is under s. 34 (3) of the Land Drainage Act, 1930."

On this ground and on the plea based on s. 21 (1) of the Limitation Act, 1939, he gave judgment for the board.

It is to be observed that there was no express plea that the plaintiff's remedy (if any) was under s. 34 (3) of the Act of 1930. It may be said that it is covered by paras. 3 and 4 of the defence. For myself, I should have preferred to see this pleaded as one answer of the board to the plaintiff's claim. Yet it is right to point out that the board do not admit that the plaintiff is entitled to compensation under s. 34 (3). Their contention is that he is not entitled either to damages or to compensation, unless he shows an actionable wrong or something which would have been actionable but for the statute, and they submit that that position never arose. The view of BYRNE, J., was that the board created a nuisance and that the damage to the plaintiff flowed from that. In this court the main submission of counsel for the plaintiff was based chiefly on the principle stated by LORD HATHERLEY (3 App. Cas. 450) and LORD BLACKBURN (*ibid.*, 456) in *Geddis* v. *Bann Reservoir Proprietors* (5) and on the statement of the law by VISCOUNT DUNEDIN in *Manchester Corporation* v. *Farnworth* (6), where he said ([1930] A.C. 183) :

> " When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The *onus* of proving that the result is inevitable is on those who wish to escape liability for nuisance . . . "

See also the observations of VISCOUNT SUMNER (*ibid.*, 195) and LORD BLANESBURGH (*ibid.*, 206, 207). Counsel for the plaintiff submitted that the board had not shown that the nuisance created was the inevitable result of their carrying out work which they were authorised to do, and that, consequently, the plaintiff had a right of action.

It is necessary to look carefully at the Land Drainage Act, 1930, which is an Act to amend and consolidate the enactments relating to the drainage of land, in order to see (*a*) what powers, rights and duties are given to catchment boards, (*b*) how the carrying out of those powers, rights or duties may affect various persons, and (*c*) whether any, and, if so, what, remedies are given to persons who may be affected by the operations. The River Waveney is a main river and thus, by s. 6 (1), the powers conferred by the Act on drainage boards can only be exercised by the catchment board. The most important sections of the Act are ss. 34 and 38. Wide powers are given to the board and it is clear that they have a discretion as to what work they shall undertake, and when, and, speaking generally, the way or manner in which they shall perform the work is left to them. It is equally clear from the nature of the work that the doing of it may cause nuisance and damage to a number of people. One cannot interfere with the course of a river, or even of a stream, without causing upset. The operation of dredging or cleansing a river or a ditch results in spoil which has to be put somewhere and that may create a nuisance. This was recognised by Parliament and s. 34 (3) provides that, where injury is sustained by any person by reason of the exercise by a drainage board of any of its powers under the section, the board shall be liable to make full compensation to the injured person in the manner provided. (I do not overlook the limitation imposed by s. 38 (1)).

In *Clowes* v. *Staffordshire Potteries Waterworks Co.* (8) MELLISH, L.J., said (8 Ch. App. 139) :

> " . . . if a public company or any individuals obtain an Act of Parliament which they say enables them to take away the common law rights of any person, they are bound to show that it does it with sufficient clearness."

I am satisfied that the remedy by way of compensation given by s. 34 (3) of the Act of 1930 was intended to cover the kind of case under consideration. I am not sure that it matters whether or not there was shown to be a violation of a legal right. My impression is that the intention of Parliament was to avoid lengthy and costly litigation on questions of this kind and to ensure that anyone who suffered damage in consequence of work done under the powers given by the section should have a right to compensation. After all, the work is undertaken for the benefit of persons in the area. They contribute to the cost of it directly or indirectly and, if one of them suffers damage from the operations, he should be entitled to compensation from the general fund. At least it would seem that, if damage was sustained through the operations, that would provide *prima facie* evidence of a right to compensation. I recognise, however, that there may be a distinction to be drawn between " damage," on the one hand, and " injury," as used in s. 34 (3), on the other hand. Moreover, it is not necessary to decide this point for the purposes of the appeal, for the judgment of BYRNE, J., was to the effect that there had been a violation of a legal right, and there was evidence which justified that conclusion. Examination of the Land Drainage Act, 1930, and of s. 34 in particular, leads one irresistibly to the view that Parliament recognised that there might be, and frequently must be, a nuisance created by the carrying out of works under the powers given by the section, and compensation for any damage sustained thereby is provided—quite a different case from the one with which LORD DUNEDIN was dealing in *Manchester Corporation* v. *Farnworth* (6). It is this which satisfies me that a person who sustains injury through the operations has no right of action for nuisance. On a fair reading of the section it is shown with sufficient clearness that the intention was that the remedy should be by way of compensation alone. I draw attention to the words of LORD DU PARCQ ([1949] 1 All E.R. 550) in *Cutler* v. *Wandsworth Stadium, Ltd.* (9).

This leaves untouched the question of negligence. No such issue was raised on the pleadings. At the close of the evidence application was made by counsel for the plaintiff for leave to amend the statement of claim by adding an allegation of negligence. This application was resisted and was refused. Before this court an application to amend was allowed, on the understanding that the plaintiff was limited to the particulars already delivered in the action. As I have said, a wide discretion is given to the board as to how and when they carry out works under the section. *Raleigh Corporation* v. *Williams* (10) is not wholly in point, but it is interesting to see the view of LORD MACNAGHTEN on a matter of this kind. He said ([1893] A.C. 550) :

> " It was argued on behalf of the respondents that if a drainage work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of the insufficiency of the outlet, or by reason of some other defect which a competent engineer ought to have foreseen and guarded against, or if the result of a drainage work is to damage a person's land by throwing water upon it which would not otherwise have come there—that is actionable negligence on the part of the municipality. This argument in their Lordships' opinion is wholly untenable. On the other hand, their Lordships do not agree with the argument of the appellants that municipalities are helpless instruments in the hands of the engineers they employ. They cannot indeed modify the engineers' plan themselves. That is no part of their business. But they may return the plan for amendment if they think that it is not desirable in the shape submitted to them. If, however, acting in good faith, they accept the engineers' plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute."

I draw attention, too, to *Colac* (*President, etc.*) v. *Summerfield* (11)) and, in particular, to the words of Lord Watson ([1893] A.C. 191). It seems to me that in order to establish a right of action against the catchment board the plaintiff must prove affirmatively that there was negligence in the manner of carrying out the work which had been undertaken. That must be alleged, sufficient particulars must be given, and proof supplied. In such circumstances, the damage would be shown to arise from the negligence of those carrying out the work rather than from the operations authorised by the section. It may be questionable how far it is worth while going into such matters in any particular case if the person who has sustained damage can recover full compensation under s. 34 (3). In the initial stages of the action it is probable that counsel had not the material on which to base a plea of negligence. If there had been such an allegation, it is difficult to see what particulars would have been given. After the board's engineer, Mr. Mobbs, had been cross-examined there was material on which it can be argued that he ought to have taken more care—and yet it can be said that, if the spoil had been placed on the opposite bank, someone else might have suffered damage. To establish a case of negligence it must be shown that there was neglect of some care which the board were bound to exercise towards someone, and it is not enough for the plaintiff to say that, if the spoil had been placed somewhere else, he would not have suffered in the way he did. The general position must be borne in mind, and the standard of care required is that of a reasonably competent man carrying out work of this kind with due regard for the rights of all. Unless there is shown to be a breach of that, the plaintiff does not prove negligence. I am not prepared to hold, on the evidence, that it is necessary in every such case that levels be taken before material is deposited on the bank of a river. It may be desirable in some cases, but that is far from saying that failure to take levels in a particular case amounts to negligence. Those responsible for the operations are entrusted with a certain amount of discretion as to how they do the work. It is not without importance to notice that no damage occurred for nearly three years after the deposit was made. I do not think that this court, on the material before it, ought to find negligence against the board.

Counsel for the plaintiff pressed on us that s. 34 (3) only applied to the *quantum* of compensation—an attractive argument in view of the wording of the sub-section—but I see no reason why we should not follow the law as stated in *Rhodes* v. *Airedale Drainage Comrs.* (12) and in *Hall* v. *Bristol Corporation* (13), which was adopted by Byrne, J. Assuming, as the learned trial judge found, that the plaintiff proved a nuisance created by the board, it arose from operations authorised by the statute and a remedy by way of compensation is provided by the statute. That I regard as an answer to the claim. I do not think it necessary to deal with the further point raised under the Limitation Act, 1939, s. 21 (1). I agree that the appeal should be dismissed.

JENKINS, L.J. : In order to maintain his action at all, it was necessary for the plaintiff to show that the deposit by the catchment board on the south bank of the River Waveney of the spoil raised in dredging the river above his mill was in the nature of an actionable wrong, which, if done by a person without statutory powers, would have entitled him to sue that person for the resulting flood-damage to his bridge. This question the learned judge decided in favour of the plaintiff, holding on the facts (*ante*, p. 53) that the board

> " . . . by their act diverted the ordinary flood course of the river, and thus did an act which, had it been done by a riparian owner, would have rendered that riparian owner liable to an action . . . "

For authority in support of this proposition he referred to *Menzies* v. *Breadalbane* (14) and *Bickett* v. *Morris* (15) as showing that " interference with a regular flood channel which formed part of the bed of the river " would be actionable at common law, whereas an erection on the bank of the river which merely prevented flood water from flowing at large over a riparian owner's and, without obstructing any existing flood channel, would not be actionable at common law by the person to whose land the flood water was diverted in consequence of the erection: see *Gerrard* v. *Crowe* (16) and *R.* v. *Pagham, Sussex, Sewers Comrs.* (17).

In his review of the authorities in *Gerrard* v. *Crowe* (16), Viscount Cave [1921] 1 A.C. 399) treated *Menzies* v. *Breadalbane* (14) as a case where there was

> " . . . a regular flood channel which, although dry when the river was low, became filled with water at times of flood ; and it is plain that such a channel forms part of the *alveus* of the river and cannot be obstructed."

He described (*ibid.*, 400) *Bickett* v. *Morris* (15) as " a case of injury to the *alveus*." He also expressed disapproval (*ibid.*, 399) of the view expressed by Lord Tenterden, C.J. (1 B. & Ad. 887) in *R.* v. *Trafford* (18) to the effect that no

> " . . . sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons . . . "

In *Gerrard* v. *Crowe* (16) the flood water diverted by the respondent's protective works from his land to that of the appellant seems formerly to have flowed from the river over the respondent's land and thence into the river again, but not by any defined channel, and the respondent's works were held by the Privy Council to afford the appellant no cause of action. I think it must, therefore, be regarded as settled that, to be actionable, an erection on the bank of a river must be shown to obstruct a defined channel through which flood water is accustomed to flow, and not merely to prevent flood water from flowing at large over land adjoining the river and thence back into the main stream, although this may be the course the flood water is accustomed to take.

After stating the law, as it seems to me, quite correctly, the learned judge expressed his finding in ambiguous terms in speaking, as he did (*ante*, p. 53) of the diversion of " the ordinary flood course of the river," which might refer either to the existence of a defined channel through which flood water normally went and which was obstructed by the deposit of spoil, or merely to the flowing of flood water at large over the land in question and from it back into the river below the mill, which was prevented by the deposit of spoil. I cannot say I am satisfied that the evidence justifies a finding to the former effect. The plans are inconclusive. They show what appear to be drainage channels traversing the marsh land, which unite and enter the river below the mill, but none of these channels seems to communicate with the river above the mill. These channels may, therefore, have been made simply for the purpose of draining off from the land in question any flood water which might happen to come on it, and never have performed the function of supplementary *alvei* for the river in time of flood. However, for the purposes of this appeal I am content to assume that the learned judge intended to find on the facts that the deposit obstructed a defined flood channel, and further to assume that his finding is justified by the evidence. On these assumptions it follows from what I have said above that the learned judge rightly held that the deposit of the spoil by the board would have constituted an actionable wrong at common law.

On the assumption that what was done by the board would, if done by a private individual, have constituted an actionable wrong, the next question is whether, as the learned judge has held, the effect of the Land Drainage Act, 1930, from which the board derives its existence and powers, is to deprive the plaintiff of the right of action he would otherwise have had against the board and leave him to the remedy by way of compensation provided by s. 34 (3) of the Act. It was argued for the plaintiff that he was not so deprived : (i) because the deposit of the spoil on the south bank in a continuous line (*i.e.*, without gaps, or without any adequate gaps, for the escape of flood water) constituted a nuisance to the plaintiff and the Act does not authorise the board to commit a nuisance (this being in substance the whole of the plaintiff's case as pleaded and as argued below, where leave to amend by alleging negligence was refused by the learned judge) ; and (ii) (an allegation of negligence on the same facts having been introduced by amendment with the leave of this court) because such deposit was a negligent act on the part of the board, and the statute does not authorise the board to commit negligent acts.

I do not think that the argument is really much advanced by describing what was done by the board as a nuisance. All that that means is that the deposit of the spoil on the south bank constituted a source of danger to the plaintiff's property in time of flood, to which the board was not entitled to subject him. Unless, however, the deposit had the effect of obstructing a defined flood channel, to the unobstructed benefit of which the plaintiff was entitled, any resulting flood damage to the plaintiff's property would be mere *damnum sine injuria,* so that the allegation of nuisance really comes to no more than an allegation of wrongful obstruction by the board of a defined flood channel. The allegation of negligence, if I may be allowed, so to speak, to write it out in full, amounts, as I understand it, to an allegation that the board, being under a duty to the plaintiff not to damage his property by their drainage operations, wrongfully and in breach of that duty deposited the spoil in a continuous line on the south bank, when it knew or ought to have known that the consequent heightening of the south bank would have the effect of diverting flood water to the opposite side of the river, and increasing the flow of water through the by-pass channel in time of flood, with possible damage to the plaintiff. But here, again, the board's duty to the plaintiff in this matter (on breach of which the claim in negligence depends) cannot, so far as I can see, be put higher than a duty to refrain from blocking any defined flood channel to the unobstructed benefit of which the plaintiff was entitled. If the deposit did obstruct any such channel, the board (apart from the Act) would be equally liable, whether or not the board knew or ought to have known of the existence of such a channel and the probable consequences of blocking it, and the allegation of negligence (or, in other words, the allegation that the board knew or ought to have known of the existence of the flood channel and the probable consequences of its obstruction), therefore, adds nothing to the cause of action, except in so far as it affords ground for the contention that the wrong here complained of, being in the nature of a negligent act, is, according to the authorities to which I am about to refer, an act in respect of which the board is not entitled to claim immunity from suit by virtue of the Land Drainage Act, 1930. If, on the other hand, all the deposit did was to prevent flood water from flowing at large over the marshland to the south of the river, then there was no duty to the plaintiff in the matter, and the question of negligence does not arise. In this latter alternative, any claim which the plaintiff might have could only be in respect of some new right conferred by the statute, for breach of which the remedy by way of compensation conferred by the statute would plainly be exhaustive.

Therefore, whichever way the case is put, I think that the question is substantially the same, namely, whether the Land Drainage Act, 1930, prevents the plaintiff from suing the board for the otherwise actionable wrong of depositing the spoil on the south bank so as to obstruct a defined flood channel (or, in other words, a channel forming part of the bed of the river in times of flood), to the unobstructed benefit of which the plaintiff was entitled for the protection of his property from flood damage, and substitutes for the ordinary right of action a claim to compensation under s. 34 (3). The grounding of the plaintiff's case on nuisance or negligence (as opposed to trespass to the plaintiff's rights in respect of the flood channel as a riparian owner) is, in effect, an invocation of the general principle that Acts of Parliament by which statutory powers are conferred should not be construed as absolving those invested with them from liability, enforceable by action in the courts, in respect of any avoidable injury to others occasioned by the exercise of the powers.

We were referred to a number of well-known authorities in which this principle has been enunciated and illustrated, and in particular to *Geddis* v. *Bann Reservoir Proprietors* (5), where LORD HATHERLEY said (3 App. Cas. 450):

> "... I apprehend, that the true construction of all such powers given to companies is this: You *may* carry out your work to its full extent, and in some cases you *must* carry it out to its fullest extent, in the manner provided by the Act, but in so doing you shall not create any needless injury —you shall use all those precautions against injury to others which you would use against injury to yourselves in carrying on a similar work, and if we find that in carrying out your powers damage has been done by you, the law will say that the powers which you can exercise shall be exercised for the prevention of mischief."

LORD BLACKBURN said (*ibid.*, 455):

> "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law."

The cases cited on this aspect of the matter also included *Manchester Corporation* v. *Farnworth* (6) where VISCOUNT DUNEDIN said ([1930] A.C. 183):

> "When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The *onus* of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense."

We were also referred to *East Suffolk Rivers Catchment Board* v. *Kent* (7), where the earlier authorities are reviewed.

The general principle is thus well settled, but its application in any particular case must depend on the object and terms of the statute conferring the powers in question (including the presence or absence of a clause providing for compensation and the scope of any such clause), the nature of the act giving rise to the injury complained of, and the nature of the resulting injury. I venture to think that the questions which arise in any given case of this kind are substantially these. (i) Was the act which occasioned the injury complained of authorised by the statute? (ii) Did the statute contemplate that the exercise of the powers conferred would or might cause injury to others? (iii) If so, was the injury complained of an injury of a kind contemplated by the statute? (iv) Did the statute provide for compensation in respect of any injury of the kind complained of which was sustained through the exercise of the powers conferred? If the answers to all these questions are in the affirmative, then I think it must follow that the party injured is deprived of his right of action and is left to his remedy in the form of compensation under the statute.

To deal with the questions, in the above order, in relation to the present case,

(i) The board clearly had power to dredge the river and deposit the spoil on the south bank under s. 6 (1), s. 34 (1) and s. 38 (1) of the Act. (ii) I think it is manifest that the Act did contemplate that the exercise of the powers conferred on the board would or might cause injury to others. It is clear that operations of the kind contemplated by s. 34 (1) must inevitably interfere with the rights of riparian owners, by altering the flow of the river and its behaviour in times of flood or drought, quite apart from the direct interference with rights of property involved in some of the works specifically mentioned. The presence of the provision in s. 34 (3), to the effect that the board must make full compensation where injury is sustained by any person by reason of the exercise by the board of any of its powers under the section, in itself shows that the Act contemplates that legal rights may be infringed, and the provisions of s. 61 (1) which prohibit the board, except with the consent of the undertakers, from doing any work which, whether directly or indirectly, interferes with, or with the use of, the works or property of various specified types of undertaking in such manner as to affect injuriously the said works or property, necessarily implies that in other cases the board may execute works notwithstanding that they interfere, or will interfere, with property so as to affect it injuriously. (iii) I think that the injury complained of by the plaintiff was clearly of a kind contemplated by the Act. It was an injury in the shape of flooding (*i.e.*, an injury in the matter of drainage in the statutory sense) occasioned by a drainage operation in the shape of the dredging and deposit of spoil. I do not think that it can be removed from the category of injuries contemplated by the Act merely on the ground that the spoil could have been deposited elsewhere or differently disposed on the south bank, or on the ground that the board knew or ought to have known that the spoil, deposited as it was, would have the effect of increasing the danger of damage to the plaintiff's property in times of flood.

There is, I think, an important distinction for this purpose between statutory powers to execute some particular work or carry on some particular undertaking (*e.g.*, the construction and operation of the reservoir, in *Geddis* v. *Bann Reservoir Proprietors* (5), the provision of hospitals, in *Metropolitan Asylum District* v. *Hill* (3), and the construction and operation of the generating station, in *Manchester Corporation* v. *Farnworth* (6)), and statutory powers to execute a variety of works of specified descriptions in a given area (the works in question being of such a kind as necessarily to involve some degree of interference with the rights of others) as and when the body invested with the powers deems it necessary or expedient to do so in furtherance of a general duty imposed on it by the Act (*e.g.*, the powers conferred on the board in the present case by s. 6 (1), s. 34 (1) and s. 38 (1) of the Land Drainage Act, 1930, to execute works of the various descriptions therein mentioned in furtherance of the general duty, imposed on it by the Act (as appears by necessary implication from s. 12), of maintaining the main river in a due state of efficiency). In cases of the former class, the powers are, in the absence of clear provision to the contrary in the Act, limited to the doing of the particular things authorised without infringement of the rights of others, except in so far as any such infringement may be a demonstrably necessary consequence of doing what is authorised to be done. Thus, power to construct and operate a reservoir, and pass water from it down a prescribed channel, does not authorise the passing of water down the channel without keeping it in a fit condition to receive the water so as to avoid the flooding of adjoining lands (*Geddis*' case (5)) ; power to provide hospitals does not authorise the provision of a fever hospital in a populous place in which it will be a nuisance to neighbouring inhabitants (*Hill's* case (3)) ; and power to construct and operate a generating station does not authorise the undertakers to carry it on so as to create a nuisance by smoke and fumes, except in so far as it may be demonstrably impossible to carry on the generating station without creating such a nuisance (*Farnworth's* case (6)). In cases of the latter class, such as the present case, it is obvious that, if the powers are subject to an implied limitation to the effect that they are to be exercised so as to not cause any avoidable infringement of the rights of others, the powers will in great measure be nullified and the manifest object of the Act will be largely frustrated. Thus, if the board in the present case could be sued in the courts, every time they dredged a reach of the river and deposited the spoil on one or other of the banks, by any riparian owner who could show that the effect of what had been done was to obstruct a flood channel and thereby increase the risk of damage to his premises by flood water, on the footing that this was an actionable wrong, notwithstanding the statute, the board could in every such case be restrained by injunction from carrying out the work. The injury, or apprehended injury, would, moreover, always be avoidable by abandonment of the particular project, however beneficial that project might be to riparian owners other than the complainant, and the board would, therefore, never be able to defeat the complainant on the ground that the injury or apprehended injury was an unavoidable consequence of the exercise of its statutory powers.

In the absence of any provision in the Act for compensating persons injured by the exercise of the board's powers, difficult questions might arise as to the extent (if any) to which the Act should be regarded as depriving a person thus injured of his ordinary remedy in the courts, inasmuch as he would, if so deprived, be wholly without remedy, but the Act including, as it does, a provision for compensation, in the shape of s. 34 (3), the considerations stated above seem to me to lead irresistibly to the conclusion that the intention of the Act was to make the board, acting in good faith and within their powers, the sole judge of what was necessary or proper to be done in the way of drainage operations for the benefit of their catchment area as a whole, and, within limits which I will endeavour to define, to deprive persons injured by any exercise of the board's powers of their ordinary remedy by way of action and substitute the remedy by way of compensation prescribed by s. 34 (3).

The limits outside which the ordinary rights of action remain are, I think, these. (*a*) The injury must be the product of an exercise of the board's powers as such, as opposed to the product of some negligent act occurring in the course of some exercise of the board's powers but not in itself an act which the board are authorised to do ; *e.g.*, an injury caused by flooding on one side of the river due to the heightening by the board of the bank on the other side would be a proper subject of compensation, as opposed to action in the courts, but an injury caused by the negligent driving of one of the board's lorries bringing materials to the site would be actionable in the ordinary way. (*b*) The injury must be the product of the operation which the board intended to carry out, and not of some unintended occurrence brought about in the course of carrying out the work owing to negligence in carrying it out. Thus, if the board dig a drain which, when dug as planned, has the effect of depriving a riparian owner of the full supply of water from the river to which he is entitled, the remedy of the riparian owner will be compensation under the Act, not action in the courts, but, if, through negligence in digging the drain, the board undermined and breached a dyke, and thereby inundated the countryside, I apprehend that the board could not claim, by way of defence to an action by a person whose land was flooded, that the breaching of the dyke brought about by its negligence, and forming no part of the operation in hand, was done in exercise of its statutory powers, and was, therefore, a matter for compensation, not action. (*c*) The operation must not be one which, on the face of it, is so capricious or unreasonable, or so fraught with manifest danger to others, that no catchment board acting *bona fide* and rationally, not recklessly, would ever have undertaken it. The last of these three limitations or requirements inevitably introduces questions of degree, but, as will be seen from the terms in which I have stated it, I think that a very strong case of something amounting to reckless conduct on the part of the board must be made out to enable an action to be maintained on account of an injury which, in the other two respects I have mentioned, is a matter for compensation under the Act as opposed to action in the courts.

I do not think that this view involves any inconsistency with the authorities on the subject of negligence in the exercise of statutory powers. None of these decisions has gone to the length of holding—and I do not think any of the parties to them would have argued—that under the Land Drainage Act, 1930, or under any Act in comparable terms, conferring powers which involve infringement of the rights of others and providing for the compensating of persons injured by the exercise of those powers, any error of judgment or lack of foresight whatsoever on the part of the statutory authority, in the planning of an operation within its powers, sufficies to make an injury resulting from the operation, when completed as planned, a matter for action in the courts, notwithstanding the statutory provisions for compensation ; or, in other words, so far as the Land Drainage Act, 1930, is concerned, to prevent the injury in question from being an injury sustained " by reason of the exercise by a drainage board of any of its powers " within the meaning of s. 34 (3). In the present case the injury sustained by the plaintiff was sustained by reason of a normal drainage operation carried out in the usual way, *i.e.*, the operation of dredging and depositing the spoil along the bank. The injury might have been avoided if the spoil had been differently disposed. The effect of depositing the spoil on the south bank was to make that bank a foot or two higher than the north bank, instead of a foot or two lower as formerly, with the obvious consequence of increasing the liability of the north bank to flooding. The prospect of serious damage to the plaintiff in times of flood, through the increased flow along the by-pass channel spanned by his bridge, was less apparent, and clearly did not amount to an imminent risk, since the work was completed in January, 1944, and the damage did not occur till December, 1946. I cannot regard the facts as bringing home to the board anything worse than an error of judgment in under-estimating the effect which the heightening of the south bank at this particular point on the river might have in times of severe flood, and, in my view, an error of judgment of that order falls very short of the degree of negligence or reckless conduct on the part of the board which is required to remove the injury sustained from the category of injuries covered by the compensation provision.

(iv) It follows from what I have said above in dealing with the other three questions that, in my view, the provision for compensation which the Land Drainage Act, 1930, contains in the shape of s. 34 (3) does provide for compensation in respect of an injury of the kind complained of by the plaintiff in this case.

Having thus arrived at affirmative answers to the four test questions stated above, I am of opinion that the learned judge was right in his conclusion to the effect that the action was not maintainable, and that the plaintiff's proper and only remedy for the injury of which he complained was to claim compensation under s. 34 (3) of the Act. The learned judge also dealt with and upheld the board's contention that the action, if otherwise maintainable, would in any event be barred by the Limitation Act, 1939, s. 21 (1), on the ground that the cause of action accrued once and for all on the date when the deposit of spoil on the south bank was completed, *i.e.*, more than a year before action brought. This is a point of considerable technicality and difficulty, and I prefer to refrain from expressing on it an opinion which, either way, could not affect my conclusions as to the result of the present appeal, which, for the other reasons I have endeavoured to state, in my view fails and should be dismissed.

Appeal dismissed with costs.

Solicitors : *Butt & Bowyer*, agents for *Daynes, Keefe & Co.*, Norwich (for the plaintiff) ; *Church, Adams, Tatham & Co.*, agents for *G. G. Sprake*, Norwich (for the catchment board).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

MANCHESTER ROYAL EXCHANGE, LTD. *v.* THE MANCHESTER, LTD. AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ.), November 22, 23, 1949.]

Landlord and Tenant—War-time lease—Termination twelve months after date of end of emergency—Termination also on happening of specified events—Validation of War-time Leases Act, 1944 (*c.* 34), *s.* 1 (1) (2) (3).

The tenants, a limited company, carried on a restaurant business on premises leased to them under three leases. On June 27, 1941, being at that time in serious financial difficulties, the tenants executed a scheme of arrangement under the Companies Act, 1929, s. 153, and after obtaining the sanction of the court entered into a deed to give effect to the scheme. As part of the scheme the landlords under the deed agreed to accept a substantial reduction in rent and to extend the terms of the leases, which were due to expire in December, 1942, until the expiration of the scheme period. The relevant clauses of the scheme were as follows : " (1) ' The scheme period ' means the period during which this scheme shall continue in force under the provisions hereinafter contained . . . (3) This scheme . . . shall henceforth have effect and continue in force until the expiration of twelve calendar months after the date on which the emergency that was the occasion of the passing of the Courts (Emergency Powers) Act, 1939, is declared by an Order in Council to have come to an end Provided nevertheless that this scheme shall determine and *ipso facto* cease to be binding on the earlier happening of any of the following events : (i) If an order is made or resolution passed for the winding-up of the company : (ii) If an execution or distress be levied and not . . . . satisfied within fourteen days : (iii) If a receiver of any part of the company's property or assets is appointed: (iv) If a resolution to the effect that owing to losses . . . the company . . . cannot any longer be usefully carried on is passed unanimously by the committee of creditors . . . " Since 1941 the financial position of the tenants had greatly improved and they had accumulated an undistributed surplus of £20,000 after allowing for unpaid creditors and other contingencies, and the landlords now contended that the term granted under the deed was void at law because of uncertainty and was not validated by the Validation of War-time Leases Act, 1944.

HELD : at law the leases provided for by the scheme of arrangement were void for uncertainty, but they were validated by the Validation of War-time Leases Act, 1944, s. 1 (1), and must have effect as if granted for a term of ten years, although they were determinable, not only on the happening of one or more of the events specified in s. 1 (2) of the Act, but also on the happening of the events specified in the proviso to cl. 3 of the scheme.

It was agreed that the date of the commencement of the period of ten years imported into the leases by s. 1 (1) of the Act should be that of the commencement of the term covered by the agreement (in the scheme) for the tenancies for the duration of the war emergency, *i.e.*, June 27, 1941.

[AS TO THE STATUTORY PROVISIONS FOR THE VALIDATION OF WAR-TIME LEASES, see HALSBURY'S STATUTES, Continuation, Vol. 37, pp. 341-344 ; and FOR CASES, see DIGEST, 2nd Supp., Vols. 30, 31, pp. 19-21, Nos. *328a-328h.*]

Cases referred to :

(1) *Lace* v. *Chantler*, [1944] 1 All E.R. 305 ; [1944] K.B. 368 ; 113 L.J.K.B. 282 ; 170 L.T. 185 ; 2nd Digest Supp.

(2) *Great Northern Ry. Co.* v. *Arnold*, (1916), 33 T.L.R. 114 ; 30 Digest 463, *1249.*

Appeal by the landlords from an order of Sir Leonard Stone, Vice-Chancellor of the County Palatine of Lancaster, dated July 11, 1949.

The tenants, a company known as "The Manchester," Ltd., carried on a restaurant business in Manchester on premises which they leased from the landlords, Manchester Royal Exchange, Ltd. Being unable to pay their debts out of their assets, the tenants entered into a scheme of arrangement under the Companies Act, 1929, s. 153. The scheme, which was dated June 27, 1941, A provided *inter alia* that unsecured creditors were not to be paid during the scheme period, nor were their debts to carry interest. "The scheme period" was defined as "the period during which the scheme shall continue in force under the provisions hereinafter contained." Clause 3 provided: "This scheme when sanctioned by the court under s. 153 of the Companies Act, 1929, shall henceforth have effect and continue in force until the expiration of twelve B calendar months after the date on which the emergency that was the occasion of the passing of the Courts (Emergency Powers) Act, 1939, is declared by an Order in Council to have come to an end, Provided nevertheless that this scheme shall determine and *ipso facto* cease to be binding on the earlier happening of any of the following events: (i) if an order is made or resolution passed for the winding-up of the company; (ii) if an execution or distress be levied and C not paid out or satisfied within fourteen days; (iii) if a receiver of any part of the company's property or assets is appointed, or (iv) if a resolution to the effect that, owing to losses incurred in carrying on the business of the company, the same cannot any longer be usefully carried on is passed unanimously by the committee of creditors to be appointed under the provisions hereinafter contained; (v) if the company acts in contravention of cl. 6 or cl. 7 hereof." D By cll. 6 and 7 the company was not to distribute any profits to its members by way of dividend or bonus, and the directors were not to receive any fees. By cl. 9 it was agreed that after the scheme had taken effect the tenants and the landlords would execute a deed whereby the rent payable in respect of the restaurant premises should be substantially reduced and the terms of the three leases, which would have expired at the end of 1942, "shall be modified as E follows: (A) the respective terms of years thereby granted shall be extended until the expiration of the scheme period . . ." The scheme was sanctioned by the court on Aug. 25, 1941, and the deed between the tenants and the landlords was executed on Oct. 31, 1941. The deed, after reciting that the scheme had been approved, stated, by cl. 2: "Leases Nos. 1, 2, and 3, shall be deemed to be extended and modified as provided by the scheme." F

Since June, 1941, the affairs of the tenant company had prospered, and, after sums had been set aside to provide for the unpaid creditors and to answer the issued capital of the company, there was an undistributed surplus of about £20,000. The directors of the tenant company had, however, forborne to pay themselves or to distribute any of the profits which had accumulated.

The landlords presented a petition seeking directions from the court on the G true construction of the deed, and they contended that the leases, contemplated by the scheme and duly executed, were void at law. Holding that the petition involved a repudiation by the landlords of the fact that they were bound by the deed, the Vice-Chancellor dismissed the petition *in limine*. The Court of Appeal now overruled his decision and considered the matters raised by the petition, the main questions being: (i) Having regard to the general law, as H laid down in *Lace* v. *Chantler* (1), was the term granted or purported to be granted by the deed of Oct. 31, 1941, void at law for uncertainty? (ii) If it was void, was the effect of the Validation of War-time Leases Act, 1944, to revive it and to give effect to it, subject to the terms and on the conditions fixed by the Act? The case is reported only on these points. Dealing with subsidiary questions, the Court of Appeal held: (*a*) that it was impossible to read into the scheme of arrangement a provision that the "scheme period" should end when the tenants' affairs were such that, not only could the creditors be paid, but also there would remain a balance at least equal to the paid-up capital of the company ; (*b*) the scheme contemplated an Order in Council under the provisions of the Courts (Emergency Powers) Act, 1939, s. 7 (3), which would have the effect of putting an end to that Act, and, as that had not occurred, the period, as defined in the scheme, had not come to an end ; (*c*) on the true construction of the agreement, the parties intended that the scheme should continue until the end of the war emergency, with the proviso that it should terminate on the earlier happening of any one of the five events specified in the proviso to cl. 3 of the scheme. On the main questions the Court of Appeal held that the leases granted by the deed of Oct. 31, 1941, were at law void for uncertainty, but were validated by the Act of 1944.

Neville Gray, K.C., and *I. Bell* for the landlords.
Milner Holland, K.C., and *Forrester* for the tenants.

SIR RAYMOND EVERSHED, M.R., stated the facts and, after dealing with the subsidiary questions, continued: It now remains to deal with the main issue which, I think, is somewhat difficult. The deed of October, 1941, was executed by both landlords and tenants and purported to be, and was treated by the two executing parties as being, the carrying out of what the scheme provided. It might be, if the argument of counsel for the landlords was to be accepted, that the result of that scheme was to create no estate in the tenants. In that event, counsel for the tenants said : "The landlords have failed to do what the scheme provided they should do, and I can claim against them that they are in breach of the terms of the scheme." That, I think, is a difficult argument to sustain, seeing that this deed was executed by the tenants themselves and on the face of it purported to be, and must be taken to be, the carrying out of the scheme. There is, however, this point. The definition of the scheme period in cl. 3 was to provide at what date the terms of the scheme as a whole should cease to operate, *e.g.*, at what date the creditors would be able to claim payment. So far as the execution of the new lease was concerned, the introductory language of cl. 9 of the scheme in terms says that the two parties, the tenants and the landlords, should "execute such deed or deeds as may be requisite to give effect to the following provisions," including a provision for extending the term of the lease until the expiration of the scheme period. I think it is certainly an arguable point that what that clause was providing for was that the parties should execute a deed or deeds in whatever was the appropriate form to give legal effect to the extension contemplated. In *Lace* v. *Chantler* (1), LORD GREENE, M.R., cited ([1944] 1 All E.R. 306), and, I think, so as to make it part of his judgment and with his approval, a passage from FOA ON LANDLORD AND TENANT, 6th ed., p. 115, at the end of which occurs the following language :

> "Consequently, a lease to endure for 'as many years as A. shall live,' or 'as the coverture between B. and C. shall continue,' would not be good as a lease for years; although the same results may be achieved in another way by making the demise for a fixed number (ninety-nine for instance) of years determinable upon A.'s death, or the dissolution of the coverture between B. and C."

Counsel for the tenants says that, if the deed in its present form does not produce a valid and effective result, the obligation of the landlords was to execute a lease for some fixed term, but determinable on the happening of the several events mentioned, and that by that device effect could be given to the scheme, and, indeed, within the language of FOA ON LANDLORD AND TENANT, the same result would have been achieved, and he contends that we ought to construe the deed as though it had been in that form. As a matter of construction, it seems to me that he is faced with an insuperable difficulty, because he must provide an answer to the question : " What is the fixed term which the document, on its true construction, provides ? " That is a question which it is impossible to answer. I do not, therefore, think that, even if we were to adopt the hook and crook method of ROWLATT, J., in *Great Northern Ry. Co.* v. *Arnold* (2), we could arrive at a construction of the document which would insert some figure of a term certain and thereby get over all the difficulties. I think, however, that the tenants might, in some other proceedings, ask either for specific performance of the agreement or rectification of the deed, which is in a sense the same thing, so as to give effect to that for which the parties bargained. I am not sure in the circumstances that it is necessary to express a concluded opinion on this matter, and, in any case, counsel for the tenants has conceded that, whatever form is adopted, effect must be given to the proviso. Adopting the language of cl. 9, " such deed or deeds as may be requisite to give effect to the following provisions," any difficulty could be overcome by providing that the lease for the extended term should in any case be determinable at the option of the landlords on the happening of any of these events. In the circumstances I do not think that the view which I take, that the Validation of War-time Leases Act, 1944, does apply, involves the difficulty which counsel for the landlords suggested it did in regard to the proviso.

I, therefore, approach the question of the application of the Validation of War-time Leases Act, 1944, on the view that here is an agreement for the grant of a term for the duration of the war with a proviso for cesser of the term on the happening of any one of the events set out in the proviso to cl. 3 of the scheme. Nevertheless, it is argued for the landlords, that is not an agreement within the language *totidem verbis* of the Act. The Act is in its title described as :

> " An Act to validate agreements purporting to grant or provide for the grant of tenancies for periods depending on the duration of the war . . . "

Section 1 (1) provides :

> " Subject to the provisions of this section, any agreement, whether entered into before or after the passing of this Act, which purports to grant or provide for the grant of a tenancy for the duration of the war shall have effect as if it granted or provided for the grant of a tenancy for a term of ten years, subject to a right exercisable either by the landlord or the tenant to determine the tenancy, if the war ends before the expiration of that term . . . "

In s. 1 (2) we find the definition of " the duration of the war." It means :

> " . . . a period which, on the proper construction of the words used in the agreement whatever they may be, ends with, or within, a specified time after . . . "

One of the events specified in the sub-section is the end of hostilities as respects any State or all States with which His Majesty is at war. The validating effect, therefore, of the Act, reading sub-ss. 5 (1) and (2) together, is limited to cases where an agreement has been made purporting to grant a tenancy for a period which, on the proper construction of the words used, ends with one of the specified events. Counsel for the landlords says that is not true of this agreement, as it provides for the grant of a tenancy for a period which ends, not only with the end of hostilities, but also with the earlier happening of certain other events, and, therefore, it is not within the Act. He reinforces his argument by referring to s. 1 (3) (*a*), where special provision is made for the cases, for example, of

> " (i) a tenancy for a specified term or for the duration of the war, whichever is the shorter ; (ii) a tenancy for a specified term or for the duration of the war, whichever is the longer."

Those examples, he says, emphasise that, save in the cases specified, this Act is intended to apply only to cases where the term purported to be granted or agreed to be granted is exclusively referable to the duration of the war.

My first answer to that argument is that the Act does not, in terms, say "exclusively referable." In any event, I think that the present is a case in which the term granted was, on the proper construction of the words used, referable to the duration of the war. In other words, it was a grant for a period which ended or was intended to end on the happening of one or other of the war events, and that is not the less true because provision is also made for the earlier cesser or determination on the happening of certain other specified events. I think that a lease for twenty-one years, but expressed to be determinable on the earlier happening of certain specified events, is none the less truthfully to be described as a twenty-one years' lease. Therefore, I think that it is not true to say that this agreement, which contemplates an extension for the duration of the war, is outside the ambit of the Act because it might be earlier determined. After all, it has to be borne in mind that what is on the face of it a clear and intelligible bargain is rendered void only by reason of the fact that the term "for the duration of the war emergency" was so uncertain as to be incapable of granting an estate by demise. Notoriously, such provisions found their way into all kinds of bargains and documents during the war, and the object of the Act was to give effect to the intention where it was possible to do so. I do not find any difficulty in substituting, as the Act in s. 1 (1) says must be done, the fixed term, in these leases, subject to the right of earlier determination. If the result were to create inconsistency, there might be difficulty, but this agreement, it seems to me, can perfectly well be read as an agreement (as the Act provides) for a fixed term of ten years, subject, first, to the right of either party to determine it by one month's notice on the earlier ending of the war emergency, and, secondly, to being terminable or liable to cease on the earlier happening of one of the other events named in the agreement. Again it is important to bear in mind that, whereas the end of the war emergency is an event which must some day happen, these other events which form the subject of the proviso might never happen at all. I, therefore, think that essentially there are here leases or there is an agreement to grant leases for a period which, on the proper construction of the words used in the agreement, ending within a specified time after the end of the war emergency.

Having reached that conclusion, it follows that the tenants are entitled to continue in their secure, if austere, enjoyment of the restaurant until the period of ten years ends, or, as I construe it, the Courts (Emergency Powers) Act, 1939, comes to an end, or on the happening of one or other of these events. That still leaves the small point, from what date does the ten years' period begin? The matter is not capable of much elaboration, but, after hearing the argument for the landlords, counsel for the tenants was not disposed to quarrel with the scheme date, *viz.*, June 27, 1941, as being the proper starting point. He was unable to contend that the ten years' period should begin at the end of the existing lease, which was December, 1942. The logic and good sense of the matter seem to me to point very strongly to the scheme date more particularly, because, by the terms of the scheme itself, the reduced rental which was part of the bargain was expressly provided to begin on the scheme date. So, without saying more, I pronounce in favour of June 27, 1941, and the result is, applying myself to the question asked on the petition, that, apart from the Validation of War-time Leases Act, 1944, the document of Oct. 31 was void at law, but that the Act was effective to validate it by making the term purported to be granted thereby a term of ten years from June 27, 1941, subject to the right of either party to determine it in the manner provided by s. 1 (1) of the Act, and subject to the appropriate provision for earlier determination on the happening of the events specified in the proviso to para. 3 of the scheme. The result is that this appeal must be allowed.

COHEN, L.J. : I am of the same opinion. The deed, which was executed pursuant to the scheme, merely provides that the leases shall be deemed to be extended and modified as provided by the scheme. What, therefore, we have to consider is the true meaning and effect of the scheme. I approach this document bearing in mind that it is in the nature of a commercial document and not a conveyancing deed. Clause 9, so far as material, is in these terms :

> " So soon as practicable after this scheme has taken effect the company and the landlord will do such acts and things and execute such deed or deeds as may be requisite to give effect to the following provisions . . . (iii) The said leases of Dec. 24, 1921, Mar. 20, 1928, and Oct. 25, 1934, shall be modified as follows :—(A) the respective terms of years thereby granted shall be extended until the expiration of the scheme period . . . (C) As from the scheme date until the determination of the said leases so modified as aforesaid, the total rent payable thereunder shall be at the rate of £2,000 per annum the same to include all other charges expressed to be payable thereunder in addition to the rents thereby reserved."

This refers back to the definition in cl. 1 of the expression, " the scheme period," and through that definition to cl. 3. Clause 1 defines the scheme period as meaning :

> " the period during which this scheme shall continue in force under the provisions hereinafter contained."

Clause 3 is in these terms :

> " This scheme when sanctioned by the court under s. 153 of the Companies Act, 1929, shall henceforth have effect and continue in force until the expiration of twelve calendar months after the date on which the emergency that was the occasion of the passing of the Courts (Emergency Powers) Act, 1939, is declared by an Order in Council to have come to an end, Provided nevertheless that this scheme shall determine and *ipso facto* cease to be binding on the earlier happening of any of the following events . . . "

The specified events are then set out.

As I read cl. 3, it provides for a period which is defined by the words " until the expiration of twelve calendar months after the date . . . ," and then goes on to provide that in certain specified events the term thus created shall determine and cease prior to the expiration of the period. Counsel for the landlords, however, says that it must be read as an agreement to grant a lease the term of which shall be one of six alternative periods. He bases this argument on the definition of the scheme period in cl. 1, and, particularly, on the words " during which this scheme shall continue in force." In other words, he is seeking to read " scheme period " as meaning one or other of the six periods which he finds in cl. 3. I am unable to accept this argument. As I read the scheme the lease is to be for a term as defined in cl. 3, determinable, however, on the occurrence of any of the five specified events therein set forth. So construed, the tenancy is clearly within the mischief of *Lace* v. *Chantler* (2). The question, therefore, is, whether on this construction the tenancy falls within the Validation of War-time Leases Act, 1944 ? In my view, it does. Counsel for the landlords admitted that, if the tenancy was for the period defined in cl. 3 of the scheme and was not determinable in the specified events, it would be within the protection of the Act. He says that, having regard especially (*a*) to the definition of the term, " the duration of the war " in s. 1 (2) of the Validation of War-time Leases Act, 1944, and (*b*) to the express provision in s. 1 (3) making the Act applicable to certain tenancies which were not purely and simply tenancies for the duration of the war, the Act only applies to tenancies for the duration of the war without any qualification, unless the tenancy in question is within the express terms of sub-s. (3). I am unable to accept that view. I agree with Sir Raymond

Evershed, M.R., that there is nothing in principle or in the Act to compel us to refuse to apply the Act to a tenancy expressed to be for the duration of the war merely because in certain events the term thus created might come to an end on the occurrence of these events before the end of the war. I think the explanation of s. 1 (3) is that it was thought advisable to make it plain that the Act was to apply to these tenancies, notwithstanding that they might be described in one sense as a tenancy for some other period than the duration of the war. I do not think we should be justified in excluding from the ambit of the Act tenancies which are expressed to be for the duration of the war merely because that term was liable to be brought to an end by an event occurring before the end of the war.

The Act is silent on the subject as to when the term of ten years is to start, but it seems to me it must be intended to refer to the commencement of the term covered by the agreement for a tenancy during the duration of the war. In the present case it is plain from cl. 9 (iii) (C) that it is intended that the term created by the modified lease could commence on the scheme date, *i.e.*, June 27, 1941. I also desire to express my concurrence with the observations which Sir Raymond Evershed, M.R., has made on the inclusion of a provision in the order that the lease should be determinable in the events specified in cl. 3 of the scheme. As at present advised, I do not read the Act as affecting the provisions of the agreement further than is required to give effect to the provision of s. 1 thereof. For these reasons I agree that the appeal must be allowed.

ASQUITH, L.J.: I also agree. The difficult question is whether the Validation of War-time Leases Act, 1944, applies to these extended leases. On that point I have come to the same conclusion as my Lords. These leases seem to me to have been leases for the duration of the war within the precise definition of that term contained in s. 1 (2) (*c*). The main argument to the contrary was that a tenancy for the duration of the war within the meaning of that sub-section means, and means only, a tenancy terminated by the end of the war as therein defined and by no other event, and, therefore, excludes a tenancy terminated by the end of the war or the earlier occurrence of another named event. The answer to this seems to me to be that a tenancy otherwise complying with the definition of a tenancy for the duration of the war does not forfeit that character merely by reason of a proviso that it is to be defeasible before the end of the war on the earlier occurrence of certain named events. Nor, for the reasons given by my Lords, to which I have nothing to add, do I think that the presence of s. 1 (3) alters this conclusion. I agree with the order proposed.

Appeal allowed. Declaration in the terms of the judgment. Landlords to receive half the costs of the appeal. No order as to costs in lower court.

Solicitors: *Bower, Cotton & Bower*, agents for *Slater, Heelis & Co.*, Manchester (for the landlords); *Hall, Brydon, Harvey & Egerton*, agents for *Hall, Brydon & Chapman*, Manchester (for the tenants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

MOODIE AND ANOTHER *v.* W. & J. SHEPHERD (BOOKBINDERS), LTD. AND OTHERS.

[House of Lords (Lord Porter, Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), October 14, 17, December 1, 1949.]

Company—Private company—Transmission of shares on death of member—Right of executors to be registered as members—Acquisition of shares by directors—Directors' right to refuse registration— Failure of directors to agree.

By art. 10 of a private company, incorporated under the Companies Act, 1929, a member of the company or other person entitled to transfer a share was not allowed to transfer it to a non-member (except as provided by art. 15) so long as any member or any person selected by the directors was willing to purchase it. By art. 11, except where the transfer was made under art. 15 : "the person proposing to transfer any shares (hereinafter called 'the proposing transferor') shall give notice in writing (hereinafter called a 'transfer notice') to the company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the company his agent for the sale of the share to any member of the company, or person selected" by the directors (under art. 10) "at the price so fixed, or, at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with these articles." By art. 12 : "If the company shall, within the space of twenty-eight days after being served with a transfer notice, find a member, or person selected as aforesaid, willing to purchase the share (hereinafter called 'the purchasing member') and shall give notice thereof to the proposing transferor, he shall be bound, upon payment of the fair value, to transfer the share to the purchasing member." Under art. 15 the proposing transferor could transfer the share to any person if the company had not, within twenty-eight days after being served with a transfer notice, found a member, or person selected by the directors, willing to purchase the shares. By art. 16 : "All shares comprised in a transfer notice shall, unless the directors think fit to offer them to any person selected as aforesaid, be first offered by the company to the directors themselves . . . and any shares not taken by the directors . . . shall then be offered to the other members . . . Where the shares comprised in a transfer notice stand in the name of a deceased member, the directors shall have three calendar months from the service of the transfer notice within which to determine whether they will themselves purchase them or not." Article 17 provided that the executors of a deceased shareholder should be the only persons recognised by the company as having any title to a share, and by art. 18 : "Any person becoming entitled to a share in consequence of the death . . . of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, subject to the directors not exercising their powers as hereinbefore contained, to acquire said shares, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased . . . person could have made ; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased . . . person before the death . . ." By art. 20 : "It shall be in the absolute discretion of the directors to refuse to register any transfer of shares of which they do not approve."

Until his death on Oct. 28, 1945, the deceased was a director and the chairman of the company, his sons, W.S. and J.S., being the other directors. The whole of the share capital of the company, which consisted of two thousand £1 shares, was owned by the deceased, three hundred shares being registered in the name of J.S. and two hundred in the name of W.S., who held as trustees for their father. By a trust disposition and settlement, dated Mar. 21, 1945, the deceased conveyed to his executors his trust estate, including the two thousand shares. By a letter, dated Jan. 8, 1948, the executors applied to the company to be registered as members in respect of one thousand two hundred of the shares to which they had become entitled and which were registered in the name of the deceased, but the directors failed to agree to their application, W.S. being in favour of granting it, A while J.S. refused to do so and offered to purchase the shares. A petition by the executors for rectification of the register of members of the company was resisted by J.S. on the grounds (*a*) that, under art. 18, he had the right to purchase, and (*b*) that, under art. 20, the directors had the right to refuse to register a transfer of which they did not approve.

HELD: (i) the words, "subject to the directors not exercising their B powers as hereinbefore contained, to acquire said shares" in art. 18 did not confer on the directors any new right of acquisition, but merely referred back to their powers under the earlier articles, and, on the true construction of those articles, the right of acquisition conferred on the directors arose only when a transfer notice had been served on the company in accordance with the provisions of art. 11; such a notice could be presented only by a C voluntary transferor, and the provisions in respect of it were not applicable when the executors of a deceased member sought to be registered; as recognised by art. 17, the executors were already entitled to the shares when they applied for registration, and, as no transfer notice had been served in respect of the shares, but the executors had merely applied as the legal personal representatives of the deceased to have the shares registered in D their own name, they were entitled, under art. 18, to be registered as members of the company, subject to the provisions of art. 20.

(ii) the directors could exercise their right to decline registration under art. 20 only by passing a resolution to that effect; mere failure to pass a resolution was not a formal active exercise of the right to decline; and, therefore, as the right had not been exercised, the executors were entitled to be registered as members of the company.

E *Re Hackney Pavilion, Ltd.* ([1924] 1 Ch. 276), *applied.*

[AS TO TRANSMISSION OF SHARES ON DEATH, see HALSBURY, Hailsham Edn., Vol. 5, pp. 281, 282, para. 486; and FOR CASES, see DIGEST, Vol. 9, pp. 404, 405, Nos. *2591-2599.*]

Cases referred to:

F (1) *Burns* v. *Siemens Brothers Dynamo Works*, [1919] 1 Ch. 225; 88 L.J.Ch. 21; 120 L.T. 211; 9 Digest 212, *1320.*

(2) *Re Hackney Pavilion, Ltd.*, [1924] 1 Ch. 276; 93 L.J.Ch. 193; 130 L.T. 658; Digest Supp.

APPEAL by the petitioners, the executors of a deceased shareholder, from an interlocutor of the Second Division of the Court of Session (LORD THOMSON G (Lord Justice-Clerk) and LORD STEVENSON; LORD MACKAY *dissenting*), dated July 15, 1948, dismissing their petition for rectification of the register of members of the respondent company.

By a trust disposition and settlement the deceased conveyed to his executors his trust estate including his shares in the company, and the executors applied to the company to be registered as members in respect of the shares. The two H directors of the company failed to agree in regard to the executors' application, one of them (William Shepherd, the minuter) being willing to grant it, while the other (the respondent, John Shepherd) objected to doing so and claimed that, under the company's articles, he was entitled to acquire the shares by purchase. The Second Division of the Court of Session held that the directors' right of acquisition under the company's articles extended to a transmission on death. The interlocutor of the Second Division was now reversed by the House of Lords, who held that the right of acquisition did not apply in the case of a transmission on death and that the directors' right to decline registration under arts. 18 and 20 of the company's articles had not been exercised, and, therefore, the executors were entitled to be registered. The facts and the relevant articles appear in the opinion of LORD PORTER.

James Walker, K.C., and *H. R. Leslie, K.C.* (both of the Scottish Bar), for the appellants.

L. Hill Watson, K.C., and *L. H. Daiches* (both of the Scottish Bar) for the A respondent, John Shepherd.

The House took time for consideration.

Dec. 1. The following opinions were read.

LORD PORTER: My Lords, this is an appeal against an interlocutor pronounced by the Second Division of the Court of Session by which the petition of the first appellant and one James Ogilvie for rectification of the register of B members of the respondent company was dismissed. The facts are not in dispute and the circumstances under which the petition was launched are as follows. The respondent company is a private company incorporated under the Companies Act, 1929, of which William Shepherd, senior, now deceased, was director and chairman until his death on Oct. 28, 1945. He left a trust disposition and settlement, dated Mar. 21, 1945, of which the petitioners were the sole trustees C and the executors nominated therein and acting thereunder. The surviving directors are William Shepherd, junior, and John Shepherd, his brother. William Shepherd is a nominal respondent, but, as a minuter, supports the appellants in this matter and John Shepherd is the respondent who alone resists the appellants' claim and is referred to hereafter as the respondent. When he died, William Shepherd, senior, owned two thousand ordinary shares of D £1 each in the company, which was the whole of the share capital thereof, and by the trust disposition and settlement conveyed to the appellants his trust estate including these two thousand shares, which were included in the inventory of the deceased's moveable estate of which the petitioners were duly confirmed as the executors-nominate of the deceased. After the interlocutor of the Court of Session, one of the executors, James Ogilvie, E retired, and it was arranged that the second appellant [Miss Elizabeth Shepherd] would be assumed as a trustee and executor of the trust disposition and settlement in his room and place. Thereupon a deed of assumption assuming the second appellant as a trustee and executor was given effect to, and no objection has been taken by the respondent to the substitution of her name for that of the retiring executor and trustee. By letter, dated Jan. 8, 1948, the then F executors and trustees applied to the company to be registered as members in respect of one thousand two hundred out of the two thousand shares to which they had become entitled and which were registered in the name of the deceased, William Shepherd. Three hundred of the remaining eight hundred shares were registered in the name of John Shepherd, and two hundred in the name of William Shepherd, junior, but the petition states that they were held by each G of them as trustees for their father, William. The petition asks for no relief in respect of these shares. There remained a further three hundred shares which the trustees proposed to transfer to William Shepherd, junior, but this portion of their application has not been included in the petition and no question arises with regard to it in the present appeal.

The letter of Jan. 8 is in the following terms: H

"Messrs. W. &. J. Shepherd (Bookbinders), Ltd.,
Broughton Market,
Edinburgh 3.

Dear Sirs,

Mr. William Shepherd's Exy.

On behalf of the trustees of the late Mr. William Shepherd the confirmation in whose favour has already been registered in your books, we now apply to have certain of the deceased's shares registered as follows, *viz.*, six hundred shares in name of Mr. James Ogilvie and Mr. Geo. Moodie ; and six hundred shares in name of Mr. Geo. Moodie and Mr. James Ogilvie. At the same time the trustees propose to transfer three hundred shares to Mr. William Shepherd, who is a director and a shareholder of the company, and we shall be glad to have your confirmation that on a proper stamped transfer being submitted to you, it will be registered accordingly. Failing our hearing from you within seven days from this date to the effect that you will agree to and carry out the proposals mentioned above, appropriate court proceedings will be taken without further notice.

Yours faithfully,
Keir, Moodie & Co."

It will be observed that the application made is to have six hundred of the shares registered in the names of James Ogilvie as the first holder and George Moodie as the second, and the other six hundred in the name of George Moodie as the first holder and James Ogilvie as the second. As their Lordships understand, no contention is now raised that the trustees are not entitled to have the shares registered in this form if they are entitled to have them registered in their names at all, and the right claimed has some support from the decision in *Burns* v. *Siemens Brothers Dynamo Works* (1). When this application was made the only two directors were those mentioned above, and the letter was answered by one dated Jan 26, 1948, and signed by the two directors. Its terms are as follows :

" Messrs. Keir, Moodie & Co., S.S.C.,
1, Leopold Place,
Edinburgh.

Dear Sirs,

Mr. Moodie.

The directors of the above company held a meeting on Jan. 23, 1948, to discuss a letter received from Mr. Moodie when he proposed to register one thousand two hundred shares in the name of the trustees and to transfer three hundred shares to Mr. William Shepherd who is a director and shareholder of the company. He also stated that if proposals were not agreed to, appropriate court proceedings will be taken within seven days. The directors failed to agree to the proposals—Mr. William Shepherd being in favour of the proposals, and Mr. John Shepherd being against the proposals, and offering to purchase a number of the shares.

Yours faithfully,
Director J. Shepherd.
Director W. Shepherd."

It is apparent that, as a result of the failure of the directors to agree, there was no definite refusal to register the shares in the name of the trustees and the question for your Lordships' decision is whether in these circumstances the company is entitled to refuse to register the shares as requested.

The answer to this difficult question must depend on the provisions of the articles of association of the respondent company. The material articles are those numbered 10 to 20 inclusive, and take the following form :

" 10. A share may be transferred by a member or other person entitled to transfer to any member selected by the transferor ; and save as provided by cl. 15 hereof no share shall be transferred to a person who is not a member so long as any member, or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership, is willing to purchase the same at the fair value. 11. Except where the transfer is made pursuant to cl. 15 hereof, the person proposing to transfer any shares (hereinafter called 'the proposing transferor') shall give notice in writing (hereinafter called a 'transfer notice') to the company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the company his agent for the sale of the share to any member of the company, or person selected as aforesaid, at the price so fixed, or, at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with these articles. A transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. A transfer notice shall not be revocable except with the sanction of the directors. 12. If the company shall, within the space of twenty-eight days after being served with a transfer notice, find a member, or person selected as aforesaid, willing to purchase the share (hereinafter called 'the purchasing member') and shall give notice thereof to the proposing transferor, he shall be bound, upon payment of the fair value, to transfer the share to the purchasing member. 13. In case any difference arises between the proposing transferor and the purchasing member as to the fair value of a share, the auditor shall, on the application of either party, certify in writing the sum which, in his opinion, is the fair value, and such sum shall be deemed to be the fair value, and in so certifying the auditor shall be considered to be acting as an expert, and not as an arbitrator, and accordingly the Arbitration (Scotland) Act, 1894, shall not apply. 14. If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the company may receive the purchase money, and shall thereupon cause the name of the purchasing member to be entered in the register as the holder of the share, and shall hold the purchase money in trust for the proposing transferor. The receipt of the company for the purchase money shall be a good discharge to the purchasing member, and after his name has been entered in the register in purported exercise of the aforesaid power, the validity of the proceedings shall not be questioned by any person. 15. If the company shall not, within the space of twenty-eight days after being served with a transfer notice, find a member, or person selected as aforesaid, willing to purchase the shares, and give notice in manner aforesaid, the proposing transferor shall at any time within three calendar months afterwards be at liberty, subject to cl. 20 hereof, to sell and transfer the shares (or those not placed) to any person and at any price. 16. All shares comprised in a transfer notice shall, unless the directors think fit to offer them to any person selected as aforesaid, be first offered by the company to the directors themselves, and so that in case of any difference between them as to the disposal or distribution of a share or shares, the mode of disposal or distribution shall be determined by lot, and any shares not taken by the directors, or some or one of them, shall then be offered to the other members in such order as shall be determined by lot. And in each case the person to whom the offer is made (whether a director or not) shall have the option of buying at the price fixed in the transfer notice, or, at his option, at the fair value, to be fixed by the auditor as aforesaid, such option to be declared in accepting the offer. Where the shares comprised in a transfer notice stand in the name of a deceased member, the directors shall have three calendar months from the service of the transfer notice within which to determine whether they will themselves purchase them or not. 17. The executors or administrators of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the executors or administrators of the deceased survivor shall be the only persons recognised by the company as having any title to the share. 18. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be required by the directors, have the right, subject to

> the directors not exercising their powers as hereinbefore contained, to acquire said shares, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made ; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy. 19. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other pecuniary advantages to which he would be entitled if he were the registered holder of the share, except that where he becomes entitled thereto by reason of such death or bankruptcy he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company. 20. It shall be in the absolute discretion of the directors to refuse to register any transfer of shares of which they do not approve."

Under these provisions the appellants maintain that they are entitled to be registered as executors unless the directors, acting as a board, refuse their consent; that, as the two directors are divided in opinion, they have not declined to effect the registration ; and that, therefore, the registration must take place. The respondent, John Shepherd, in answer, points to the provisions of art. 16, and contends that the appellants are not entitled to have the shares transferred into their name until the directors have had a period of three months in which to make up their minds whether the shares shall be transferred to them. He further claims that, as one of those directors, *videlicet* himself, has offered, in accordance with art. 16, within three calendar months from the service of the request for transfer to purchase one thousand two hundred shares, he is entitled to have these shares transferred to himself at such price as may be fixed by the auditor of the company ; that, accordingly, the appellants' application is premature ; and that they are not entitled to be registered in accordance with the terms of their application. The appellants, on their part, say that they are not applying that the shares should be transferred to anyone, that the shares have been transmitted to them as executors and trustees, that the only provision in the articles entitling the company to refuse to register the shares in their name is that contained in art. 20, and that that article can only be brought into effect by a resolution of the board.

Both parties rely on art. 18 as determining the relationship of the parties. If, say the appellants, that article be read without the words :

> " . . . subject to the directors not exercising their powers as hereinbefore contained, to acquire said shares . . . "

they (the appellants) would be entitled to demand either to be registered as members or to make such transfer of the shares as the deceased could have made, unless the directors, acting as a board, were to decline or suspend registration. The respondent, John Shepherd, relies on the words, the omission of which is suggested above, and to the final words of the article, and says that the directors are exercising their powers to acquire the shares given by the previous articles, and are entitled to decline registration of a transfer to the trustees and executors under the will of the deceased owner to the same extent as they would have been if he had attempted to transfer them in his lifetime. The article, he maintains, deals generally with the transfer or transmission of shares from one interest to another and is required in order to protect the shareholders in a family, or, indeed, in any private, company. This contention raises the question what their rights to acquire the shares under the previous articles are, and as to the meaning of the word " transfer " in art. 18. The appellants say that these powers apply only in the case of a transfer, properly so called, not to cases where the shares have been transmitted by course of law. It is with these contentions in mind that I have thought it necessary to set out the relevant articles in full in order to determine what the directors' powers of acquisition are and when they arise.

It will be observed that, except in the case of a transfer under art. 15 which has no application to the present case, a transfer as contemplated by the articles necessitates the giving of a transfer notice specifying the sum fixed by the transferor as the fair value of the shares, and that the right of the company to find a substitute only arises after such a transfer notice has been served. In particular, art. 16, which contains the provisions under which John Shepherd claims a right to purchase the shares and to have them transferred to him and registered in his name, has reference only to shares comprised in a transfer notice. Moreover, the relevant articles throughout speak of the person to whom the transfer is to be made as "the purchasing member," an expression inappropriate to the acquisition of shares by transmission. I conclude that the acquisition of the shares referred to in art. 18 does not include the case of transmission of the shares to the representatives of a deceased member and that "transfer" in that article is exclusive of such a transmission. Apart from and in addition to the matters already adverted to, this construction is, in my view, supported by the terms of art. 17 which treats the transmission of shares to an executor as standing on a different footing from the transfer of shares from one person to another by agreement, and, indeed, art. 18 itself makes the same distinction when it gives the representatives of a deceased member the alternative either to be registered or to transfer the shares devolving on him. Accordingly, in my opinion, the appellants' contention should prevail. Powers of restriction on the right of the transfer or transmission of shares from one person to another are a serious restriction on the rights of holders of shares in a company, even though that company be a private one. No doubt in such a case it may well be desirable for the directors to have control over the transfer of shares to outside persons, but that construction does not necessarily apply to the transmission of shares from a holder to his personal representatives, and, if it is desired to control such a transmission, it should be done in plain terms.

The respondent, John Shepherd, however, contended that under art. 20 the directors had an absolute discretion to refuse to register any transfer of shares of which they did not approve, and that, unless some such approval was given, the company was under no obligation to register them in the name of anyone of whom they did not approve. This argument, no doubt, would be effective if the directors had as a body disapproved of the transfer, but, inasmuch as one director alone disapproved, there cannot be said to have been any refusal by the board, and, in my view, the board and not the individual director must disapprove within the terms of the article. The mere failure to pass a resolution is not a formal active exercise of the right to decline, as Astbury, J., said ([1924] 1 Ch. 280) in *Re Hackney Pavilion, Ltd.* (2), and, in my view, a formal active exercise of the right of refusal to register is required before the company is authorised to refuse to register the shares in the names of those to whom they have been transmitted. I would allow the appeal and order the respondent, John Shepherd, to pay costs both here and in the Court of Session.

LORD NORMAND : My Lords, were it not that I find myself disagreeing from the conclusion reached by the majority of the Second Division of the Court of Session, I would have wished to add nothing to the opinion delivered by my noble and learned friend on the Woolsack. On the first point I need say little because I agree with the unanimous view of the learned judges of the Second Division. The right of executors to have the shares of their deceased author registered in their own names is, under arts. 18 and 20, subject to a discretionary veto by the directors. The veto must be actively exercised : see *Re Hackney Pavilion, Ltd.* (2). Here, however, there are only two directors and they are in disagreement, one of them being in favour of granting the appellants' application and the other against. The deadlock has prevented the exercise of the veto by the directors as a body and the claim of the appellants to be registered cannot be countered by invoking the discretionary veto.

The right of pre-emption is a heavy burden on the rights of shareholders, and though it is not doubtful that it may be created by implication as well as by the express terms of the articles, an inference from ambiguous *data* will no do. It must be a clear implication. Article 18 is the article which deals with the registration of shares transmitted on death to the personal representatives of a deceased shareholder and of shares transmitted by law to the trustee in sequestration of a bankrupt shareholder. It provides that, subject to the production of evidence of title :

> "Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall . . . have the right, subject to the directors not exercising their powers as hereinbefore contained, to acquire said shares, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made . . ."

But, when the earlier articles are read, it is apparent that the rights of acquisition created by them become effectual when a transfer notice has been presented, in accordance with the provisions of art. 11, by the person proposing to transfer the shares. Article 11 requires that the notice shall specify the sum which the transferor fixes as the fair value, and shall constitute the company his agent for the sale of the share to any member of the company, or person selected, at the price so fixed, or, at the option of the purchaser, at the fair value to be fixed by the auditor in accordance with the articles. This is a notice which could be filled up and presented to the company only by a voluntary transferor, and the provisions in respect of it are not applicable when the executor of a deceased member or the trustee of a bankrupt member seeks to be registered. They do, however, apply if the executor or trustee, instead of asking for registration of his own name, decides to transfer the share to another person.

The articles are ill-expressed and obscure, and, if it was intended that the directors' right of pre-emption should operate in circumstances like the present, where there has been a transmission but as yet no transfer or proposed transfer, they have failed to give effect to that intention either expressly or by a reasonably clear implication. Since the respondent, John Shepherd, no longer insists in his objection to the registration of the shares in two blocks and to the order of the names proposed for registration, I think that the appellants are entitled to the relief craved, and I find it unnecessary to deal with the other questions which were debated. I would allow the appeal with costs against the respondent, John Shepherd.

Vide.

LORD MORTON OF HENRYTON : My Lords, the claim of the original executors was opposed by John Shepherd on two grounds. In the first place he relied on the words :

> ". . . subject to the directors not exercising their powers as hereinbefore contained, to acquire said shares . . ."

which appear in art. 18 of the company's articles of association. Secondly, he relied on the words, appearing in the same article :

> ". . . but the directors shall . . . have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy."

These words are linked up with art. 20 which provides :

> "It shall be in the absolute discretion of the directors to refuse to register any transfer of shares of which they do not approve."

In my view, the first objection fails because the words quoted do not confer any new right of acquisition on the directors, but merely refer back to their powers "as hereinbefore contained." It is, therefore, necessary to look to the earlier articles to see what powers of acquisition were thereby conferred on the directors. Under these articles, as I read them, no such powers arise unless and until a transfer notice has been served on the company, and no transfer notice has been served in respect of the one thousand two hundred shares now in question. The original executors simply applied to have these shares registered in their names as the legal personal representatives of the deceased, William Shepherd. The second objection also fails because there has been no decision by the directors to decline or suspend registration. One director was in favour of registration and the other was against it: see *Re Hackney Pavilion, Ltd.* (2). No question now arises in regard to the substitution of Miss Elizabeth Chisholm Shepherd for the original executor, James Ogilvie, and no objection is now raised to the request to have the one thousand two hundred shares in question registered in two blocks, the name of George Moodie being placed first in respect of one block and the name of Miss Shepherd being placed first in respect of the other block. I express no view whether the letter of Jan. 26, 1948, and that of Feb. 3, 1948 [containing an intimation by Mr. John Shepherd of his desire to acquire the shares] could in any event have been an effective exercise by Mr. John Shepherd of any powers of acquisition conferred on the directors by the articles. I have stated my reasons very briefly, as the points raised have already been so fully discussed by the noble and learned Lord on the Woolsack. I concur in the motion proposed.

LORD MACDERMOTT: My Lords, I agree that this appeal should be allowed and only wish to add a brief statement of the reasoning which has led me to a different conclusion from that reached by the majority in the Second Division of the Court of Session. The right of the present appellants, as the persons entitled to the shareholding of the deceased, William Shepherd, in consequence of his death, to be registered as members of the respondent company in the manner sought by the prayer of their petition (as amended) was challenged on two grounds. Both of these were based on art. 18 of the articles of association. The first was that the directors of the company had, in exercise of the power in that behalf conferred by that article, declined to effect the desired registration. The second was that the right claimed was subject to the power of the directors to acquire the shares in question and that the respondent, John Shepherd, had taken the necessary steps to exercise that power.

The first of these contentions is, on the facts, untenable. The deceased, William Shepherd, was, until his death on Oct. 23, 1945, a director and also chairman of the company. Since then the only directors have been his sons, the respondents, John Shepherd and William Shepherd. They met to consider the claim for registration at a meeting held on Jan. 23, 1948, but disagreed regarding it. The deadlock thus caused has continued. It does not appear that any chairman of the board has been appointed since the death of William Shepherd, senior, and no question of a casting vote under the Companies Act, 1929, sched. I, table A, art. 81, arises. In these circumstances there has been no resolution or determination on the part of the directors. Their right to decline registration has, therefore, not been exercised.

The second contention is founded on that part of art. 18 which makes the appellants' right to registration in respect of the shares standing in the name of the deceased:

> "... subject to the directors not exercising their powers as hereinbefore contained, to acquire said shares ..."

In the Second Division the Lord Justice-Clerk (LORD THOMSON) and LORD STEVENSON took the view that, by implication, this power extended to a transmission on death so as to enable the directors to acquire shares held by a personal representative as such. LORD MACKAY, on the other hand, was of opinion that the power only arose in relation to a proposed transfer of shares. I think he was right. Whatever may be said of the drafting of these articles, their provisions on this matter are clear enough and leave, in my opinion, no room for implication. The powers of acquisition referred to in art. 18 are, expressly, those "hereinbefore contained." But the earlier articles give no power to the directors to acquire shares save where a "transfer notice" has been served, and art. 11 makes it plain that a transfer notice is, for the purposes of the articles, a notice in writing given to the company by a person proposing to transfer any shares that "he desires to transfer the same." The representatives of William Shepherd, deceased, have expressed no such desire in relation to the shares in question. All they want is registration and for that a notice of transfer would be not only unnecessary but quite inappropriate. On this short ground the right to acquire mentioned in art. 18 never arose and the second contention must, therefore, fail. Had that right accrued, the question whether John Shepherd did what was needed to exercise it would fall to be considered. That question, however, does not arise on the view I take and I express no opinion on it. I would, accordingly, hold in favour of the relief sought and reverse the interlocutor with costs against the respondent, John Shepherd, here and in the Second Division.

LORD REID: My Lords, the questions at issue in this appeal depend on the construction of certain of the articles of association of W. & J. Shepherd (Bookbinders), Ltd., which is a private company. These articles clearly provide that, if a member of the company or other person entitled to transfer a share wishes to transfer it to a non-member, that share must first be offered for sale to a person selected by the directors or to the directors and then to the other members of the company, and it is only in the event of none of these persons being willing to purchase that the transferor can transfer to another transferee. Article 11 requires that a person proposing to transfer a share shall give a transfer notice to the company specifying the sum which he fixes as the fair value and art. 16 makes provision for determining the order in which the share shall be offered to directors and members. A person who agrees to purchase under these provisions is entitled, instead of paying the price fixed by the transferor, to pay the value of the share as fixed by the auditor. I have said that these provisions apply where it is proposed to transfer a share to a non-member. It is not altogether clear what the position is when the proposed transferee is a member of the company. As it is not necessary to determine that question in this case, I express no opinion about it.

Article 18 makes special provision for transmission of a share on death or bankruptcy. Under it an executor has:

> "... the right, subject to the directors not exercising their powers as hereinbefore contained, to acquire said shares, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made ..."

The first question for decision is whether this provision gives to the directors, or any of them, any right to acquire shares which belonged to a deceased member of the company when his executors do not seek to transfer the shares to another person but only seek to have their own names registered as members in respect of the shares. The earlier articles contain no provision for the acquisition by directors, or others, of shares which are not comprised in a transfer notice, and transfer notice is defined in art. 11 as the notice which the person proposing to transfer any shares shall give to the company stating that he desires to transfer the same. "Transfer," if the word is used in its ordinary sense, means a transfer from one person to another and implies that there must be both a transferor and a transferee. But where an executor is registered in respect of shares forming part of the deceased's estate, there is no transfer from one person to another. The executor, as is recognised by art. 17, is already entitled to the shares when he makes application for registration of his name. This distinction between transfer and transmission on death is well recognised in company law and I can find nothing in any of the articles which precede art. 18 to suggest that in these articles the word " transfer " is used in any but its ordinary sense. Therefore, if any directors have a right under this article to acquire shares forming part of the estate of a deceased member on the occasion of the executor seeking to have his own name registered as a member, that right cannot be by virtue of " any power as hereinbefore contained." It can only be found by implication from the terms of the articles of association as a whole and in particular from the terms of art. 18. This was recognised by the Lord Justice-Clerk (LORD THOMSON) and by LORD STEVENSON who concurred with him. The Lord Justice-Clerk founded on the general intendment of the articles and their main purpose to secure directors' control over the personnel of the shareholders. I do not think that this is a good ground of decision. Where there is in question a power which so severely limits a right of property as does a right of pre-emption, I would not be prepared to base its existence on implication except, perhaps, in a very clear case. I can see no foundation for any such implication here. There is nothing illogical or even unreasonable in drawing a distinction between a case where an executor seeks to have his own name registered and a case where an executor seeks to transfer shares to someone else. Indeed, it would be rather surprising in this case, where one shareholder held three quarters of the shares of the company, to find a power which enabled the other shareholders, on the death of the principal shareholder, to prevent his executors from ever acquiring voting rights by acquiring for themselves all the shares which were registered in the name of the deceased as soon as the executors sought to be registered as members of the company.

There was a further argument submitted for the respondent, John Shepherd, which I should notice. It was said that the grammatical structure of art. 18 made it necessary that the words :

> " . . . subject to the directors not exercising their powers as hereinbefore contained, to acquire said shares . . . "

shall apply both to the right of the executor to be registered himself and to the right to transfer the shares. But a sentence, in the form that subject to a certain qualification a person shall have alternative rights, does not, in my view, necessarily mean that that qualification must apply equally to both alternative rights, and I attach little weight to this argument.

On the second question in the case I agree with your Lordships that directors can exercise their right to decline registration only by passing a resolution to that effect, and I, therefore, agree that this appeal must be allowed.

Appeal allowed. The respondent, John Shepherd, to pay the costs here and in the Court of Session.

Solicitors : *Beveridge & Co.*, agents for *Keir, Moodie & Co.*, Edinburgh (for the appellants) ; *Morrish, Strode & Searle*, agents for *R. J. Kennaway*, Edinburgh (for the respondent, John Shepherd).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

WOOZLEY *v.* WOODALL SMITH.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ), November 2, 3, December 2, 1949.]

Rent Restriction—Standard rent—Premises let at progressive rent—Rent payable on Sept. 1, 1939, *and for five years thereafter less than two-thirds rateable value—Maximum rent more than two-thirds—Application of Rent Acts—Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920 (*c.* 17) (*as amended by the Rent and Mortgage Interest Restrictions Act,* 1939 (*c.* 71), *sched. I*), *s.* 12 (1) (*a*) ; *s.* 12 (7).

By s. 12 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sched. I, it is provided : " The expression ' standard rent ' means the rent at which the dwelling-house was let on Sept. 1, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said Sept. 1, 1939, the rent at which it was first let : Provided that, in the case of any dwelling-house let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent ; and, where at the date by reference to which the standard rent is calculated, the rent was less than the rateable value the rateable value at that date shall be the standard rent." By s. 12 (7) it is provided : " Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house, and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

The landlord of a dwelling-house to which the Rent Acts applied held the premises under a lease for a term of twenty-nine years from Sept. 29, 1936, at a progressive rent of £5 a year until Sept. 29, 1944, and £65 a year thereafter. On Sept. 1, 1939, the rateable value of the premises was £38 a year. On Nov. 14, 1947, the landlord granted to the tenant an underlease of the premises for the remainder of the term less three days at a rent of £225 a year. On an application by the tenant to determine the standard rent of the premises,

HELD : (i) the words " rent payable in respect of any tenancy " in s. 12 (7), meant the rent payable under the provisions of the tenancy in force on Sept. 1, 1939, and not the rent actually payable on that date ; on the true construction of the proviso to s. 12 (1) (*a*), read with the substantive provisions of that paragraph, where a dwelling-house was let at a progressive rent the rent at which it was let at Sept. 1, 1939, must be taken to be " the maximum rent payable under such tenancy agreement " ; and, therefore, the rent payable on Sept. 1, 1939, in respect of the tenancy in the present case must be taken to be £65 and so not less than two-thirds of the rateable value of the dwelling-house, with the result that s. 12 (7) did not exclude the operation of the Rent Acts and under s. 12 (1) (*a*) the standard rent was £65.

(ii) whether the word " where " in s. 12 (7) meant " in cases in which " or " if and so long as " (a construction to which the court inclined) the effect of the fact that the rent payable in respect of the tenancy on Sept. 1, 1939, was less than two-thirds of the rateable value was then to exclude the tenancy from the provisions of the Rent Acts, but when the rent rose to £65 the lease came within the provisions of s. 12 (1) (*a*) as a first letting after Sept. 1, 1939, and, again, the standard rent would be £65.

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-

314, para. 369 ; and for Cases, see DIGEST, Vol. 31, pp. 564-566, Nos. *7117-7123*.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (*a*), s. 12 (7), see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 998, 1014.]

Case referred to :

(1) *Stone* (*J. & F.*) *Lighting & Radio, Ltd.* v. *Levitt*, [1946] 2 All E.R. 653 ; [1947] A.C. 209 ; [1947] L.J.R. 65 ; 170 L.T. 1 ; 2nd Digest Supp.

Appeal by the tenant from an order of His Honour Judge Sir Gerald Hargreaves made at West London County Court and dated July 6, 1949, fixing at £225 a year the standard rent of a dwelling-house to which the Rent Acts applied.

By a lease dated Sept. 14, 1937, the premises were let for a term of twenty-nine years from Sept. 29, 1936, at a progressive rent of £5 a year until Sept. 29, 1944, and £65 a year thereafter. On Nov. 14, 1947, the premises were sub-let to the tenant for the term of the headlease less three days at a rent of £225 a year. On an application by the tenant to fix the standard rent, the learned county court judge held that, since the rent on Sept. 1, 1939 (the material date for the purpose of determining the standard rent) was less than two-thirds the rateable value, the premises were excluded from the provisions of the Rent Restrictions Acts by s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and must be regarded as being " first " let within the meaning of the Acts in 1947. The Court of Appeal now allowed the appeal and held that the standard rent was the maximum rent payable under the 1937 lease, *viz.*, £65.

Beney, K.C., and *Crispin* for the tenant.
Stranders for the landlord.

Dec. 2. **COHEN, L.J.**, read the following judgment of the court. This appeal is from an order of His Honour Judge Sir Gerald Hargreaves made on the application of Mrs. Woozley, the tenant of certain premises known as 41, Hasker Street, Chelsea, for determination of the standard rent of those premises under s. 11 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. The landlord, Mrs. Woodall Smith, was herself entitled, as hereafter appears, to the benefit of a lease of the premises from the freeholder, Earl Cadogan. It is conceded that the premises were brought within the purview of the Rent Restrictions Acts by virtue of the Rent and Mortgage Interest Restrictions Act, 1939. The standard rent has, therefore, to be determined in accordance with the terms of s. 12 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by sched. I to the Act of 1939. The sub-section, as amended, is as follows :

> " The expression ' standard rent ' means the rent at which the dwelling-house was let on Sept. 1, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said Sept. 1, the rent at which it was first let : Provided that, in the case of any dwelling-house let at a progressive rent payable under a tenancy agreement or lease, the maximum rent payable under such tenancy agreement or lease shall be the standard rent ; and, where at the date by reference to which the standard rent is calculated, the rent was less than the rateable value the rateable value at that date shall be the standard rent."

The premises were the subject of a lease granted on Sept. 30, 1845, by the then Earl Cadogan to one George Todd for the term of ninety-nine years from Sept. 29, 1845. The term of this lease expired, therefore, on Sept. 29, 1944. It is, however, a curious feature of the case that the rent payable under the lease of 1845 is unknown, nor is it known who, at the date of the grant of the lease under which the landlord derives her title, namely, Sept. 14, 1937, was entitled to the unexpired residue of George Todd's term of ninety-nine years or who was then, in fact, in occupation of the premises. In the result, it has been agreed by the parties to the present litigation, both in the county court and in this court, that the lease of 1845 must be regarded as irrelevant, and that the premises must be treated as having been for the first time let as a dwelling-house by the lease of 1937. By this lease the present freeholder granted to a Mrs. Boyes a lease of twenty-nine years from Sept. 29, 1936. The rent payable under this lease was for the period from Sept. 29, 1936, to Sept. 29, 1944, that is, for the then unexpired residue of George Todd's term (if still subsisting) £5 per annum, and thereafter, for the remainder of the twenty-nine years, £65 per annum. It is conceded that £5 per annum is, and was at all material times, less than two-thirds of the rateable value of the premises. At some time prior to Nov. 14, 1947, the landlord acquired the interest of Mrs. Boyes under the 1937 lease and on Nov. 14, 1947, she, the landlord, granted to the tenant an under-lease of the premises for the term of the 1937 lease less three days at a rent of £225 per annum. On these facts the question is whether the standard rent is £65 per annum or, as the county court judge held, £225 per annum. No doubt, s. 12 (1) (*a*) of the Act of 1920, which deals with the ascertainment of the standard rent, and s. 12 (7), which excludes certain tenancies from the operation of the Act, and, therefore, *inter alia*, from that of s. 12 (1) (*a*) must, for the purpose of ascertaining the standard rent, be read together, *i.e.*, each must be construed with due regard to the existence and terms of the other.

We will consider the two provisions in the order in which they appear in the Act. In the first two or three lines of s. 12 (1) (*a*), as amended, the words "was let on Sept. 1, 1939," clearly mean "was the subject-matter of a letting current on Sept. 1, 1939," not "was let under a contract made on that date." We do not think this is challenged. In any case it seems to be plain beyond argument. If so, the first question is: Were these premises the subject-matter of a letting in force on Sept. 1, 1939? On the face of this sub-section, read *in vacuo*, the answer must be "Yes." The second question, on the same basis, is: At what rent were they so let? This means *not* what rent was *de facto* being paid or could be exacted in the latter part of 1939, but what rent was provided for under the contract of letting current on Sept. 1 of that year. The answer is, therefore, not "at a rent of £5 a year," but "at a progressive rent, rising from £5 a year in the period up to Michaelmas, 1944, to £65 thereafter till 1965." No other answer would be true. If so, still confining ourselves within the frontiers of s. 12 (1) (*a*), and giving effect to the proviso, we must conclude that the standard rent is £65 and that the tenant wins.

On behalf of the landlord it is contended that one must now re-read s. 12 (1) (*a*) in the light of s. 12 (7). Section 12 (7) reads as follows:

> "Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house, and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

The argument of counsel for the landlord based on this sub-section is that, at the material time, which he says is Sept. 1, 1939, the rent "payable in respect of the [material] tenancy" was £5 a year; that this was less than two-thirds of the rateable value; that this tenancy must, accordingly, by reason of s. 12 (7), be treated as non-existent and as never having existed; that, if so, s. 12 (1) (*a*) cannot begin to operate on it; and, finally, that s. 12 (1) (*a*), in the agreed absence of any evidence as to the rent payable under any tenancy created next before Sept. 1, 1939, designates as the tenancy determinative of the standard rent the tenancy created next after Sept. 1, 1939, *viz.*, the sub-tenancy held by the tenant at £225 per annum.

In considering this argument and the effect of s. 12 (7) generally, certain terms occurring in the first two lines of the sub-section which are capable of more than one meaning call for elucidation : (i) The opening word " Where." Does this mean " in cases in which," a meaning which, as Sir Raymond Evershed, M.R., pointed out during the argument, it is capable of bearing, or does it mean : " If and so long as," as suggested in a *dictum* of Lord Uthwatt ([1946] 2 All E.R. 657) in *Stone (J. & F.) Lighting and Radio, Ltd.* v. *Levitt* (1), or has it, perhaps, some yet other meaning ? That is the first problem of construction. (ii) The words " payable in respect of the tenancy." Do they mean, in the circumstances of the present case, so payable at the time when proceedings are taken, or payable at the time prescribed as relevant by s. 12 (1) (*a*) ? And what does " payable in respect of the tenancy " mean in the particular case of a tenancy at a " progressive rent " ? For in such a tenancy two or more rents are payable in successive periods in respect of the same tenancy, and the question is : Which is relevant for the purposes of s. 12 (7) ?

We will deal with these points in inverse order. The rent " payable *in respect of the tenancy* " in the case of a tenancy at a progressive rent cannot mean simply the rent payable at its inception. In such a case as the present, if the question were posed : What was the rent payable *in respect of the tenancy* which was in force on Sept. 1, 1939 ?, the answer " £5 a year " would, as indicated above, be misleading and, indeed, untrue. The consequences of this will be considered later. The question here is : Payable when ? More than one answer is possible. (i) If it means " payable at the time when application is made to the court," the issue is simplified, for at that time the rent, whether it be treated as £65 or £225 a year, unquestionably exceeded two-thirds of the rateable value ; the tenancy is not excluded by s. 12 (7) from the scope of the Act ; s. 12 (1) (*a*) applies to it, and the effect of its application, having regard to the proviso about progressive rents, is that the standard rent is £65. (ii) As against this, and I will assume without deciding that the first basis is wrong, it has been argued that " payable," whatever it may mean for other purposes, for example, for those of an application for possession, means, in a case brought to ascertain the standard rent, payable at the time or times laid down in the provisions of s. 12 (1) (*a*) which deal with that subject-matter, namely, *prima facie* Sept. 1, 1939; that on that date the rent exigible was £5 a year; and that, as £5 a year is less than two-thirds of £38 a year, the then rateable value, the material tenancy, that of 1937, is excluded by s. 12 (7) from the operation of s. 12 (1) (*a*) of the Act, and that the first tenancy which attracted its operation was the sub-tenancy of £225. The answer to this contention has been anticipated when we were dealing with s. 12 (1) (*a*). The word " payable " is followed by the words " in respect of any tenancy." This means in the case of a tenancy current on Sept. 1, 1939; not the rent payable in the latter part of 1939 ; but the rent payable under the provisions of the tenancy in force on Sept. 1, 1939, which provisions provide for a progressive rent rising from £5 to £65. Again, we are confronted with the question : Which of these figures is relevant for the purposes of applying s. 12 (7) ? It must be possible to say whether s. 12 (7) excludes a particular tenancy from the Act or not. Yet here are two (successive) rents both " payable in respect of the tenancy," and there is nothing within the four corners of s. 12 (7) to show which is relevant. If the £5 rent is relevant, the tenancy is excluded. If the later £65 rent is relevant, it is not excluded. The answer must be sought and can be arrived at by reading this sub-section together with s. 12 (1) (*a*) and its proviso. The proviso to s. 12 (1) (*a*), which we have already read, begins : " Provided that, in the case of any dwelling-house let at a progressive rent . . . the maximum rent payable under such tenancy . . . " We pause there. If the sentence had continued " shall be deemed to be the rent at which the house was let on Sept. 1, 1939," the case would have been completely plain, and £65 would have been, or been deemed to be, the standard rent. The proviso, in fact, does not continue in that way. It proceeds "shall be the standard rent," words which assume that s. 12 (7) had not excluded the tenancy in question from the ambit of the Acts and the operation of s. 12 (1) (*a*), because, if it had, no question of a standard rent could arise. That is the crux to which the case in this aspect of it narrows down.

Reading the two sub-sections together, and reading the proviso to s. 12 (1) (*a*) together with the substantive provisions of that paragraph, we feel little doubt as to the result. So read, the proviso, which is condensed, can, in our view, legitimately be construed as though it were expanded by the insertion of certain words drawn from the substantive part of s. 12 (1) (*a*). So expanded it would read as follows : "Provided that, in the case of any dwelling-house let at a progressive rent . . . the rent at which it was let on Sept. 1, 1939, shall be taken to be the maximum rent payable under such tenancy and the latter shall be the standard rent." This does not involve re-writing the provision in any pejorative sense of "re-writing." It merely involves making its implications explicit. We say this because : (*a*) By the substantive provision of s. 12 (1) (*a*) the rent at which the dwelling-house was let on Sept. 1, 1939, equals the standard rent. (*b*) By the proviso, in the case of a lease at a progressive rent, which is this case, the maximum rent under that lease equals the standard rent ; hence (*c*), since things which are equal to the same thing are equal to each other, the rent at which the dwelling-house was let on Sept. 1, 1939, is to be taken to be equal to the maximum rent payable under the lease, which equals £65, and so excludes the annihilating application of s. 12 (7).

We have still to deal with the meaning of the word "Where" at the beginning of s. 12 (7). If it means "in cases in which," the conclusions reached above stand, but the same conclusions, namely, that the standard rent is £65 can be reached if "where" means, as LORD UTHWATT, *obiter*, in the *Stone Radio* case (1) took it to mean, "if and so long as," a construction to which we incline. For, assuming the foregoing arguments are fallacious, assuming against the tenant that on Sept. 1, 1939, the rent payable in respect of the tenancy is £5 a year, and that, consequently, s. 12 (7) kills the lease of 1937, and that, so long as the rent remains £5 a year its lethal effect continues, yet, if "where" means "if and so long as," that lethal effect does not continue beyond Michaelmas, 1944, when the rent rises to £65. The tenancy then comes to life again, s. 12 (1) (*a*) has to be applied to it, and the result of its application is that, there having been on Sept. 1, 1939, no lease which the law would recognise and no intelligible evidence as to any letting next before Sept. 1, 1939, the first lease recognised by the law as existing after Sept. 1, 1939, is that which springs into life in September, 1944, and that was a lease at £65, which is, accordingly, on this basis, too, the standard rent. In other words, we construe s. 12 (7) as meaning that, whenever it is, in fact, found that, as an incident of the relationship of landlord and tenant as regards any premises, the rent payable by the tenant is below the level indicated, then for all the purposes of the Act that rent and relationship are to be excluded from consideration, that is, the premises are not to be treated as being "let as a dwelling." We see no necessity, however, for treating the exclusion as operative for any longer time than the period during which the conditions demanding it, in fact, exist. All roads, therefore, seem to lead to £65. We think the appeal should be allowed, and a refund ordered of all sums paid in excess of £65 a year.

Appeal allowed with costs here and below.

Solicitors : *R. Raymond Pollard & Co.* (for the tenant) ; *Stoneham & Sons* (for the landlord).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re ISLE OF THANET ELECTRIC SUPPLY CO., LTD.

[Court of Appeal (Sir Raymond Evershed, M.R., Asquith, L.J., and Wynn-Parry, J.), November 17, 18, 1949.]

Company—Winding-up—Rights of preference stockholders—Surplus assets—Effect of article defining rights—Onus of proof of right to participate.

In 1929 a company, which had been incorporated in 1896, adopted new articles of association which, by art. 3, defined the rights of shareholders as follows: "The issued preference shares shall confer on the holders the right to a fixed cumulative preferential dividend at the rate of £6 per cent. per annum upon the amounts for the time being paid up or credited as paid up thereon respectively in priority to the ordinary shares, and the right to participate *pari passu* with the ordinary shares in the surplus profits which in respect of any year it shall be determined to distribute remaining after paying or providing for the said preferential dividend and a dividend for such year at the rate of six per cent. per annum on the amounts for the time being paid up or credited as paid up on the ordinary shares, and the preference shares shall confer the right in a winding-up of the company to repayment of capital, together with arrears (if any), and whether earned or not of the preferential dividend to the date of the commencement of the winding-up in priority to the ordinary shares". The two classes of shares therein referred to were subsequently converted into stock. In July, 1946, the company went into voluntary liquidation, and at that date its issued capital consisted of £282,000 preference stock and £150,000 ordinary stock. Certain arrears of dividend on the preference stock were paid, and the capital on both the preference and the ordinary stock was repaid. As regards the surplus assets,

Held: the onus lay on the preference stockholders to show that they were entitled to participate therein; art. 3 must be taken as being exhaustive in defining their rights; and, therefore, the onus had not been discharged.

Scottish Insurance Corpn., Ltd. v. *Wilsons and Clyde Coal Co., Ltd.* ([1949] 1 All E.R. 1068) *and dictum of* Sargant, J., in *Re National Telephone Co.* ([1914] 1 Ch. 769), *applied.*

[As to Rights of Preference Shareholders, see HALSBURY, 1949 edn., Vol. 5, pp. 156-158, para. 282; and for Cases, see DIGEST, Vol. 10, pp. 1002-1009, Nos. *6961-6993.*]

Cases referred to:

(1) *Re Fraser and Chalmers, Ltd.*, [1919] 2 Ch. 114; 88 L.J.Ch. 343; 121 L.T. 232; 10 Digest 1008, *6989.*

(2) *Re John Dry Steam Tugs, Ltd.*, [1932] 1 Ch. 594; 101 L.J.Ch. 271; 147 L.T. 493; Digest Supp.

(3) *Re Metcalfe (William) & Sons, Ltd.*, [1933] Ch. 142; 102 L.J.Ch. 121; 148 L.T. 82; Digest Supp.

(4) *Scottish Insurance Corpn., Ltd.* v. *Wilsons and Clyde Coal Co., Ltd.*, [1949] 1 All E.R. 1068; [1949] A.C. 462; [1949] L.J.R. 1190.

(5) *Will* v. *United Lankat Plantations Co., Ltd.*, [1914] A.C. 11; 83 L.J.Ch. 195; 109 L.T. 754; 9 Digest 597, *3991.*

(6) *Re National Telephone Co.*, [1914] 1 Ch. 755; 83 L.J.Ch. 552; 109 L.T. 389; 9 Digest 598, *3992.*

(7) *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317; 60 L.J.Ch. 415; 64 L.T. 576; 10 Digest 1005, *6977.*

(8) *Collaroy Co., Ltd.* v. *Giffard*, [1928] Ch. 144; 97 L.J.Ch. 69; 138 L.T. 321; Digest Supp.

(9) *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.*, (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 10 Digest 1003, *6965.*

Appeal by a holder of ordinary stock from an order of Roxburgh, J., dated February 21, 1949, on an application by way of originating summons.

Roxburgh, J., held that, on the voluntary liquidation of the Isle of Thanet Electric Supply Co., Ltd., the preference stockholders were entitled to participate with the ordinary stockholders in the surplus assets rateably according to the nominal amount of their holdings. Having regard to the decision of the majority of the House of Lords in *Scottish Insurance Corpn., Ltd.* v. *Wilsons and Clyde Coal Co., Ltd.* ([1949] 1 All E.R. 1068) in which their Lordships' opinions were given on May 6, 1949, an ordinary stockholder applied to Roxburgh, J., for leave to appeal out of time. Roxburgh, J., granted the application (*ante*, p. 316), and the Court of Appeal now allowed the appeal. The facts appear in the judgment of Wynn-Parry, J.

Christie, K.C., and *Cecil Turner* for a holder of ordinary stock.

Gray, K.C., and *K. W. Mackinnon* for a holder of preference stock.

J. A. Brightman for the liquidator.

SIR RAYMOND EVERSHED, M.R.: I will ask Wynn-Parry, J., to give the first judgment.

WYNN-PARRY, J.: This is an appeal from the judgment of Roxburgh, J., on an originating summons which raises the question how the surplus property of the company should be distributed as between the preference stockholders and the ordinary stockholders of the company in its liquidation.

The company was incorporated on Nov. 3, 1896, and went into voluntary liquidation on July 16, 1946, in view of the imminent transfer of its electricity undertaking (then its only activity) under the Margate, Broadstairs and District Electricity Act, 1937. At the date of the liquidation the issued capital of the company consisted of £282,000 of preference stock and £150,000 of ordinary stock. By a special resolution of the company passed on Mar. 13 and confirmed on Apr. 10, 1929, new articles of association were adopted. Those articles have remained in force ever since. Article 3 of those articles defined the rights of the two classes of shares which were subsequently converted into stock, and, so far as relevant, provided :

> " The issued preference shares shall confer on the holders the right to a fixed cumulative preferential dividend at the rate of £6 per cent. per annum upon the amounts for the time being paid up or credited as paid up thereon respectively in priority to the ordinary shares, and the right to participate *pari passu* with the ordinary shares in the surplus profits which in respect of any year it shall be determined to distribute remaining after paying or providing for the said preferential dividend and a dividend for such year at the rate of six per cent. per annum on the amounts for the time being paid up or credited as paid up on the ordinary shares, and the preference shares shall confer the right in a winding-up of the company to repayment of capital, together with arrears (if any), and whether earned or not of the preferential dividend to the date of the commencement of the winding-up in priority to the ordinary shares."

That is followed by a provision the like of which, in my experience, I have never seen :

> " In the event of capital being written off on a reduction of capital amounts paid or credited on the ordinary shares shall be written off before the amounts paid or credited on the preference shares."

I read that provision only to dispose of it, because, in my view, it has really no effect whatsoever on the present question.

Prior to the liquidation, certain arrears of preference dividend which had accumulated during the war period were, according to the evidence before us, paid off. Further, the capital on the preference stock and on the ordinary stock has been repaid to the respective holders thereof, and there remains a very substantial balance, as to the destination of which the question before us has arisen. ROXBURGH, J., felt himself bound by authority and, with a reluctance which appears on the face of his judgment, was constrained to make a declaration to the effect that the holders of the preference stock were entitled to participate in this sum with the holders of the ordinary stock rateably in proportion to the nominal amount of the stocks held by them respectively. The two authorities which the learned judge mentions in his judgment are *Re Fraser and Chalmers, Ltd.* (1) and *Re John Dry Steam Tugs, Ltd.* (2). He does not in terms refer to *Re Metcalfe & Sons, Ltd.* (3), but it is plain that he must have had that case in mind, for it is a judgment of the Court of Appeal, and, at the time when the present case was before him, it was good authority. In *Re Metcalfe & Sons, Ltd.* (3) the Court of Appeal, while accepting that each case must be regarded as one of construction turning on the terms of the particular document, approved the statement of ASTBURY, J., in *Re Fraser and Chalmers, Ltd.* (1), where he said that all shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares. He proceeded on the view that that was the correct principle to apply when considering the construction of articles or resolutions dealing with the rights of classes of shareholders *inter se*. I think the effect of *Re Metcalfe & Sons, Ltd.* (3) can, stated shortly, be said to be that, in questions between preference shareholders and ordinary shareholders as to the right of the preference shareholders to share in what has been many times described as surplus assets, the onus of showing that the preference shareholders are not entitled to share in those surplus assets lies on the ordinary shareholders.

Since the matter was before ROXBURGH, J., the position has been materially altered by the decision of the House of Lords in *Scottish Insurance Corpn., Ltd.* v. *Wilsons and Clyde Coal Co., Ltd.* (4). For the purposes of the present case I do not think that it is necessary to embark on a detailed analysis of that case or the opinions of the members of the House of Lords who heard it, but, as appears from the headnote, the facts were that the colliery assets of a coal-mining company had been transferred to the National Coal Board under the Coal Industry Nationalisation Act, 1946, and in consequence it was the intention of the company to go into voluntary liquidation. Meanwhile, the company proposed to reduce its capital by returning their capital to the holders of the preference stock, which would be thereby extinguished. The reduction was opposed by certain preference stockholders on the ground, *inter alia*, that it deprived them of the right to participate in the liquidation and the division of the company's surplus assets. It was held by VISCOUNT MAUGHAM, LORD SIMONDS and LORD NORMAND, LORD MORTON OF HENRYTON dissenting, that the proposed reduction was not unfair or inequitable and should be confirmed, because even without it the preference stockholders would not have been entitled in a winding-up to share in the surplus assets or to receive more than a return of their paid up capital. Accordingly, they could not object to being paid, by means of the reduction, the amount which they would receive in the proposed liquidation. For reasons which I shall endeavour to show it appears to me that the effect of the decision of the majority in that case is not merely to remove the onus in cases such as this from the holders of ordinary shares, but to throw the onus on the holders of preference shares, and it is for the holders of preference shares to satisfy the court that, on the true construction of the particular document, they are entitled to share in the surplus assets. Perhaps the point emerges most clearly from the speech of LORD NORMAND, in which he quotes as follows ([1949] 1 All E.R. 1083) from the speech of VISCOUNT HALDANE, L.C., in *Will* v. *United Lankat Plantations Co., Ltd.* (5), where the Lord Chancellor said ([1914] A.C. 17):

> " ' Shares are not issued in the abstract and priorities then attached to them ; the issue of shares and the attachment of priorities proceed *uno*

> *flatu*; and when you turn to the terms on which the shares are issued you expect to find all the rights as regards dividends specified in the terms of the issue.' With this opinion LORD LOREBURN and LORD ATKINSON agreed. My Lords, the *ratio decidendi* applies with equal force to priorities of participation in the company's property, and I see no ground on which it may be supposed that the declaration of rights as regards dividends is exhaustive but the declaration of rights as regards property is not exhaustive. There is as good reason and it is equally easy to define exhaustively the one set of rights as the other. In *Re National Telephone Co.* (6), SARGANT, J., said ([1914] 1 Ch. 774): '. . . it appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding-up, the express gift or attachment of preferential rights to preference shares, on their creation, is, *prima facie*, a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights, they would have been entitled.' The decision of this house in *Will's* case (5) had not been pronounced when SARGANT, J., decided *Re National Telephone Co.* (6), and his opinion reflects his construction of the judgment of the Court of Appeal."

In my view, it follows from what I have read that LORD NORMAND took the view that the same principle applies to the construction of rights in a winding-up as applies to the construction of dividend rights and that he approved the extract from the judgment of SARGANT, J., in *Re National Telephone Co.* (6), which he cites. It, therefore, seems to me plain that he takes the view that the onus in such a case as this lies on the holders of preference shares. I think that the same view is, in effect, expressed both by VISCOUNT MAUGHAM and by LORD SIMONDS, the other members of the majority. VISCOUNT MAUGHAM says ([1949] 1 All E.R. 1074):

> "Much reliance is placed on behalf of the appellants on *Re William Metcalfe & Sons, Ltd.* (3). I must say that, in my opinion, that case was wrongly decided; and it should be noted that it is expressly stated that the bulk of the sum of £21,000 there in dispute was attributable to undistributed profits. It seems to me difficult to reconcile that case with the decision of this House in *Will* v. *United Lankat Plantations Co., Ltd.* (5), and impossible to reconcile it on sound grounds with the decision of *Re Bridgewater Navigation Co.* (7)."

It appears to me from that statement of VISCOUNT MAUGHAM that he could not reconcile the decision of *Re Metcalfe & Sons, Ltd.* (3) with the decision of the House of Lords in *Will* v. *United Lankat Plantations Co., Ltd.* (5) and that he was ranging himself on the same side as LORD NORMAND in taking the view that the onus in such cases is on the holders of preference shares. LORD SIMONDS, having discussed the relevant words in the relevant article in that case, says (*ibid.*, 1079):

> "I do not ignore that in the same case [*Will* v. *United Lankat Plantations Co., Ltd.* (5)] in the Court of Appeal the distinction between dividend and capital was expressly made by both COZENS-HARDY, M.R., and FARWELL, L.J., and that in *Re William Metcalfe & Sons, Ltd.* (3), ROMER, L.J., re-asserted it. But I share the difficulty, which LORD KEITH has expressed in this case, in reconciling the reasoning that lies behind the judgments in *Will's* case (5) and *Re William Metcalfe & Sons, Ltd.* (3), respectively. In *Collaroy Co., Ltd.* v. *Giffard* (8) ASTBURY, J., after reviewing the authorities, including his own earlier decision in *Re Fraser and Chalmers, Ltd.* (1), said in regard to capital and dividend preference respectively ([1928] Ch. 155): 'But whether the considerations affecting them are "entirely different" is a question of some difficulty.' He approved the proposition there urged by the ordinary shareholders that a fixed return of

> capital to shareholders in a winding-up is just as artificial as a provision for a fixed dividend, and that, if the latter is regarded as exhaustive, there is no *prima facie* reason why the former should not be similarly regarded."

It was urged on us that the true rule is to be found in the language of Lord Macnaghten in *Birch* v. *Cropper* (9). Counsel for the party who in effect represents the holders of preference stock read a passage from Lord Macnaghten's speech as follows (14 App. Cas. 543):

> "Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company, including its uncalled capital. He is liable in respect of all moneys unpaid on his shares to pay up every call that is duly made upon him. But he does not by such payment acquire any further or other interest in the capital of the company. His share in the capital is just what it was before. His liability to the company is diminished by the amount paid. His contribution is merged in the common fund. And that is all."

The passage relied on proceeds over the next three pages of the report, ending with these words (*ibid.*, 546):

> "There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company."

So that, both at the beginning and at the end of the passage relied on, there is the vital qualification that the rule which was stated by Lord Macnaghten only applies if the articles are silent as to any right in the preference shareholders to participate in surplus assets.

That rule, it appears to me, is in no way impinged on by the later cases, and, in particular, by *Scottish Insurance Corpn., Ltd.* v. *Wilsons and Clyde Coal Co., Ltd.* (4). Indeed, in the latter case Lord Simonds brings the statement by Lord Macnaghten in *Birch* v. *Cropper* (9) into true perspective in the light of the subsequent authorities. He says ([1949] 1 All E.R. 1079):

> "Finally, on this part of the case I ought to deal with an observation made by Lord Macnaghten in *Birch* v. *Cropper* (9) on which counsel for the appellants relied. Lord Macnaghten said (14 App. Cas. 546): '. . . they [the preference shareholders] must be treated as having all the rights of shareholders, except so far as they renounced those rights on their admission to the company.' But, in my opinion, Lord Macnaghten can have meant nothing more than that the rights of the parties depended on the bargain that they had made and that the terms of the bargain must be ascertained by a consideration of the articles of association and any other relevant document, a task which I have endeavoured in this case to discharge. I cannot think that Lord Macnaghten intended to introduce some new principle of construction and to lay down that preference shareholders are entitled to share in surplus assets unless they expressly and specifically renounce that right."

Having regard to the view which I take of the opinions of the majority of the House of Lords in the *Scottish Insurance Corpn.* case (4), it appears to me to be unnecessary to embark on any review of the earlier authorities, all of which were considered in that case, and, in my judgment, the effect of the authorities as now in force is to establish the two principles for which counsel for the ordinary stockholder contended: first, that, in construing an article which deals with rights to share in profits, *i.e.*, dividend rights and rights to share in the company's property in a liquidation, the same principle is applicable; and, secondly, that that principle is that, where the article sets out the rights attached to a class of shares to participate in profits while the company is a going concern, or to share in the property of the company in liquidation, *prima facie* the rights so set out are in each case exhaustive.

With these considerations in mind, I turn back to art. 3 of the articles of association in this case. As regards the rights as to profits, the whole of the distributable profits are expressly dealt with. They are to be applied, first, in paying to the holders of the preference stock "a fixed cumulative preferential dividend at the rate of six per cent. per annum on the amounts for the time being paid up or credited as paid up thereon respectively in priority to the ordinary shares"; secondly, in paying a non-cumulative dividend at the rate of six per cent. per annum, calculated on the same basis, to the holders of the ordinary shares; and the balance is then distributable between the two classes of shares *pari passu*. Nothing could be more plainly exhaustive than that language. Then, as regards the rights in a winding-up, the holders of the preference shares are stated to be entitled to certain payments in priority to the ordinary shares. Those payments are, first, repayment of the capital paid up on the preference stock, and, second, any arrears of dividend, whether earned or not. The question then is whether there is anything to suggest that the language regarding the rights of the holders of the preference stock in a winding-up is not exhaustive. I can find nothing. The onus now, as I have said, is, in my view, on the holders of the preference stock to show that the provision is not exhaustive, and, in my judgment, they have failed to discharge that onus.

There is present in this case a circumstance which, in my view, makes that conclusion *a fortiori*, namely, the express right conferred on the holders of the preference stock, while the company remains a going concern, to participate in the profits remaining after providing for the fixed non-cumulative dividend on the ordinary stock. A somewhat similar provision was contained in the articles of association which SARGANT, J., had to construe in *Re National Telephone Co.* (6). The relevant article (set out at [1914] 1 Ch. 758) was introduced by a resolution, which was as follows:

> "That the capital of the company be increased by the issue of 15,000 new shares of £10 each. That such shares be called second preference shares, and that the holders thereof (subject to the payment of the preferential dividend of the original preference shares) be entitled to a cumulative preferential dividend at the rate of six per cent. per annum. After the ordinary shares have received a dividend at the rate of six per cent. per annum out of the profits of each year, the second preference shares and the ordinary shares shall participate rateably, according to the amounts paid up thereon, in any surplus profits. The second preference shares shall not confer any right of voting at any general meeting of the company, and, in the event of the company being wound-up, the surplus assets thereof shall be applied in the first place in repaying to the holders of the original preference shares the full amount paid up thereon, and, subject thereto, in repaying to the holders of the second preference shares the full amount paid up thereon, in priority to any payment in respect of the ordinary shares of the company."

It will be seen that, in almost every material respect, art. 3 in this case is comparable with the provision which I have just read. On that SARGANT, J., says (*ibid.*, 769):

> "The question upon that clause, as in the previous case, is whether there is an implied negativing of any right on the part of the holders of the second preference shares to receive more in the winding-up of the company than the repayment of the whole of their capital. In my opinion there is.

> I am speaking now, on first impression, on my own construction of these articles, apart from authority, which I shall allude to hereafter. In my judgment the fact that an express right was given, in respect of dividend, to receive more than the amount of the preferential dividends in certain events strengthens the inference that the silence as regards return of capital in a winding-up indicates that there was to be no return of capital beyond the return of the nominal amount of the capital of the shares. I should have felt disposed to come to that conclusion even without the assistance to be derived from a consideration of the terms of the rights to dividend, but with that assistance it seems to me that any business man reading that resolution would come to the conclusion that the holders of the second preference shares were not entitled on a winding-up to get more than their return of capital."

I accept entirely the proposition, as, indeed, one is directed to do throughout the authorities, that each case must, in the end, be a question of the construction of the particular document in question, and it can be but infrequently that, in the construction of a particular document, one obtains such almost direct aid as I obtain in this case from the remarks of SARGANT, J., which I have just quoted. In my opinion, they are good sense, and I would apply them in their full force to the art. 3 before the court in this case. It was urged on us that, in construing art. 3, we must have regard to the whole of the articles of association and to the surrounding circumstances. I accept that. It was urged on us that a relevant circumstance was that in this case the voting control rests in the hands of the holders of the preference stock, and from that it was sought to be argued that it is impossible to conclude that the holders of the preference stock, the controllers of the company, should have contemplated that, in a liquidation, they would get no more than any arrears of dividend on their preference stock, together with the capital thereon. I am unable to accept that argument. It involves speculation and, therefore, uncertainty. The bargain as regards rights of participation, whether in profits or assets, appears to me to be contained in art. 3. Nor can I find any context affecting the construction of that article to be derived from any other article in the articles of association. Finally, it was urged on us that we ought to have regard to the state of the law as it existed when the articles were adopted in 1929, and that the relevant art. 3 should be construed in the light of the law as then obtaining. There might—I say no more—perhaps have been some force in that argument had *Re Metcalfe & Sons, Ltd.* (3) been decided before the adoption of these articles; but the argument appears to me to be completely without weight when one considers what was the position of the law on this point in 1929. It is, I think, sufficient to say that there was then a conflict of judicial opinion on this point, which was only resolved, and then only for the time being, by the decision of the Court of Appeal in *Re Metcalfe & Sons, Ltd.* (3) in 1933. For these reasons I would allow this appeal.

ASQUITH, L.J.: I agree.

SIR RAYMOND EVERSHED, M.R.: I also agree. At the end of his judgment the learned judge stated his conclusion thus:

> "It is quite clear that if, on a fair construction of the article, I cannot find that the preference shareholders are excluded from participation in the surplus assets, then they are entitled to participate."

That conclusion was based on the decision of this court in *Re Metcalfe & Sons, Ltd.* (3), which governed this case when it was before ROXBURGH, J. Since then the law has been substantially affected by the decision of the House of Lords in *Scottish Insurance Corpn., Ltd.* v. *Wilsons and Clyde Coal Co., Ltd.* (4). In those circumstances, I shall not be thought disrespectful to the learned judge if I do not state at length the reasons for taking a view different from that which he reached. I agree with WYNN-PARRY, J., that, as a result of the *Wilsons and Clyde* case (4) the two propositions for which counsel for the ordinary stockholder contended should be now taken as established.

Out of respect, however, for the careful and forceful argument of counsel for the preference stockholder before us, I will state in a few sentences why I reach that conclusion. At the end of his speech dealing with this point in the *Wilsons and Clyde* case (4) LORD NORMAND said ([1949] 1 All E.R. 1084) :

> " It is, I think, not possible to distinguish *Metcalfe's* case (3) from the present case, and I have, therefore, come to the conclusion that it should be overruled and that the *ratio* of *Will* v. *United Lankat Plantations Co., Ltd.* (5), was correctly applied in *Collaroy Co., Ltd.* v. *Giffard* (8) and *Re National Telephone Co.* (6).

It is true, as counsel has pointed out, that the language of LORD NORMAND in this respect is, perhaps, somewhat less qualified than the language which fell from VISCOUNT MAUGHAM and LORD SIMONDS on the same matter. But the disapprobation which both VISCOUNT MAUGHAM and LORD SIMONDS expressed for *Re Metcalfe & Sons, Ltd.* (3) is found in a context in which reference was made to the fact that LORD KEITH, in the Court of Session, had found it impossible to reconcile *Will* v. *United Lankat Plantations Co., Ltd.* (5) and *Metcalfe's* case (3). It seems to me, therefore, that the result of the majority speeches is to treat as established, and as good law, the statement of SARGANT, J., in *Re National Telephone Co.* (6), which WYNN-PARRY, J., has read, and to do so notwithstanding any observations of LORD MACNAGHTEN in *Birch* v. *Cropper* (9), which must be construed as applicable only to the case where the articles are wholly silent as regards particular or specific rights.

I think that, during the sixty years which have passed since *Birch* v. *Cropper* (9) was before the House of Lords, the view of the courts may have undergone some change in regard to the relative rights of preference and ordinary shareholders—and to the disadvantage of the preference shareholders, whose position has, in that interval of time, become somewhat more approximated to the role which *Sir Horace Davey* attempted to assign to them, but which LORD MACNAGHTEN rejected in *Birch* v. *Cropper* (9), namely, that of debenture holders. In his dissenting opinion in the *Wilsons and Clyde* case (4), LORD MORTON OF HENRYTON, after citing a passage from LORD MACNAGHTEN'S speech in *Birch* v. *Cropper* (9), based this conclusion on it (*ibid.*, 1086) :

> " Thus, in the present case the preference stockholders are entitled to share in the surplus assets with the ordinary stockholders in proportion to their respective holdings, unless the articles of the company otherwise provide."

But that view, and that interpretation of LORD MACNAGHTEN'S speech, were rejected by the majority of the House of Lords. It is the duty of the court to follow loyally the result, and not to seek by minute analysis to perceive fine distinctions between the opinions of the concurring Lords, more especially when the effect might be to produce a condition of perhaps inconvenient uncertainty.

I, therefore, on the point of law conclude that, after the *Wilsons and Clyde* case (4), the onus is, so to speak, on the preference stockholders. It is, of course, quite true that the matter in the last resort is one of the construction of the articles. For reasons which WYNN-PARRY, J., has already stated, and with which I agree, I think the onus has not been discharged. It is true that this case possesses, in some respects, notable features. For example, the preference shareholders have a majority of the voting powers, and they have, under the terms employed at the end of art. 3, a position in regard to reduction of capital which is (I agree with WYNN-PARRY, J.) unique in my experience, nor do I forget that they are given earlier in the article a right to participate with the ordinary shareholders in surplus profits. I cannot, however, come, on any of those matters, or on all of them together, to a conclusion which would discharge the onus placed on the preference stockholders, even if (without saying that it is right to do so) regard is had to the state of the law as it was thought to be when the article was first adopted. I think that there may be this difficulty too. Counsel for the preference stockholder before us said that one would expect to find some kind of parallelism between the rights *inter se* of the preference shareholders and the ordinary shareholders as to dividend and their rights *inter se* in a winding-up. Having regard to the nature of the right of participation, it would, I think, be difficult to reproduce a true parallel between the two classes in a winding-up, and still more difficult to read into the provisions of the article appropriate language to produce such a result. Even if one did, one would still be left with some anomaly having regard to the rights on a reduction of capital. I think, for these reasons, as well as those that have already been stated, that this appeal should be allowed, and that the appropriate declarations should be to the effect that the surplus assets are now distributable exclusively among the ordinary stockholders.

Appeal allowed. Authorisation to the liquidator out of the funds in his hands to pay the costs of all parties as between solicitor and client.

Solicitors : *Stock & Slater* (for the ordinary shareholder) ; *Peacock & Goddard*, agents for *Parker, Son & Nickson* (for the preference shareholder) ; *Ashurst, Morris, Crisp & Co.* (for the liquidator).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

ANGLO-DANUBIAN TRANSPORT CO., LTD. *v.* MINISTRY OF FOOD.

[King's Bench Division (Devlin, J.), November 24, 25, 1949.]

Shipping—Charterparty—Delivery of cargo to safe berth—Nomination by charterer of discharge berth—Ship diverted to another berth—Consequent loss of freight—Right of shipowner to recover—Measure of damages.

A charterparty provided that the ship should take a cargo of potatoes from Rotterdam to a range of ports including London and there deliver it to the usual safe berth, as customary. The charterer nominated New Hibernia Wharf above London Bridge as the place of discharge, but, on the vessel's arrival there, the charterer gave orders for her to proceed to Hay's Dock, 260 yards down the river, and below London Bridge, where the cargo was discharged. The freight payable to the shipowners was 2*s.* 3*d.* per ton less at Hay's Dock than at New Hibernia Wharf.

Held : (i) when nominated by the charterer New Hibernia Wharf was to be treated as if written into the charterparty as the place of discharge, and it could not be altered subsequently by the charterer alone.

(ii) the breach of the charterparty by the charterer's failure to have the cargo discharged at New Hibernia Wharf was not waived by the action of the master in taking the ship to the new berth, nor by his action had he prejudiced the shipowner's claim for damages for the breach.

(iii) the shipowner was entitled to recover the additional freight of 2*s.* 3*d.* per ton.

[As to the Discharging Berth in Carriage of Goods by Sea, see HALSBURY, Hailsham Edn., Vol. 30, pp. 523-6, paras. 675, 676 ; and for Cases, see DIGEST, Vol. 41, pp. 525-527, Nos. *3542-3553.*]

Action for damages for breach of a charterparty and/or freight.

The Ministry of Food (the charterers) had nominated New Hibernia Wharf above London Bridge as the place of discharge of a ship which they had chartered from the plaintiffs, but on the ship's arrival off the wharf they ordered her to discharge instead at Hay's Dock down the river where the freight rate payable to shipowners was 2*s.* 3*d.* per ton less. They contended that they were entitled to nominate a new berth at any time before the ship began to discharge or before she became an arrived ship, and, alternatively, that, if the change of orders constituted a breach of the charterparty, such breach had been waived by the master on behalf of the shipowner. DEVLIN, J., gave judgment with costs for the plaintiffs on both points.

Michael Holman for the shipowners.
E. W. Roskill for the charterers.

DEVLIN, J. : The plaintiffs, the owners of a ship called the Shelley, are claiming £40 6*s.* 11*d.* from the Ministry of Food as the balance of freight which they say is due to them under a charterparty dated Apr. 15, 1948. On Apr. 23, 1948, the ship loaded a cargo of potatoes at Rotterdam, and, under the charterparty, she was required to take them to a range of ports which included London and there to deliver the cargo at " the usual safe berth, as customary, on being paid freight in cash . . . " That provision with regard to the usual safe berth implies that it is the charterers' right to nominate. Before the vessel left Rotterdam on Apr. 23, the charterers nominated New Hibernia Wharf, London, as being the place of discharge. The freight was to be paid in accordance with the Chamber of Shipping schedule rate, and that rate varies according to whether the place of discharge in the port of London is above or below London Bridge. It is obvious that, if a vessel is to go into the higher reaches of the river the journey will cost more, so some line of demarcation has to be drawn, and London Bridge is taken as the line. If the place of discharge is above London Bridge an extra sum of 2*s.* 3*d.* per ton is paid. New Hibernia Wharf is just above London Bridge, and so the nomination was a fortunate one for the shipowners, for they earned the extra 2*s.* 3*d.* with very little, if any, additional expenditure. The ship arrived in the river on Apr. 25, and when she got to New Hibernia Wharf she was given orders by the charterers to discharge instead at Hay's Dock which is about 260 yards down the river below London Bridge. She discharged there, and the matter in dispute is whether or not her owners are entitled to the 2*s.* 3*d.* per ton.

The first point counsel for the charterers has taken is that a charterer is not debarred from changing his mind after he has nominated the vessel's berth, but that he can nominate another berth at any time before the ship begins to discharge, or, at any rate, before she becomes an arrived ship. It is, clearly settled by the authorities that where there is an express reservation in the charterparty to the charterer to nominate the port or berth, that port or berth, when nominated, is to be treated as if it had been written into the charterparty. I have not been troubled in detail with the authorities that may cover the position where the right to nominate is implied rather than expressed, counsel for the charterers has conceded that there can be no difference, as clearly there cannot. That being so, the position seems to me to be that when the charterers nominated New Hibernia Wharf it was to be treated as if it was written into the charterparty as the place of discharge, and it follows from that that it cannot be altered by the charterers. To permit the charterers to alter it would be to permit a unilateral alteration of the contract. Accordingly, I think that point fails.

The next point made for the charterers is that, if there was a breach of the charterparty, it was waived by the master on behalf of the plaintiffs. That makes it necessary to determine what the material breach is. I think that the material breach is that the charterers failed or refused to discharge the vessel at New Hibernia Wharf. I think, in substance, that that is what did happen—that the change of orders, given in the circumstances in which it was given, carried with it the implication that the charterers were not going to discharge the ship at New Hibernia Wharf. In those circumstances, when one talks of waiving a breach, it is necessary to be a little more precise. What counsel for the charterers would have to establish in order to succeed would be that the master on behalf of the shipowners agreed to abandon their right to damages. Once I am satisfied that the breach occurred, unless the shipowners did something which amounted to an abandonment of their right to damages (and that could only be by agreement), they are entitled to pursue their right to damages. I dare say that, if the master had been a lawyer, he would have sent for the charter-party, and, after having read it carefully, would have discussed the legal position with Mr. Windle, the boatman who was selected to convey the message relating to the change in instructions, and would have told Mr. Windle expressly that he was reserving his right to damages. Whether Mr. Windle would have made very much of that, I gravely doubt. I have to be satisfied, since it is not suggested that the master expressly abandoned his right to damages, whether anything in his acts necessarily amounted to that, and I am clear that it did not. By taking what was in the circumstances the sensible course, if only to minimise the damages, of taking the vessel where the charterers wanted her to go and discharging, I do not think that he in any way prejudiced the position of the shipowners to claim damages for any breach there might have been. The damages clearly are the amount claimed, *viz.*, the sum which the owners lost by reason of the fact that they discharged at Hay's Dock instead of above London Bridge. They lost a profitable rate and had to take instead a less profitable rate, and I do not think it is contested that that is the right measure of damages. It is not, therefore, necessary to deal with the point argued before me—which may very well be right—that the ship was entitled to be paid freight at the higher rate quite apart from her claim for damages inasmuch as she had arrived off New Hibernia Wharf and had done everything to make herself an arrived ship. There will be judgment for the shipowners for the sum claimed.

Judgment for plaintiffs with High Court costs, and interest at three per cent.

Solicitors: *Holman, Fenwick & Willan* (for the plaintiffs); the *Treasury Solicitor* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re NEW ROCK COLLIERY CO., LTD. THE COMPANY *v.* MINISTRY OF FUEL AND POWER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ.), November 9, 10, December 2, 1949.]

Coal—Nationalisation of industry—Interim income—"Last complete accounting period"—Accounts of company made up quarterly, but embodied in annual account—Coal Industry Nationalisation Act, 1946 (c. 59), *s.* 22 (3) (*c*).

The Coal Industry Nationalisation Act, 1946, s. 22, which prescribes the method of satisfying the right of expropriated concerns to interim income pending satisfaction of compensation, provides by sub-s. 3 (*c*): "... a concern's or subsidiary's comparable ascertained revenue ... shall be taken to be ... the amount of its profits and gains ... computed on income tax principles ... for its last complete accounting period before July 1, 1946, ... (any such amount for any accounting period of more or less than twelve months being adjusted to a twelve months' equivalent thereof) ..."

From the date of the incorporation of a company in 1925 its accounts were made up quarterly for the periods ending on Mar. 31, June 30, Sept. 30 and Dec. 31, and a balance sheet was prepared at each of those dates. Each quarterly account was audited as soon as possible after the end of the quarter, and written up in the company's private ledger. The accounts presented to the shareholders of the company at the annual general meeting of the company were the four quarterly accounts combined into one account in respect of the year ending Sept. 30, and it was to the balance sheet made at Sept. 30 and presented at the annual general meeting that the auditor's certificate required under the Companies Acts was appended. These were the only accounts presented to the shareholders at the annual general meeting of the company. For the purposes of income tax the company always produced quarterly accounts until 1939, after which a single account covering one year was produced, but all supporting schedules of information were prepared on a quarterly basis.

HELD : on their true construction the words " last complete accounting period " in s. 22 (3) (*c*) meant the last period in respect of which the owner of the colliery concern in question chose to make up its accounts ; on the evidence it was clear that this company had as a matter of business practice for many years made up its accounts, in the true and proper sense of that term, quarterly ; and, therefore, for the purposes of the sub-section its profits and gains had to be ascertained for the quarter ending on June 30, 1946.

Jenkins Productions, Ltd. v. *Inland Revenue Comrs.*, ([1944] 1 All E.R. 610), *distinguished.*

Decision of VAISEY, J., ([1949] 1 All E.R. 613), *affirmed.*

[FOR THE COAL INDUSTRY NATIONALISATION ACT, 1946, s. 22 (3), see HALSBURY'S STATUTES, Vol. 39, pp. 278, 279.]

Case referred to :

(1) *Jenkins Productions, Ltd.* v. *Inland Revenue Comrs.*, [1944] 1 All E.R. 610 ; 170 L.T. 292 ; *varying*, [1943] 2 All E.R. 786 ; 2nd Digest Supp.

APPEAL by the Ministry of Fuel and Power from an order of VAISEY, J., dated Feb. 23, 1949, and reported [1949] 1 All E.R. 613. VAISEY, J., held that the " last complete accounting period " of the New Rock Colliery Co., Ltd., was the quarter ending June 30, 1946. The Court of Appeal now dismissed the appeal. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R., and are summarised in the headnote.

Cross, K.C., and *D. B. Buckley* for the Ministry of Fuel and Power.
Russell, K.C., and *Wilfrid Hunt* for the company.

Cur. adv. vult.

Dec. 2. The following judgments were read.

SIR RAYMOND EVERSHED, M.R. : The question raised in this appeal is the short question of the effect of the Coal Industry Nationalisation Act, 1946, s. 22, and, particularly, of the phrase in sub-s. (3) (*c*) of that section " its last complete accounting period " on the respondent company. The purpose of the section is to provide for payment to colliery concerns (of which the respondent company is one) in respect of their interests transferred under the Act (in this case its whole business and undertaking) income payments for the two years next following the vesting date, namely, July 1, 1946. The payment so to be made for each year is by s. 22 (3) (*a*) of the Act specified as " one half of the comparable ascertained revenue " of the concern. Paragraph (*c*) of the sub-section, on which the whole matter turns, prescribes the way in which the comparable ascertained revenue is to be determined. The paragraph is in the following terms:

> " for the purposes of para. (*a*) of this sub-section a concern's or subsidiary's comparable ascertained revenue attributable to activities mentioned in that paragraph shall be taken to be either (as the concern or subsidiary may elect in accordance with regulations) the amount of its profits and gains so attributable, computed on income tax principles subject to such adaptations as may be prescribed, for its last complete accounting period before July 1, 1946, or the average of the amounts of its profits and gains so attributable and computed for its two complete accounting periods last before July 1 in the years 1944 and 1945 respectively (any such amount for any accounting period of more or less than twelve months being adjusted to a twelve months' equivalent thereof) . . . "

It will be observed that a choice of two alternatives is given by the paragraph. In the present case, the company chose the first alternative, and they have claimed to have the relevant calculation made by reference to the quarterly period to June 30, 1946, as the last complete period prior to July 1, 1946, in respect of which, in accordance with the company's regular business practice for very many years, revenue or profit and loss accounts were, in fact, made up and examined and verified by its auditors. The appellants, the Ministry of Fuel and Power, contend, on the other hand, that, since this quarterly accounting was done merely for the internal convenience of the company and the information of its directors and was not undertaken pursuant to any statutory or other obligation imposed on the company and also was not laid before its members in general meeting, the quarterly period in question cannot properly be regarded as the company's " last . . . accounting period " within the meaning of the section, but that, by the phrase quoted, Parliament must have intended to refer (so far as relevant to the present case) to the last period for which the company's accounts, in the ordinary business acceptation of the term, were prepared, that is, the yearly period to Sept. 30, 1945, for which the company's annual accounts were made up for presentation to the company's annual general meeting pursuant to its obligation under the Companies Act, 1929, s. 123. On the facts of the case as they have turned out, the latter view, if correct, will produce results very much less advantageous to the company than the former.

As will have appeared, the whole question turns on the proper interpretation to be given to the few words " its last complete accounting period." No further instruction is given in the definition section or elsewhere in the Act as to the meaning of the phrase, nor does it appear to have any special or established significance. It is, therefore, necessary to apply to the words, as ordinary English words, the ordinary principles of construction adopted in the courts and to ask and answer the question : What, on the facts of the case as proved by properly admissible evidence, was the last accounting period of this company ? I have posed the question in this form since it is, I think, particularly important in this case to bear in mind that the function of the court is in general to confine itself to the particular subject-matter presented to it and not (save to the extent necessary for the determination of the case before it) to lay down general principles for application to other cases and other circumstances. In the present case, the evidence before the court—and the only evidence—consists of two affidavits sworn on the company's behalf, one by a Mr. Thomas, a partner in the firm who have acted for many years as the company's auditors, and the other by the company's secretary, together with a letter written—no doubt, for the purposes of the action—to Mr. Thomas' firm by His Majesty's Inspector of Taxes in November, 1948. No books or accounts of the company have been in evidence before the court, nor have its memorandum and articles of association been exhibited. It was stated and agreed by counsel (though not proved) that the company had only two shareholders at all material times who were also its directors.

The relevant facts as to the company's practice in regard to its accounts are stated in the first five sub-paragraphs of para. 6 of Mr. Thomas' affidavit. All these sub-paragraphs are important for present purposes, but it will be sufficient in this judgment to read only sub-paras. (1), (3) and (5) :

> " (1) Since the incorporation of the company on Sept. 17, 1925, its accounts have always been made up and produced quarterly for the periods ending on Mar. 31, June 30, Sept. 30 and Dec. 31, and a balance sheet was prepared at each of those dates . . . (3) Each quarterly account has been audited as soon as possible after the end of the quarter, and written up in the company's private ledger. For the purposes of the said quarterly accounts royalties, which were in fact payable for the half years ending June 30 and Dec. 31, were estimated for the quarters ending Mar. 31 and Sept. 30 . . . (5) The accounts presented to the shareholders of the company at the annual general meeting of the company were the four quarterly accounts combined into one account in respect of the year ending Sept. 30. It was to the balance sheet made at Sept. 30 and presented at the annual general meeting that the auditor's certificate required under the Companies Acts was appended. These were the only accounts presented to the shareholders at the annual general meeting of the company."

In his letter, to which I have earlier referred, the inspector of taxes stated :

> " As far back as I can trace this company always produced for purposes of arriving at its taxation liabilities, quarterly accounts (including detailed balance sheets) up to and including the income tax year 1938-39. For that year you forwarded as usual four quarterly accounts ended Dec. 31, 1937."

Then, after referring to a recorded note in his possession of a conversation with Mr. Thomas when the latter " explained to me that the company had always made up its accounts quarterly," the inspector ended his letter as follows :

> " Since that time (*i.e.*, for the year to Sept. 30, 1938, and following years) a single account covering one year has been produced to me. It seems quite clear, however, that the company has still continued to prepare its accounts quarterly. All supporting schedules of information produced to me have invariably been prepared on a quarterly basis."

Finally, Mr. Caines, the company's secretary, in his affidavit states that, prior to the transfer of its business under the Act of 1946, the company made half-yearly returns made up to June 30 and Dec. 31 to the Somerset District Colliery Owners Association for the purpose of district wages ascertainment and also made annual returns to the Board of Trade (afterwards the Ministry of Fuel and Power) made up to Dec. 31, and that in each case the returns were " an aggregation " of the figures in the appropriate quarterly accounts. As previously appears, the company's financial year at all material times ended on Sept. 30.

On this evidence it is, in my judgment, clear beyond reasonable doubt that this company has as a matter of business practice for very many years made up its accounts, in the true and proper sense of that term, quarterly. No doubt, having regard to the various returns it had to make for income tax and other purposes, it was convenient so to do, so that on these occasions it had only to make the appropriate compilations or aggregations. In any event, it is quite plain that the professional inspection and verification of the company's books was undertaken quarterly and that no separate audit was made, for example, for the purposes of the annual accounts to be laid before the general meeting or for income tax purposes. It is true that the auditors' certificate pursuant to the Companies Act was annexed only to the annual accounts, but I cannot see that for present purposes that fact can be of material assistance. The terms of the certificate could not be said to suggest that the information given to the auditors had been given otherwise than in the course of taking the quarterly accounts. In these circumstances, counsel for the company suggested that, whatever might be, or have been, the position on other dates, the last complete accounting period prior to July 1, 1946, was, undoubtedly, the quarterly period which ended on June 30, 1946, so that, if the company's financial year was also an accounting period, nevertheless the quarter to June 30, 1946, was later in date than the year to Sept. 30, 1945.

I agree with Vaisey, J.'s conclusion that the quarter to June 30, 1946, was the company's last complete accounting period before July 1, 1946. I do not, however, think it right or satisfactory to decide the present case solely on the narrow ground suggested by counsel for the company. Though it is true that the company's financial year is not, as it were, directly in competition with the quarterly period to June 30, 1946, as it would have been had the financial year also ended on June 30, nevertheless, if (as the Ministry of Fuel and Power have contended) the section, on its true interpretation, must be taken in the case of this company to point to an annual accounting period, then the year to Sept. 30, 1945, was the last such period, and ought *prima facie* to take precedence for present purposes over the quarterly period to June 30, and, in deference to the argument put before us, if both the financial year and the quarters can properly be called accounting periods it is, I think, proper to state my conclusion why the period, which, in this case, I think to be the relevant period, qualifies as such—that is, whether it does so by virtue only of chronology or because of its characteristics other than those of date. I turn, therefore, to the language of the paragraph in the sub-section. No assistance, to my mind, can be derived from the word "complete." It was suggested on the Ministry's part that the quarterly accounts should be regarded as, at most, "interim" accounts and, therefore, not "complete" within the meaning of the paragraph, but I cannot accept the suggestion. The adjective "complete" is related to the noun "period," and must, therefore, in my judgment, mean not broken or unfinished. A significance by way of contrast to "interim" would only be possible if the word had been used to qualify, not the period, but the accounts.

The main burden of the Ministry's case hinged on the word "accounting," and it was urged that the use of this word necessarily imported the notion of an obligation—statutory or contractual—to account to someone. In the case of a partnership (which the Act must clearly be taken to have contemplated), the "accounting" would be by the partners to each other under the common provision to that effect found in articles of partnership, but, in the case of a company subject to the Companies Act the obvious obligation (it is said) is that imposed by statute—the obligation to account once, at least, in every year to the shareholders in general meeting. Alternatively, it was argued—particularly in the light of the immediately preceding reference to "income tax principles"—that the duty to account contemplated was the duty in respect of income tax, with the same practical result, namely, that the company's yearly accounting period must alone have been intended. I am unable to accept either of these contentions. It is to be observed that the language of the paragraph appears to contemplate the making of a new account rather than a reference to an already existing account. The comparable ascertained revenue is (in the present case) to be taken to be "the amount of its profits and gains . . . computed on income tax principles subject to such adaptations as may be prescribed . . ." It follows, in my judgment, that there is a distinction between the principles on which the account is to be taken (which may be modified by statutory instrument), and the period in respect of which such account will be made up. The principles on which the account is to be taken cannot, to my mind, be governed or affected by the period which they cover. No doubt, the existing accounts, already verified, will in practice form the basis of the computation which the paragraph requires, but it does not, to my mind, follow that the period to be selected for the purposes specified by the paragraph should be determined by reference to the purposes for which periodical accounts have been, in fact, made up.

Much reliance was placed by the Ministry on the judgment of Lord Greene, M.R., in *Jenkins Productions, Ltd.* v. *Inland Revenue Comrs.* (1). I agree with VAISEY, J., that the *Jenkins* case (1) was decided on a statute wholly different in its language from that which we have to construe, and I confess that, for my part, I derive little assistance towards the solution of the present problem from the *Jenkins* decision (1). The question in that case was whether the appellant company in fact "made up" accounts for a twelve-monthly period within the meaning of the Finance Act, 1939 (imposing excess profits tax). It is true that in that case it was proved that the appellant company in fact regularly caused accounts of its business transactions to be prepared and audited for six-monthly periods, and that the annual accounts laid before the shareholders in general meeting were a compilation or aggregation of the two relevant half-yearly accounts. The real question, therefore, was not what was the company's "accounting period," but (though it might well be said to have "made up" accounts for periods of six months) whether, nevertheless, it could truly be said that it in fact "made up" accounts for periods of twelve months. To this question the court gave an affirmative answer, but, in my judgment, the answer neither involved any denial that the company also "made up" six-monthly accounts nor suggested any answer to the question (which was quite irrelevant for the decision, and was not raised or argued in the case): What was the company's "last accounting period"? The learned Master of the Rolls, however, having stated his answer to the question posed on the lines indicated above, proceeded to add ([1944] 1 All E.R. 612):

> "Here you have a company which in fact did prepare two different sets of accounts; one a six-monthly account prepared for the convenience of the directors; the other a twelve-monthly account prepared for the information of the shareholders. That twelve-monthly account is one which has certain characteristics. First of all, it is to be submitted to the shareholders, who are entitled to approve or disapprove it. Therefore, in that sense, it is a final account in a way in which the accounts produced to the directors for the six months were not final accounts at all. Secondly, the accounts so submitted to the shareholders were submitted in pursuance of the statutory obligation to submit accounts. It seems to me, bearing those two considerations in mind, that the yearly accounts are primarily the more important of the two sets of accounts which this company in fact got out. Applying the language of this section to that state of affairs, which of these two sets of accounts is properly to be described as 'the accounts of the trade or business'? Surely, there can only be one answer to that question. The accounts are the important final accounts. It seems to me that these words have to be construed in the light of the well-known practice of companies to have a financial period. A company's financial period is commonly twelve months; and accounts are got out in reference to that financial period. When the paragraph speaks of the accounts being 'made up,' it surely must mean the accounts which are the accounts for the purposes of the company's financial unit of time."

It is on this passage that the Ministry most strongly rely, and most particularly on the last sentence that I have quoted. Having regard to the answer which the Master of the Rolls had already given to the question raised in the case, the passage quoted must, in my judgment, be regarded as "*obiter*"—though none the less deserving of great weight. The Master of the Rolls was, as I follow his judgment, finding in the circumstances to which, in the passage quoted, he refers, corroboration for his view that the appellant company in a real sense of the term in fact "made up" its accounts for twelve-monthly periods. Counsel for the company has criticised the reference to the power of the shareholders to "approve or disapprove" the accounts laid before them, and he has pointed out that disapproval would not, in fact, invalidate the accounts or disqualify

them as "the company's accounts." For present purposes, however, I do not think such criticism assists the present problem one way or another. I am ready to assume that in the present case the company can properly be said to have "made up" its accounts when the necessary aggregation or compilation was made for the purpose of the annual general meeting, as I am also strongly inclined to think that it can be said to have "made them up" half-yearly for the purpose of wages ascertainment and annually to Dec. 31 for the purpose of A
tendering returns to the Board of Trade or the Ministry of Fuel and Power. Whatever may have been the company's "financial unit of time" generally or for particular purposes, the question in this appeal remains: What was its last complete accounting period before July 1, 1946?

I can well understand that, in other cases and on other facts, where a company or other "colliery concern" was shown to have "accounted" both annually B
and in respect of shorter periods, it might be held that the concern had two (or more) accounting periods, and that for the purposes of s. 22 of the Act of 1946 the "last complete accounting period" before the vesting date was that period (twelve-monthly or other) which, in fact, last ended before that date, or (because two such periods were directly in competition for qualification under sub-s. (3) (*c*) or otherwise) that the accounts taken in respect of the shorter period ought to C
be regarded as subsidiary in character so that the twelve-monthly period ought to be accorded primacy. But on the facts of the present case, as I have attempted to show, the facts proved in evidence seem to me clearly to establish the truth of Mr. Thomas' statement to the inspector of taxes—"the company had always made up its accounts quarterly."

I ought also to refer to the Ministry's argument based on the second alternative D
offered to the colliery concern by the relevant paragraph. If the view of the learned judge is correct, then it is pointed out that, had the company chosen the second alternative, the figures would have been calculated on the somewhat artificial basis of two quarterly accounts separated by a gap of nine months. This is undoubtedly true, but it is not, to my mind, sufficient to compel us to give to the phrase "last accounting period" a strained or special significance. E
The statutes which were subject to consideration in the *Jenkins* case (1) show, at least, that, if Parliament had desired or intended in the case of limited companies or otherwise to give a preference to twelve-monthly periods of accounting, there were available precedents in the Finance Acts for doing so. The choice was made of what appears to be a novel phrase "last accounting period," and, if the purpose of the section is considered, there are at least reasonable grounds for the choice. F
By s. 19 of the Act the undertakings of the colliery concerns had become vested in the State, but it was apparent that the fixing of the global amount of capital compensation, and (still more) its apportionment among the various participants, would take a considerable time. It was, therefore, decided to provide, in addition to the capital compensation, for payment of a further sum by way of compensation for the loss of revenue experienced G
during the two years following the vesting date, at a rate (speaking broadly) of fifty per cent. of the income which the concerns were, by the effect of the Act, prevented from earning. In such circumstances it is, at least, not surprising that, for the purpose of calculating the income compensation, the period taken should be that which ended as near as possible to the vesting date, for the figures for that period might fairly be supposed to have indicated, as nearly as H
practicable, what the fortunes of the concerns would have been, apart from nationalisation. And if, in any case, as a result of temporary changes, this latest period might operate unfairly on a concern, it was given the option of taking the average of the corresponding periods next before July 1, 1944, and July 1, 1945. I should add that, in any event, the second alternative has not been expressed so as to cover all possible cases, for if a concern, the accounting period for which had at all times been admittedly yearly, had chosen to alter

the date to which the (annual) accounts were made up, it might well have happened that there was no complete accounting period after July 1, 1944, and before July 1, 1945, so that in such a case the second alternative would not be available at all.

I have left until last the effect of the final parenthesis in the paragraph—"(any such amount for any accounting period of more or less than twelve months being adjusted to a twelve months' equivalent thereof)"—which VAISEY, J., regarded as decisive. I am myself disposed to place less emphasis on these words than did the learned judge, for it is, I think, true to say that even if, in the case of the ordinary trading company, the period indicated is the normal "financial unity" of twelve months, sensible effect can be given to the parenthesis which, on this view, would cover the case where at the material date the company had changed its accounting year so that its last accounting period was, in fact, a period of less or more than twelve months. Nevertheless, I agree with the learned judge in thinking that the parenthesis more naturally supports the view of the company than that of the Ministry. As counsel for the Ministry have rightly emphasised, the colliery concerns affected might well be, not only limited companies, but partnerships or businesses carried on by individuals, and in the latter instances, whatever might have been their practice as regards income tax, their "accounting periods" might have been some periods other than yearly, for example, under partnership articles the duty of accounting is not uncommonly imposed half-yearly. Bearing such cases in mind, it seems to me that Parliament chose a form of words of universal application and intended to cover each and every case in accordance with the facts proved as to its particular established business practice.

Having regard to the importance of the case, and out of respect for the arguments submitted to us, I have dealt at length with the various points submitted for our consideration, but, in the result, I find myself in agreement with the conclusion of VAISEY, J., as expressed by him at the end of his judgment ([1949] 1 All E.R. 615):

> "It cannot be disputed on the evidence that the company did account quarterly. There is no evidence that the combined account was anything but the most formal combination of the four preceding quarterly accounts. Here we have a company which, with no ulterior object in view, but merely as a matter of the legitimate arrangement of its own private affairs, has for years made up its accounts, had them audited, and entered them in its ledger, on a quarterly basis."

For these reasons I think the appeal should be dismissed.

COHEN, L.J.: I am of the same opinion. As the Master of the Rolls has said, the question before us is the short one of the meaning of the expression "its last complete accounting period before July 1, 1946," in the Coal Industry Nationalisation Act, 1946, s. 22 (3) (*c*). VAISEY, J., has held that so far as the New Rock Colliery Co., Ltd., is concerned, it is the quarterly period ending on June 30, 1946. He has based his conclusion largely on the words "(any such amount for any accounting period of more or less than twelve months being adjusted to a twelve months' equivalent thereof)" at the end of para. (*c*). I do not myself attach the same importance as he did to those words, as I think they might have been inserted to cover the contingency, for instance, of a company having altered the date of its financial year in the year preceding July 1, 1946, and thus having made up its accounts on that occasion only for a period of more or less than twelve months. None the less, for the reasons I will state, I think VAISEY, J., came to the right conclusion on the evidence before the court.

What grounds did counsel for the Ministry put forward to induce us to reach a different conclusion? His first and main contention was that the expression "its last accounting period" connoted that the company had accounts made up for the purpose of enabling it to account to someone whom I will refer to for the time being as "X." I am unable to accept this argument. In the first place, I do not think that the construction suggested by counsel accords with the natural meaning of the words used in the section. In the second place, who is "X"? Counsel first suggested that "X" is the company in general meeting, but the owner of a colliery concern may be an individual, and counsel was unable to make any suggestion as to who would, in that event, be the understudy for the role of "X." Alternatively, he suggested that "X" might be the Inland Revenue Commissioners to whom every trader, individual, partnership or limited company, has to make a return, but the difficulty arises that under the relevant section (s. 34 of the Finance Act, 1926) the accounting period for income tax purposes would necessarily be twelve months and it would be impossible, therefore, to attribute any meaning to the concluding words of s. 22 (3) (*c*). I think counsel for the company was right when he said that the expression "its last complete accounting period," on the natural construction of the words, meant only the last period in respect of which the owner of the colliery concern chose to make up its accounts—in other words, to borrow the phrase used by Lord Greene, M.R., in the *Jenkins Productions, Ltd.* case (1), "the period which the company chooses as its 'financial unit of time.'" This is, in each case, a question of fact. In the case of a partnership, it may well be that normally the financial unit of time will be the period fixed by the articles of partnership as the period to be covered by each partnership account. In the case of an individual it may well be that the only traceable financial unit of time will be the year selected as the basis of the income tax assessment. In the case of a company, bearing in mind the relevant provisions of the Companies Acts and the common form articles (see, for example, Palmer's Company Precedents, 15th ed., vol. 1, p. 728), it may well be that normally the financial unit of time will be twelve months, that being the usual period covered by the accounts laid before the annual general meeting, but it must be remembered that the Act does not require the company to present its accounts to a general meeting only once a year. There is nothing in s. 123 of the Act of 1929, or in the corresponding section of the Companies Act, 1948 (s. 148), preventing the company presenting accounts half-yearly or more often to a general meeting. Nor can I see anything to prevent a company selecting any period it chooses as its financial unit of time on the basis of which accounts are prepared for other purposes.

In the present case, on the evidence before him, I think Vaisey, J., was compelled to conclude that the company's financial unit of time was the quarter; that, therefore, its profits and gains had to be ascertained for the last complete quarter before July 1, 1946, namely, that ending on June 30, 1946; and that the fact that, for the various purposes to which the Master of the Rolls referred, including the preparation of an account covering a twelve months' period for presentation to the annual general meeting, two or more quarterly accounts were aggregated was *nihil ad rem*, and did not prevent the quarterly period being the last complete accounting period before July 1, 1946, of this company. For these reasons I agree the appeal should be dismissed.

SIR RAYMOND EVERSHED, M.R.: I am authorised by **ASQUITH, L.J.**, to say that he agrees with the judgments which have been delivered.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor*; *Church, Adams, Tatham & Co.*, agents for *Burges, Salmon & Co.*, Bristol (for the company).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

KITCHEN'S TRUSTEE *v.* MADDERS AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Cohen and Asquith, L.JJ.), November 23, 24, 25, 1949.]

Bankruptcy—Set off—Set off of amount of damages recovered from bankrupt for fraud against claim by trustee for rent—Rent accrued before and after bankruptcy—Bankruptcy Act, 1914 (c. 59), *s.* 31.

Rent Restriction—Part of dwelling-house used for business purposes—Boarding house—Tenant living on premises—Business not incompatible with residence as tenant—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), *s.* 3 (3).

The plaintiff, trustee in the bankruptcy of Mrs. K., sued for five quarters of rent due under a lease, the first two quarters having accrued before the date of the bankruptcy, *viz.*, Dec. 9, 1947, and the last three after that date. In April, 1947, the bankrupt sold to the defendants the goodwill and contents of a private hotel for £5,000 and in May granted them a lease of the premises for seven years at £500 a year, the premises being described as the "R. Private Hotel" and the defendants covenanting "not to use the demised premises for any purpose other than that of the business or trade of a hotel proprietor or boarding-house keeper or in any manner inconsistent with such user . . ." The defendants paid £2,000 down and gave a bill of sale on the furniture for the balance of £3,000. On going into possession the defendants found that the bankrupt had previously mortgaged the premises to a building society and had made the lease without first obtaining the consent of the society as required by the mortgage deed. The defendants thereupon began proceedings against the bankrupt for fraud, and, in default of defence, judgment was given in their favour, the damages being assessed at £5,560. In August, 1948, the plaintiff obtained a stay of that action, which was later removed on an undertaking by the defendants not to prove in the bankruptcy the amount due under the judgment. The building society then commenced proceedings in the Chancery Division for foreclosure, but subsequently they amended their pleadings and asked for possession, striking out all other clauses in the originating summons. The defendants, in their defence to a claim for rent, pleaded that they were entitled to set off so much of the judgment debt as might be required to extinguish the claim, and also that, in the events which had happened, their liability for rent was, not to the plaintiff, but to the building society. Alternatively, the defendants contended that they were only liable for the standard rent payable under the Rent Restrictions Acts, 1920 to 1939, because the premises, having been let as a dwelling-house on Sept. 1, 1939, and being rated at £72 a year, were controlled under those Acts.

HELD : (i) by the undertaking not to prove in the bankruptcy the amount of the judgment debt the defendants in effect agreed not to treat that debt as a provable debt, and since it was not provable it could not be the subject of a set off under the Bankruptcy Act, 1914, s. 31.

(ii) as to the last three quarters rent accruing after the bankruptcy there was no mutuality, and, therefore, there could be no set off.

Lawrence v. *Hayes* ([1927] 2 K.B. 111) and *Stoddart* v. *Union Trust, Ltd.* ([1912] 1 K.B. 181), *distinguished.*

(iii) the building society as mortgagees could only recover against the defendants for mesne profits, which depended on the unlawful withholding of possession, and until the mortgagees began their action for possession the bankrupt, as mortgagor, was entitled to possession, and as between the bankrupt and the defendants, the defendants were entitled to be in possession.

(iv) on the facts the defendants conducted a boarding-house in, and also occupied as their home, premises which had been let in 1939 as a dwelling-house and were assessed at a rateable value within the Rent Restrictions Acts, 1920 to 1939 ; the nature of the business carried on was not incompatible with the residence of the defendants on the premises as tenants, and the premises came within the provisions of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, so that the defendants were liable only for the standard rent and not for the rent payable under the lease granted by the bankrupt.

Vickery v. *Martin* ([1944] 2 All E.R. 167), *applied.*

Decision of Harman, J. (*ante*, p. 54), *affirmed.*

[As to Set Off, see HALSBURY, Hailsham Edn., Vol. 2, pp. 281-287, paras. 373-379 ; and for Cases, see DIGEST, Vol. 4, pp. 389-415, Nos. *3561-3749.*

As to Rent Restriction on Partly Business Premises, see HALSBURY, Hailsham Edn., Vol. 20, pp. 315, 316, para. 371 ; and for Cases, see DIGEST, Vol. 31, pp. 558, 559, Nos. *7054-7067.*]

Cases referred to :

(1) *Epsom Grand Stand Assocn., Ltd.* v. *Clarke*, (1919), 35 T.L.R. 525 ; 31 Digest 581, *7296.*
(2) *Vickery* v. *Martin*, [1944] 2 All E.R. 167 ; [1944] K.B. 679 ; 113 L.J.K.B. 552 ; 171 L.T. 89 ; 2nd Digest Supp.
(3) *Ex p. James, Re Condon*, (1874), 9 Ch. App. 609 ; 43 L.J. Bkcy. 107 ; 30 L.T. 773 ; 4 Digest 171, *1603.*
(4) *Sovereign Life Assurance Co.* v. *Dodd*, [1892] 2 Q.B. 573 ; 62 L.J.Q.B. 19 ; 67 L.T. 396 ; 40 Digest 369, *3.*
(5) *Alloway* v. *Steere*, (1882), 10 Q.B.D. 22 ; 52 L.J.Q.B. 38 ; 47 L.T. 333 ; 47 J.P. 55 ; 4 Digest 394, *3609.*
(6) *Lawrence* v. *Hayes*, [1927] 2 K.B. 111 ; 96 L.J.K.B. 658 ; 137 L.T. 149 ; 91 J.P. 141 ; 40 Digest 400, *274.*
(7) *Stoddart* v. *Union Trust, Ltd.*, [1912] 1 K.B. 181 ; 81 L.J.K.B. 140 ; 105 L.T. 806 ; 40 Digest 390, *200.*
(8) *Moss* v. *Gallimore*, (1779), 1 Doug. K.B. 279 ; 35 Digest 323, *678.*
(9) *Dudley and District Benefit Building Society* v. *Emerson*, [1949] 2 All E.R. 252 ; [1949] L.J.R. 1441.
(10) *Burns* v. *Radcliffe*, [1923] 2 I.R. 158 ; 31 Digest 558, *b.*

Appeal of the defendants from a decision of Harman, J., dated May 12, 1949, (p. 54 *ante*), rejecting the defendants' claim to set off damages awarded to them against the bankrupt for fraud in an action by the trustee in bankruptcy to recover £625 arrears of rent.

By a lease dated May, 1947, the bankrupt, Hilda Kitchen, let to the defendants, the Roslyn Private Hotel, Blackpool, for seven years at a rent of £500 a year. In the previous April the defendants had purchased from Hilda Kitchen the contents of the hotel and the goodwill for £5,000, and it was not until they had paid her £2,000 in cash and given a bill of sale on the furniture that they were informed that she had previously mortgaged the premises to a building society and under the mortgage deed she was not empowered to grant a lease without the society's consent, which had not been given in respect of the lease granted to the defendants. On Aug. 11, 1947, the defendants issued a writ against Hilda Kitchen claiming damages for fraud. Hilda Kitchen became bankrupt on Dec. 9, 1947, at which date two quarters' rent was due under the lease. Judgment against the bankrupt was given in the defendants' action on Jan. 2, 1948, and later the damages were assessed at £5,560. A stay was obtained by the receiver, but it was subsequently removed on the defendants' undertaking not to claim in the bankruptcy. The trustee in the bankruptcy having begun the present action to recover two instalments of rent under the lease which had accrued due before the date of the bankruptcy and three instalments which had accrued thereafter, the defendants sought to set off the amount of the damages awarded to them in their action for fraud against the amount of rent claimed.

The Court of Appeal now allowed an application by the defendants to be allowed to tender new evidence to show that the premises were within the Rent Restrictions Acts, 1920 to 1939, and to amend the defence accordingly, and held that the premises were within the Rent Restrictions Acts. The court affirmed the decision of HARMAN, J., on the main issue, but allowed the appeal as to *quantum* so far as it was affected by their decision under the Rent Acts, and ordered that the defendants should have one half of their costs of the appeal. The facts are summarised in the headnote.

Michael Browne for the defendants.
Aronson, K.C., for the plaintiff.

Argument in support of an application by the defendants to call further evidence having been submitted,

Nov. 24. **SIR RAYMOND EVERSHED, M.R. :** The defendants have asked for leave to adduce further evidence, and, as a necessary corollary, for leave to amend the pleadings by raising a new point by way of defence. [HIS LORDSHIP stated the facts, held that, despite reasonable efforts, the new evidence was not available at the trial of the action, and continued]. There is one further matter to which I need allude, and that is whether on the facts it can be said that the defendants at the material date were occupying these premises as a dwelling-house. Put more precisely, were the premises let as a dwelling-house at the material date ? It is significant that in 1932 the premises were described as " all that messuage or dwelling-house known as Roslyn." It does not appear that the premises were then described, at any rate, as a boarding-house. However that may be, when the lease to the present defendants was entered into the premises were described thus : " All that the premises known as the Roslyn Private Hotel." I assume, and, no doubt, it is the fact, that the defendants acquired these premises for, and ran them as, a boarding-house. I have already referred to the evidence in the affidavit which states, among other things, that the neighbourhood consists mainly of residential small hotels and boarding-houses. The lease of 1947 contained the following covenant by the lessee (and it is on this that the main point turns) :

> " Not to use the demised premises nor allow them to be used for any purpose other than that of the business or trade of a hotel proprietor or boarding-house keeper or in any manner inconsistent with such user without the consent in writing of the landlord first had and obtained."

I am going to assume that on the evidence in the affidavit there is no doubt that the defendants in fact lived on these premises and have used the premises as their home ever since they acquired the lease. That, of course, leaves the question whether, having regard to the facts, they can say that the premises were let as a dwelling-house ? On that point counsel for the defendants has referred us to two cases, *Epsom Grand Stand Association* v. *Clarke* (1) and *Vickery* v. *Martin* (2). The latter case alone will suffice for the present purpose. I should state that under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2), it is laid down that premises do not cease to be within the Act by reason of the fact that they are in part used for business purposes, and, among other things, *Vickery's* case decided that that provision means what it says and that one is not concerned to see how substantial the part is that is used for business purposes. It must, of course, still be true to say that it is a dwelling-house—that it is the home of the tenant claiming the protection of the Act—because, as has been many times stated, one of the main objects of the Act is to protect persons who are tenants from being evicted from their homes. In the course of his judgment in *Vickery* v. *Martin* LORD GREENE, M.R., said ([1944] 2 All E.R. 168) :

> " He [the county court judge] said that the parties intended that the house should be used as a boarding-house. That certainly does not bring the landlord home, or anywhere near home, because the user as a boarding-house is not inconsistent with the house being a dwelling-house within the meaning of the Rent Restrictions Acts."

Counsel for the defendants, in referring to that passage, had, I think, in mind the language of this covenant, a covenant against user for any purpose " otherwise than that of the . . . trade of a hotel proprietor or boarding-house keeper or in any manner inconsistent with such user . . . " The point can be put thus. On the facts, assuming that the defendants lived and had their home on the premises, but at the same time ran there a boarding-house in the ordinary acceptation of the word, was that a breach of the covenant ? Though I am not necessarily excluding further evidence or further argument, on the matter as it now stands it seems to me that it is at least reasonably probable that it would be held that this was not a breach of covenant, and that, as such user was contemplated by the lease, the defendants can fairly say that these premises were let as a dwelling-house at the material date. Other matters of fact may have to be investigated, but, assuming that point in the defendants' favour, as I do, it is, at the least, reasonably probable that the conclusion of the court will be that the amount claimable for rent would be limited to the £85 suggested in the amended defence. For these reasons I think, in this very exceptional case and on its special and peculiar circumstances, that the court should exercise its discretion, and, with the object of doing justice between these parties, admit this evidence and allow the defence to be amended.

Argument on the appeal was then heard.

Nov. 25. **SIR RAYMOND EVERSHED, M.R.** : I will ask COHEN, L.J., to deliver the first judgment.

COHEN, L.J. : In this case the plaintiff, a trustee of the property of a bankrupt, Mrs. Hilda Kitchen, sues the defendants, Mr. and Mrs. Madders, for five quarters of rent due under an agreement of lease of May 9, 1947. The first two quarters accrued due before the commencement of Mrs. Kitchen's bankruptcy and the last three fell due after that date. There was no dispute about the liability for the rent, but the defendants originally set up two defences, and it was on those two defences that the matter came before HARMAN, J. There has since been added, pursuant to the leave of this court, a third defence, to which I will refer in due course.

The first defence was that of a set off. The defendants claimed a set off of so much of a judgment debt for over £5,000 as might be required. The second defence was that the liability for rent in the events which had happened was, not a liability to the trustee in bankruptcy, but one to a company to whom the bankrupt had mortgaged the premises. There was also a somewhat faint suggestion of a defence on the lines of *Ex parte James* (3) that this was not a case which the court ought to allow its official, the trustee in bankruptcy, to pursue. The first defence arose in these circumstances. The defendants had taken the lease in question as part of a larger transaction into which they were induced to enter by certain fraudulent misrepresentations of the bankrupt. In fairness to the bankrupt, I should add that it appears she was prosecuted for the fraudulent misrepresentation, but the criminal proceedings failed. However, the lease arose out of an oral agreement under which the defendants agreed to purchase from the bankrupt for the sum of £5,000 the goodwill of the

Roslyn Private Hotel, together with the fixtures and fittings contained therein, and also to take the lease. The defendants paid £2,000 in cash to the bankrupt and gave a bill of sale for the remaining £3,000. On Aug. 11, 1947, they commenced proceedings against the bankrupt claiming cancellation of the bill and damages by reason of the alleged fraud. On Jan. 21, 1948, they obtained judgment on motion for judgment in default of defence for damages which were ultimately assessed at the sum of £5,562 11*s.* 5*d.* It is that sum, or rather the appropriate part of it, that the defendants seek to set off against the trustee. So far as the first two quarters rent, which accrued due before the commencement of the bankruptcy, are concerned, counsel for the plaintiff admits that, if it were not for an undertaking, given in the circumstances to which I will refer in a moment, the defendants would have a right of set off under the Bankruptcy Act, 1914, s. 31. That section, as far as material, provides :

> " Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively . . ."

Counsel for the plaintiff admitted that he could not dispute that the frauds alleged by the defendants against the bankrupt were so linked with contract that the right of set off would arise. He said that the undertaking given to the court as a condition of obtaining a removal of the stay in the King's Bench action prevented the set off arising.

The circumstances in which that undertaking was given were as follows. The judgment which I have already mentioned having been recovered, and Mrs. Kitchen having been made bankrupt, on Aug. 13, the trustee moved for a stay. That matter came before the court in due course and a stay was granted temporarily. When the matter came before the court on Aug. 31, it was stood over until the first available day in the autumn sittings, the stay being continued upon the applicant's undertaking that, if he pursued proceedings under R.S.C., Ord. 14, in the action with which we are now concerned, he would not make the summons returnable before Oct. 20, 1948. That order having been made, the matter came again before SLADE, J., on Oct. 15, and on that occasion, the plaintiffs by their counsel—that is, the defendants in this action—undertaking not to prove their claim—the subject-matter of the King's Bench proceedings—in bankruptcy, no order was made except that the stay was removed. That was the undertaking which was given, and it was the condition under which the stay was removed, and the defendants were enabled to quantify the judgment in the King's Bench proceedings.

Counsel for the defendants says that the undertaking was limited to using the King's Bench judgment as a weapon of offence. It debarred him, so he says, from lodging a proof, but it did not debar him from using it as a weapon of defence, namely, by way of set off. That set off, he says, accrued when the writ was issued in the Chancery proceedings on Aug. 19, 1948, and was not affected by the undertaking. On any other view, it was argued, the removal of the stay would be valueless since he could not prove his debt, and, as the debt arose, not out of pure tort, but out of fraud connected with the contract, the claim would be barred when the debtor got her discharge. He relied in support of his argument on some observations of LORD ESHER, M.R., in *Sovereign Life Assurance Co.* v. *Dodd* (4) ([1892] 2 Q.B.D. 578) :

> " What is the result of a plea of set off ? It is not a counter-claim or a cross-action, but a plea in bar ; and therefore, in cases where the plea

> is made out, although it may be true that when the action was brought the defendant was a debtor of the plaintiff, yet, the plaintiff being the defendant's debtor to the same amount, the plaintiff's claim is barred. Bankruptcy, therefore, makes no difference to the right of set off."

Counsel for the plaintiff says, however, that this is based on a complete misconception of the situation. The damages recovered were damages for fraud, and on the basis of the undertaking given this would not be a provable debt. He referred us to the Bankruptcy Act, 1914, s. 30, which makes it clear that unliquidated damages arising otherwise than by reason of contract or breach of trust are not provable in bankruptcy. He says that what the defendants were getting out of the removal of the stay was that, by the undertaking that their debt would not be treated as a provable debt, they were procuring recognition of the claim as one in pure fraud which, when quantified, would leave them free to take whatever proceedings they might think appropriate, including, if they thought fit, steps to make the defendant bankrupt, or, alternatively, if she got her discharge, they could seek to recover the debt from the bankrupt. HARMAN, J., considered and dealt with this point as follows (*ante*, p. 57) :

> "As to the instalments before the bankruptcy, counsel for the trustee, as I have said, was driven to rely on the undertaking. The right of set off in bankruptcy is the creature of statute and arises under the Bankruptcy Act, 1914, s. 31, under the terms of which the persons between whom there must be mutual dealings are the debtor, on the one side, and any other person proving or claiming to prove a debt under the receiving order, on the other. The present defendants, having regard to their undertaking, cannot either prove or claim to prove a debt under the receiving order, and therefore, they do not come within s. 31. To that argument I see no answer, and, therefore, I am of opinion that there is no right of set off either for the pre-bankruptcy or the post-bankruptcy amount of rent."

I respectfully agree with the conclusion to which HARMAN, J., came. The real meaning of the undertaking is, I think, that the damages were not to be treated as a provable debt. If the defendants were now allowed to set off this debt, or part of it, against the claim for rent, the defendants would be getting by a back door what they had undertaken not to take out of the front door. It is wrong, I think, to say that set off is a mere matter of defence on the facts of this case. If we were to take the opposite view, the effect would be that the asset of the rent would be taken out of the estate for the exclusive benefit of the defendants who could remain in possession for the whole term without contributing one penny to the estate. I think that when the defendants undertook not to prove this debt they were, in effect, agreeing that the debt should not be treated as a provable debt, and, if it were not a provable debt, it clearly could not be the subject of set off under s. 31.

As to the last three quarters' rent which accrued due after the commencement of the bankruptcy, there was, I think, no mutuality, and, therefore, there could be no set off. I agree with the reasons given by HARMAN, J., in his conclusion on this point. He referred to the decision in *Alloway* v. *Steere* (5), the headnote of which is set out in his judgment. He pointed out that it was exactly the converse of the present case, and I accept his view. It seems to me to justify the conclusion to which he came. I ought, however, perhaps to refer shortly to the two cases on which counsel for the defendants relied. The first of them was *Lawrence* v. *Hayes* (6). In that case the headnote is ([1927] 2 K.B. 111) as follows :

> "The owner of a business sold it to the defendant on terms of payment by instalments, and then assigned the benefit of the agreement to the plaintiff. Before notice of assignment was given to the defendant, the latter obtained judgment for a sum of money against the assignor as damages for

> breach of warranty on the above sale. In an action by the plaintiff, as assignee, against the defendant for payment of instalments due under the assigned agreement, the defendant claimed to set off the amount of the judgment. The plaintiff contended that the defendant's right to damages in respect of the breach of warranty had merged in the judgment, and that the latter could not be set off against his claim :—*Held,* that the set off was valid."

That case, as it seems to me, is a long way from the point with which we are dealing. In the first place, that was a matter of contract and did not turn on the terms of a lease, which is something separate from contract, and the whole matter was so plainly linked that I do not think there is any doubt that there was a right of set off. Moreover, it is to be observed, as counsel for the plaintiff pointed out, that that was a case in which the complications of bankruptcy did not arise, and the court was not concerned with the terms of the Bankruptcy Act, s. 31. The other case which, as counsel for the defendants frankly admitted, was apparently more in direct relation with what we are dealing with, was *Stoddart* v. *Union Trust, Ltd.* (7), where the question of fraud did arise. The headnote is as follows ([1912] 1 K.B. 181) :

> " The defendants entered into a contract for the purchase of a newspaper for a sum of £1,000, of which £200 was paid on the completion of the contract, and the balance of £800 was to be payable by certain instalments. The defendants were induced to enter into the contract by fraudulent misrepresentations made to them by the vendor. The vendor for valuable consideration assigned the balance of the purchase-money by deed absolutely to the plaintiff, and notice in writing of that assignment was given to the defendants. The plaintiff at the time of that assignment had no notice of the fraud on the part of the vendor. In an action by the plaintiff against the defendants for the debt of £800 so assigned, the defendants pleaded, by way of defence, in substance, that they were induced to enter into the contract for the purchase of the newspaper by the fraud of the vendor, and that by reason thereof they had sustained damage exceeding £800, and no money was due from them at the date of the assignment to the plaintiff, and, in the event of their being held liable to pay the sum claimed by the plaintiff, they counter-claimed against the vendor damages for fraud to an equal amount. The defendants were not in a position, and did not claim, to rescind the contract for the purchase of the newspaper. At the trial the jury found that the defendants had been induced to enter into the contract for purchase of the newspaper by the fraud of the vendor, and had thereby sustained damage to the amount of £800. The judge on those findings gave judgment for the defendants on the plaintiff's claim and judgment for the defendants against the vendor for £800 damages upon the counter-claim, but stayed execution on the latter judgment."

This court, however, held :

> " upon the above-mentioned facts, that the defendants could not set up the claim to £800 damages for the fraud of the vendor by way of defence against the claim of the plaintiff, and that the plaintiff was entitled to judgment against the defendants for £800."

However, here, too, no question of bankruptcy was involved, and I do not base my conclusion on anything to be found in either case. Here we are considering instalments of rent which accrued due for the first time after the commencement of the bankruptcy. We are considering, therefore, debts which were never due to the bankrupt but which become due to the trustee. It seems to me in those circumstances impossible to say that there is such mutuality between the claim for rent due to the trustee and the claim for fraudulent misrepresentation against the bankrupt as to found a right to set off within s. 31 of the Bankruptcy

Act, 1914. For these reasons I think Harman, J., was right when he rejected the defence based on set off.

The next defence to which I have to refer is the defence based on the mortgage by the bankrupt to the Provincial Building Society. That was a legal charge under which the mortgagor was entitled to remain in possession until certain events occurred (among others, committing an act of bankruptcy), and he attorned tenant to the society at a yearly rental of a peppercorn, the society having the right to take possession on one week's notice to quit given to the mortgagor. I should add that under cl. 10 of the deed the mortgagor was not without the previous consent in writing of the society to exercise any of the powers of leasing conferred on a mortgagor by s. 99 of the Law of Property Act, 1925. In the result, therefore, as between the mortgagor and the mortgagee, Mrs. Kitchen had no right to grant to the defendants the lease which she did grant in 1947. The defence based on that document is that the right of the mortgagor to receive rent had determined. The argument of counsel for the defendants on that point is very clearly stated by Harman, J., *ante*, p. 57 ([1949] 1 Ch. 594):

> "Mr. *Browne* cited s. 98 of the Law of Property Act, 1925, which provides: 'A mortgagor for the time being entitled to the possession or receipt of the rents and profits of any land, as to which the mortgagee has not given notice of his intention to take possession or to enter in the receipt of the rents and profits thereof, may sue for such possession or for the recovery of such rents or profits,' and he contended that the trustee, although claiming through the mortgagor, is not entitled to sue, because in fact notice has been given by the mortgagee (the building society) of intention to take possession. In support of that contention he cited the old case of *Moss* v. *Gallimore and Another* (8), which is still good law and appears in *Smith's Leading Cases*, and the sidenote to which is: 'A mortgagee, after giving notice to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards and he may distrain for it after such notice . . .' Therefore, it was contended, the building society, if it gave effective notice, could give a good receipt for the accruing rent, so that it follows that the tenants are in peril in that way of having to pay the rent twice."

When the matter was before Harman, J., the argument that the mortgagees could sue the defendants for rent derived some support from the judgment of Vaisey, J., in *Dudley and District Benefit Building Society* v. *Emerson* (9). That decision was reversed by the Court of Appeal. It is now clear, I think, that, if the mortgagees could recover anything against the defendants, it could be only as mesne profits. As Sir Raymond Evershed, M.R., pointed out in the course of the argument, the right to mesne profits depends on unlawful withholding of possession. Until the mortgagees commenced proceedings against the trustee and the defendants on Oct. 25, 1948, the mortgagor was entitled to possession. As between the defendants and the mortgagor, the defendants were entitled to be in possession. The defendants, therefore, were not wrongfully withholding possession from anyone. All the rent which is here sued for accrued due before Oct. 25, 1948, and for this reason, it seems to me, this point really has no substance. Indeed counsel for the defendants admitted that the decision of this court in *Dudley and District Benefit Building Society* v. *Emerson* (9) made it very difficult to sustain the argument which he advanced with great force in the court below, and which Harman, J., recognised as a difficult point as the authorities then stood. If the true effect of the undertaking given by the defendants in the King's Bench action be as I have stated, there can be nothing dishonourable in the action of the trustee in commencing the present proceedings. I need say nothing about the defence based on *Ex parte James* (3).

That being so, it appears that on the pleadings as they were in the court below the defendants failed completely in their defences, and the plaintiff was entitled to the judgment which he recovered before HARMAN, J. For the reasons SIR RAYMOND EVERSHED, M.R., gave yesterday we have allowed the pleadings to be amended and have allowed the defendants to set up an alternative defence based on the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. It is common ground between the parties that the rateable value of the property comprised in the lease on Apr. 1, 1939, was £72 per annum, and it is not disputed that, if the house was let as a dwelling-house at that date, it was then within the Rent Restrictions Acts. It has been proved in evidence before us that it was at that date let as a dwelling-house and occupied as a dwelling-house at a rent of £140 per annum. The question, however, remains whether the defendants had a lease which permitted user as a dwelling-house. SIR RAYMOND EVERSHED, M.R., referred to the relevant clauses of the lease when giving judgment on the question whether the amendment should be allowed, because plainly the amendment and further evidence could not be allowed unless, if allowed, it would be either conclusive or raise a very strong *prima facie* case. SIR RAYMOND EVERSHED, M.R., gave our reasons for coming to the conclusion that, if the evidence established the facts that were alleged, there would be raised a strong *prima facie* case that at all material times this house was let on terms which permitted user as a private dwelling. I do not propose to repeat what he then said. I would add that the evidence which has since been given seems to me strongly to reinforce the conclusions which he then stated. It appears that the dwelling-house now in question was a ten-bedroom house. The defendants lived there with their two children throughout. One room was reserved for the exclusive use of the family, being occupied at all times by the children, and during the season by the parents also, and, in addition to this bedroom in the attic, there was also reserved for the use of the family a sitting room on the ground floor. It seems to me that those facts reinforce the conclusion that SIR RAYMOND EVERSHED, M.R., came to and that there is nothing in the terms of the lease which can prevent us holding that at the material time this house was a dwelling-house within the meaning of the Rent Restrictions Acts, 1920 to 1939. The result is that the rent was payable only at the rate of £140 per annum instead of at the rate of £500 per annum. On that basis counsel for the defendants claims that the sum recoverable, instead of being £625, should be £85. In making that calculation, however, he went too far, because he tried to set off the £90 which his clients had overpaid for the quarter's rent which they had paid in advance, not only against the first two quarters' rent, as to which it was clearly a proper subject-matter of set off, but also to the extent of £20 against the rental accrued due after the commencement of this action. For the reasons I have already given I do not think the set off can be applied as regards the last three quarters' rent. In my view, therefore, the proper sum for which judgment should be entered for the plaintiff is £105. For these reasons I think the appeal should be allowed and judgment entered for the sum which I have stated.

ASQUITH, L.J.: I agree, and would only add that there is a decision of the Court of Appeal of Northern Ireland which seems very closely in point, *Burns* v. *Radcliffe* (10). In that case, as in this, there was a lease of hotel premises to the defendant, and the defendant resided on the premises. In that case, as in this, it was a term of the lease that the defendants should use the premises for the purposes of a temperance hotel only. Yet the court held, and the Irish Court of Appeal upheld it, that the Rent Restrictions Acts applied and protected the lessee from proceedings for possession. MOORE, L.J., said ([1923], 2 I.R. 162):

> "... where the nature of the business is not incompatible with the residence of the tenant, if, as in this case, it would almost require it, I can

see no reason for holding that the whole premises were not her dwelling-house."

That decision supports the conclusions at which my Lord has arrived, with which I agree.

SIR RAYMOND EVERSHED, M.R. : I am entirely of the same opinion.

Appeal allowed. Defendants to receive one-half of their costs of the appeal.

Solicitors : *Sidney Pearlman* (for the plaintiff) ; *Gibson & Weldon* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

NOTE.

DOLLAR *v.* WINSTON AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), November 17, 25, 1949.]

Lease — Assignment — Withholding of consent — Reasonableness — Prevention of creation of statutory tenancy—Tenant in possession at date of assignment.

ACTION for possession of premises which the tenant had assigned without having obtained the landlord's consent.

By an agreement, dated Mar. 1, 1946, the landlord let to the tenant a flat to which the Rent Restrictions Acts applied for a term of three years expiring on Feb. 28, 1949, the tenant covenanting, *inter alia,* not to assign the premises without first obtaining the written consent of the landlord "which consent shall not be unreasonably withheld." On Dec. 16, 1948, the tenant applied to the landlord for a licence to assign, but this was refused on the ground that, as the lease only had a few weeks to run before expiry, an assignment would in all probability result in the creation of a statutory tenancy. On Jan. 24, 1949, the tenant assigned the residue of the term and went out of occupation of the premises. The landlord claimed possession.

Newsom for the landlord.

Lester for the tenant and assignee.

(Counsel referred to *Swanson* v. *Forton* ([1949] 1 All E.R. 135 ; [1949] Ch. 143 ; [1949] L.J.R. 632) ; *Lee* v. *K. Carter, Ltd.* ([1948] 2 All E.R. 690 ; [1949] 1 K.B. 85; [1949] L.J.R. 7) and *Re Swansons' Agreement* ([1946] 2 All E.R. 628 ; [1947] L.J.R. 169 ; 176 L.T. 25)).

ROXBURGH, J., in a considered judgment, held (i) the fact that in the present case the residue of the term was to be measured in weeks and not, as in *Swanson* v. *Forton* ([1949] 1 All E.R. 135) in days, did not make the refusal of the landlord to consent to the assignment unreasonable ; (ii) whether or not the tenant was in occupation when he assigned was immaterial, and, therefore, the landlord was entitled to possession.

Judgment for landlord with costs.

Solicitors : *H. H. Wells & Sons* (for the landlord) ; *Hart-Leverton & Co.* (for the tenant and assignee).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

IRVIN *v.* HINE.

[KING'S BENCH DIVISION (Devlin, J.), October 19, 20, 21, 24, 25, 26, 27, 28, 29, November 29, 1949.]

Insurance—Marine insurance—Constructive total loss—Statutory definition—Exclusion of common law—Partial loss—Termination of risk—Abandonment of voyage—Amount of indemnity—Marine Insurance Act, 1906 (c. 41), *s.* 60 (1) (2) ; *s.* 69 (3) ; *s.* 78 (4).

While a trawler was being towed to a dry dock for refitting in January, 1942, she was stranded on a rock, was heavily pounded by the seas, and suffered severe damage. The owner gave notice of abandonment under the insurance policy covering her and, after the vessel had been salvaged by the Admiralty, refused to have her put in dry dock for survey and ascertainment of damage, and he did not contest salvage proceedings after which the vessel was sold under an order of the court for £685 which was accepted as her value after the damage. She had been insured for £9,000, but in an action by the owner on the policy evidence was given for the underwriters that her true value before the damage was £2,000 and it was found as a fact that the cost of repairs of damage due to stranding would have been £4,620. It was also found as a fact that the owner at all material times would have been unlikely to obtain a licence to repair the vessel or to place her in dry dock within a reasonable time, and not in any case before 1947.

HELD : (i) the fact that the owner would have been unlikely at all material times to obtain a licence to repair the vessel or to place her in dry dock within a reasonable time did not justify a claim for constructive total loss because, even if it would have done so at common law, such a common law rule would have been inconsistent with the comprehensive definition of " constructive total loss " in the Marine Insurance Act, 1906, s. 60, and so, by s. 91 (2) of the Act, would no longer apply.

Dictum of LORD PORTER in *Robertson* v. *Nomikos* ([1939] 2 All E.R. 734), *applied.*

(ii) with regard to partial loss, the risk ended when the ship was abandoned by the owner in circumstances which made it clear that he did not intend to pursue the voyage to its destination, and, therefore, under s. 69 (3) he was entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage not exceeding the reasonable cost of repairing such damage.

(iii) by refusing to have a survey in dry dock the owner was not in breach of any duty laid on him by s. 78 (4) of the Act, which requires an assured to take all reasonable measures to avert or minimise a loss, because such a survey would not have averted or minimised the loss but would merely have ascertained its extent.

(iv) the reasonable depreciation of the vessel arising from the unrepaired damage should be estimated, not by deducting the true damaged value of £685 from the true undamaged value of £2,000, but by deducting from the conventional value of £9,000 in the insurance policy either the true damaged value of £685 or a figure bearing the same proportion to the £9,000 as the true damaged value bore to the true undamaged value, and, as the cost of the repair of damage due to the stranding, assessed (on the evidence) at £4,620, was less than either of these figures, the owner was entitled to be indemnified in that sum under s. 69 (3).

[AS TO GENERAL RULES IN CASE OF PARTIAL LOSS OF SHIP, see HALSBURY, Hailsham Edn., Vol. 18, pp. 346-350, paras. 492-500 ; and AS TO CONSTRUCTIVE TOTAL LOSS, see *ibid.*, pp. 364-369, paras. 522-530 ; and FOR CASES, see DIGEST, Vol. 29, pp. 268-272, Nos. *2153-2198.*]

Cases referred to :

(1) *Robertson* v. *Petros M. Nomikos, Ltd.*, [1939] 2 All E.R. 723 ; [1939] A.C. 371 ; 108 L.J.K.B. 433 ; 160 L.T. 542 ; Digest Supp.

(2) *Polurrian S.S. Co., Ltd.* v. *Young*, (1913), 109 L.T. 901 ; *affd.*, [1915] 1 K.B. 922, C.A. ; 18 Digest 139, *891.*

Action on a Lloyd's policy of marine insurance claiming that a vessel was a constructive total loss, or, alternatively, had sustained particular average damage amounting to not less than £9,000. A

The plaintiff was the executor of his wife who had owned a steam trawler named the Elswick. The defendant was one of the underwriters of a policy of marine insurance on the vessel. The Elswick was built in 1906 and she was laid up from November, 1936, to January, 1942, when she required substantial refitting. The plaintiff obtained a licence for sufficient repairs to make her B seaworthy to be towed from the Tyne to Peterhead, where arrangements had been made for the main repairs and the necessary licence had been promised. The voyage to Peterhead commenced on Jan. 10, 1942, and on Jan. 20 the vessel grounded on the Horseback rock and received a heavy pounding. On Feb. 4, the plaintiff decided to abandon the ship to underwriters and on Feb. 9 he gave a notice of abandonment, which was not accepted, but he was placed C in the same position as if he had issued a writ. Thereafter he stood on his notice of abandonment and refused to interest himself in the vessel or to have her put in dry dock so that she could be surveyed and he never had her examined. An official of the Ministry of Transport who examined her came to the conclusion that her repair was "not an economical proposition." She was also examined by surveyors on behalf of the underwriters. On June 12, 1942, D the Admiralty Salvage Department floated the vessel off and beached her in Peterhead Harbour. On July 10, 1943, they began a salvage action in the Court of Session against the plaintiff, who did not contest it, and on Nov. 28, 1943, they were awarded £500 or one third of the £1,500 which they claimed to be the value of the vessel. The ship was sold by auction by order of the court and realised £685. The buyers were unable to obtain a licence to repair the vessel E and subsequently removed her to a beach three miles south of Peterhead. The vessel had been insured while laid up for £2,000. On Dec. 11, 1941, the plaintiff took out an all risks policy on the vessel for the voyage to Peterhead in which the vessel was valued at £8,000, increased on Jan. 16, 1942, to £9,000.

The plaintiff's claim for constructive total loss was based on the ground that at all material times he would have been unlikely to obtain a licence to repair F the vessel or to place her in dry dock within a reasonable time. It was conceded that the claim was not tenable under any of the heads specified in the Marine Insurance Act, 1906, s. 60, but it was contended that it was justified at common law, was not inconsistent with any of the provisions of s. 60, and, accordingly, was valid by virtue of s. 91 (2), which preserved the application of the rules of the common law save in so far as they were inconsistent with the express provisions G of the Act. On the claim for a partial loss, the defendant contended that the vessel had never arrived at her destination and that the sale under an order of the court had been a sale during the risk. It was also contended that, if the claim for partial loss were admitted, that loss should be the difference between the value of the vessel in her damaged condition, taken by both sides at £685, and her true undamaged value put at £2,000, or that the loss should be arrived at H by deducting from the conventional value of £9,000 a proportion of that £9,000 equal to the proportion borne by the damaged value of £685 to the true undamaged value, £2,000. The plaintiff contended that the loss was the difference between the conventional value, £9,000, and the damaged value, £685.

Devlin, J., gave judgment for the defendant on the claim for constructive total loss and for the plaintiff on the claim for a partial loss, awarding £4,620, as the cost of repairs.

Sir William McNair, K.C., and *Mocatta* for the plaintiff.
Sir Robert Aske, K.C., and *A. J. Hodgson* for the defendant.

Cur. adv. vult.

Nov. 29. **DEVLIN, J.**, read a judgment in which he stated the facts, found that the plaintiff at all material times would have been unlikely to obtain a licence to repair the vessel or to place her in dry dock within a reasonable time, and continued : I have heard an interesting argument on the common law principle governing constructive total loss, but it would be idle for me to express any opinion on it unless I first determine that I can look outside the Marine Insurance Act, 1906. I have to consider whether on its true construction the Act expressly provides that s. 60 is a complete definition of constructive total loss. If it does, then any addition to the definition or alteration of it would be inconsistent with its completeness, and so would not be admissible under s. 91 (2). Section 56 (1) provides :

> " . . . Any loss other than a total loss, as hereinafter defined, is a partial loss."

That seems, as LORD PORTER pointed out in *Robertson* v. *Nomikos* (1) ([1939] 2 All E.R. 734) to mean that the definition of constructive total loss in s. 60 must be complete. If any loss outside s. 57 (which defines actual total loss) and s. 60 were to be held to be a total loss, it could not be a partial loss, as that would be inconsistent with the express provision of s. 56. I see no answer to this argument except possibly that it puts too literal a construction on the words of s. 56. That makes it material to consider whether such a construction is out of harmony with the object of s. 60, as shown in its marginal note, and with the general purpose of the Act. The marginal note is " Constructive total loss defined." This is in keeping with the words of s. 56 " total loss, as hereinafter defined " and shows that s. 60 is intended to contain a definition. I have used the words " complete definition," as LORD PORTER did, as a convenient and expressive term. I dare say it is not meticulously accurate, for, strictly speaking, a definition must be complete, else it is not a definition at all. The question really is whether s. 60 is a definition section, defining constructive total loss as a whole, and not merely categories of it, or whether, as counsel for the plaintiff in terms argued, all it does is to lay down the main characteristics of a constructive total loss. This argument gives no weight to the word " defined," both in s. 56 and in the marginal note to s. 60. I think that that word shows conclusively that s. 60 is intended to *define* a constructive total loss, which is the same as saying that s. 60 circumscribes completely the conception of constructive total loss. As to the general purpose of the Act, it is described in its title as a codifying Act, and it would, I think, be surprising if its framers had not included in it a comprehensive definition of constructive total loss, or that, if they had intended only to define categories, they would not have made their intention clear.

I have arrived at my conclusion without relying on the authority of the *dictum* by LORD PORTER to that effect in *Robertson* v. *Nomikos* (1), to which I have referred. I have approached the matter in this way because counsel for the plaintiff may be right in saying that it is *obiter dictum*. The conclusion I have reached is greatly strengthened by the high persuasive authority of such a *dictum*. This appears to be the only place in the authorities in which the point has been considered. Counsel for the plaintiff claimed that in 1913 PICKFORD, J., in *Polurrian Steamship Co.* v. *Young* (2) (109 L.T. 903) had, in effect, treated s. 60 as incomplete by adding the qualification " within a reasonable time " to the provision about recovery of the ship or goods in sub-s. (2) (*i*). It seems to be clear from the passage referred to that PICKFORD, J., was doing no more than to give the provision what he thought was its right construction. The sub-section is silent as to whether the deprivation of possession has to be perpetual or not, and so is open to either construction. Even if the right construction of the language, taken by itself, is that the deprivation of possession is to be perpetual, it is clear that the Act does not textually cover the point, and accordingly there would be a *lacuna* which the common law could fill without inconsistency with any express provision. I hold, therefore, that the claim for constructive total loss based on this ground is bad in law.

[HIS LORDSHIP dealt with the claim for constructive total loss on two further alternative grounds, *viz.*, that the trawler was abandoned because her actual total loss appeared unavoidable (s. 60 (1)) and that the cost of repairing the damage would have exceeded the value of the ship when repaired (s. 60 (2) (ii)), rejected them on the facts, and continued :] I turn now to consider the alternative claim for a partial loss. In the early stages of his argument on this point, counsel for the defendant submitted that the case did not fall within any of the provisions of the Act. The only relevant provision is s. 69 (3), which provides :

> " Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above."

Counsel for the defendant submitted that, as the ship had never arrived at her destination at Peterhead the period of risk was never terminated, with the result that the sale under the order of the court in 1944 was a sale during the risk. In the course of this argument I put forward as a possible view that the risk terminated when the ship was abandoned by the plaintiff in circumstances and in language which made it clear that he did not intend to pursue the voyage to its destination. Neither side expressly accepted this view, but likewise neither actively dissented from it, and both sides addressed me on the assumption that the case fell within s. 69 (3). I think that assumption is correct : see ARNOULD ON MARINE INSURANCE, 12th ed., vol. 1, p. 703, s. 504.

Although it is not the logical starting point under s. 69 (3) I think it is convenient in the circumstances of this case that I should begin by computing the reasonable cost of repairing the stranding damage. Before I come to the figures I must deal with come preliminary matters. It is common ground that any accurate estimate of the extent of the damage could not be obtained without a survey of the ship in dry dock, which was never done. The underwriters contend that it was the plaintiff's duty under s. 78 (4) to cause such a survey to be made, and that, he being in breach of his duty, the claim cannot be sustained. Section 78 (4) requires an assured to take such measures as may be reasonable for the purpose of averting or minimising a loss. A survey in dry dock in the circumstances of this case would not avert or minimise the loss, but would merely ascertain its extent. Its cost would, I think, be part of the cost incurred by the plaintiff in proving his claim. In so far as the burden of proof lies on him, it may be foolish of him to dispense with the survey, but that is another matter. I do not think he is in breach of any duty under s. 78 (4). [After examining the question whether dry dock facilities would have been available, HIS LORDSHIP continued :] It is true that without the survey, the extent of the damage cannot be exactly ascertained, and must be a matter of conjecture or of inference. Whether this state of affairs is the plaintiff's misfortune or his fault, the burden of proof is, I think, the same. He has not to establish with certainty that any item of damage occurred. He has to satisfy me that on balance of probability it did. The plaintiff's figures were taken as the cost of repairs in 1946, and I was invited by the defendant to deduct the appropriate percentage so as to reduce them to a 1942 basis. I think this contention is unsound. In estimating the cost of repair for the purpose of a partial loss, I think that the court has to get as near as possible to the actual figure which would have been expended had she been repaired, and, if it be proved to my satisfaction, as it is, that she could not have been repaired earlier than the early part of 1947, I think I ought to take the figures appropriate to that time. [His Lordship examined the evidence of the cost of repairs of damage due to the stranding and assessed it at £4,620.]

I must now return to s. 69 (3) of the Act. Under its provisions I have first to ascertain the reasonable depreciation arising from the unrepaired damage. That requires a comparison between the value of the vessel immediately before the damage and the value in her damaged condition. The value in her damaged condition is taken by both sides to be £685. There is a dispute about the ascertainment of her undamaged value, both on the law and on the facts. Counsel for the defendant contended that the value to be ascertained for this purpose is her true value, which he put at £2,000, and not her conventional value of £9,000. On this contention the plaintiff's claim would be limited to £1,315. Alternatively, he contended that the extent to which the ship had depreciated in value should be ascertained by a comparison between her true undamaged value and her true damaged value. This would show that she had depreciated in value by approximately two-thirds. This proportion should then be applied to her conventional value, thus arriving at a figure (subject, of course, to the overriding maximum of the cost of repairs) of about £6,000. This method of ascertaining the extent of the depreciation where there is a valued policy is that which is specifically prescribed by s. 71 (3) in the case of damaged goods.

I do not accept the first of these contentions. Section 27 (3) provides that the value fixed by the policy is conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial. Consequently, I think that, unless the defendant's alternative contention is right, the effect of s. 69 (3) is that the true damaged value must be subtracted from the conventional undamaged value. This is, indeed, what was contended on behalf of the plaintiff. It produces a figure of over £8,000. It is unnecessary for me to decide whether this contention of the plaintiff is to be preferred to the alternative contention of the defendant, for both methods produce a figure higher than that which I have taken as the cost of repairs and there is no doubt that the latter figure is overriding. This makes it likewise unnecessary that I should for the purposes of this judgment find any figure for the true undamaged value of the ship, but, as it is a question of fact, I think it desirable that I should express, so far as I can, the view that I have formed about it. It is best approached by endeavouring to put a figure on the market value in 1942 of the trawler, if she had been in good condition, and then by deducting from it the probable cost of her refitting.

[His Lordship took the market value of the vessel in 1942 at £9,000 or £10,000 and assessed the cost of refitment at about £3,000. He assessed the salvage charges claimed at £300, based on a value of £685, for which the vessel was sold, instead of the £500 based on a value of £1,500, awarded to the Admiralty; held that the plaintiff was entitled to recover £4,920 under the policy; and gave judgment for the appropriate proportion of the amount subscribed by the defendant of the £9,000 insured.]

Judgment for the plaintiff with costs, and interest at 2½ *per cent. from Nov.* 29, 1942, *instead of from the date—Feb.* 9, 1942*—on which the plaintiff was placed in the same position as if he had issued the writ.*

Solicitors: *William A. Crump & Son* (for the plaintiff); *Hill, Dickinson & Co.* (for the defendant).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

THE GIUSEPPE MAZZINI. THE NAZARIO SAURO. THE URANIA. THE PROMETEO. THE RIVA LIGURE. THE ANTONIA C.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), November 8, 1949.]

Prize Law—Condemnation—Ships scuttled in land-locked bay of enemy island—Subsequent capture of island—Ships formally seized in prize six years after capture of island.

Prize Law—Condemnation—Ship taken out of harbour when capture of harbour imminent, and scuttled in deep water about a mile and a half from shore—Formally seized as prize six years after capture of harbour.

On Apr. 12, 1941, three Italian vessels lying in a land-locked bay of Dahlak Island, about fifty miles east of Massawa, were scuttled on the order of the Italian naval authorities at Massawa. Towards the end of April, 1941, the island was captured by British naval forces. On Feb. 6, 1947, the three vessels, and also a fourth vessel which was sunk in the bay in an air attack on Apr. 7, 1941, were formally seized in prize by a British naval officer. Each of the vessels was partly above water, one being on her side, while the other three had their masts showing.

HELD : it could make no difference in principle whether the harbour was protected by natural features, as in this case, or artifically protected, as in the case of the port of Tripoli, and, therefore, applying the principle in *The Bellaman* ([1948] 2 All E.R. 679), the vessels must be regarded as having been seized when the island was captured in 1941, and were condemnable as good and lawful prize.

On Apr. 4, 1941, when the capture of Massawa by British forces was imminent, an Italian vessel lying in the harbour was taken out to sea, on the order of the Italian naval authorities, and scuttled in deep water, about a mile and a half from an island at the southern end of the harbour. On Apr. 8, 1941, Massawa was captured by the British, and on Feb. 4, 1947, the vessel was formally seized in prize by a British naval officer.

HELD : as the vessel was taken out of the harbour to be scuttled because the capture of the harbour was imminent, (*a*) she should be regarded as having been captured when the harbour was captured, and (*b*) at the material time, *i.e.*, when the harbour was captured, she was captured as a ship, and not as a piece of wreckage at the bottom of the sea, and, therefore, she was condemnable.

The Bellaman. The Agostino Bertani ([1948] 2 All E.R. 679), *applied.*

[AS TO VALIDITY OF CAPTURE, see HALSBURY, Hailsham Edn., Vol. 26, pp. 216-224, paras. 489-513 ; and FOR CASES, see DIGEST, Vol. 37, pp. 589-593, Nos. *258-295.*]

Cases referred to :

(1) *The Bellaman, The Agostino Bertani,* [1948] 2 All E.R. 679.

(2) *The Moncalieri, The* XXIII *Marzo, The Alberto Treves,* (1949), unreported.

ACTION IN PRIZE.

The Crown sought condemnation of six Italian ships, the Guiseppe Mazzini, the Nazario Sauro, the Urania, the Prometeo, the Riva Ligure and the Antonia C., on the grounds that they were, at the date of seizure, the property of an enemy. The Guiseppe Mazzini was sunk in a land-locked bay, called Ghubbet Mus Nefit, off the island of Dahlak, in the Red Sea some fifty miles east of Massawa, in an air attack on Apr. 7, 1941. The Nazario Sauro, the Urania and the Prometeo were scuttled in the same bay on Apr. 12, 1941, by order of the senior Italian naval officer present in Massawa at that time. On Apr. 27, 1941, the island of Nocra, at the mouth of the bay, surrendered to British naval forces and Dahlak was captured at the same time. On Feb. 6, 1947, the wrecks of the four ships were formally seized in prize by a British naval officer. The Prometeo was lying on her side, while the other three ships had their masts showing. The Riva Ligure was scuttled close to the shore in Harkiko Bay, south of Massawa Harbour, on Apr. 5, 1941, by order of the senior Italian naval officer in Massawa, which was captured by British forces on Apr. 8, 1941. The Riva Ligure was partly submerged when she was formally seized in prize by a British naval officer on Feb. 4, 1947. The Antonia C. was taken out to sea on Apr. 4, 1941, at the order of the senior Italian naval officer in Massawa, when the capture of the port was imminent, and scuttled in deep water about one and half miles to the south of Sheikh Said Island, in Harkiko Bay. She was formally seized in prize by a British naval officer on Feb. 4, 1947, but she was wholly under water at the time.

The formal affidavits of seizure of the six ships were made on Mar. 19 and 20, 1947, and the writs in prize were issued on Mar. 29, 1947, in the case of the first three, and on Oct. 17, 1947, in the case of the last three. By the terms of the Italian armistice, which was signed on Sept. 3, 1943, the right to capture Italian merchant vessels was precluded, but not the right to render effectual in the Prize Court captures made before the armistice. It was contended by the Crown that the principle in *The Bellaman* (1) applied, and that the first four ships were seized when the islands of Nocra and Dahlak were captured in April, 1941, and the last two when Massawa was captured on Apr. 8, 1941. Appearances were entered on behalf of the respective Italian owners of the ships, but they decided not to proceed with their claims.

Article 76 of the Treaty of Peace with Italy which was signed on Feb. 10, 1947, and came into force on Sept. 15, 1947, provides : " 1. Italy waives all claims of any description against the Allied and Associated Powers on behalf of the Italian government or Italian nationals arising directly out of the war or out of actions taken because of the existence of a state of war in Europe after Sept. 1, 1939, whether or not the Allied or Associated Power was at war with Italy at the time, including the following : (*a*) claims for losses or damages sustained as a consequence of acts of forces or authorities of Allied or Associated Powers ; (*b*) claims arising from the presence, operations or actions of forces or authorities of Allied or Associated Powers in Italian territory ; (*c*) claims with respect to the decrees or orders of Prize Courts of Allied or Associated Powers, Italy agreeing to accept as valid and binding all decrees and orders of such Prize Courts on or after Sept. 1, 1939, concerning Italian ships or Italian goods or the payment of costs ; (*d*) claims arising out of the exercise or purported exercise of belligerent rights. 2. The provisions of this article shall bar, completely and finally, all claims of the nature referred to herein, which will be henceforward extinguished, whoever may be the parties in interest . . . 5. The waiver of claims by Italy under para. 1 of this article includes any claims arising out of actions taken by any of the Allied and Associated Powers with respect to Italian ships between Sept. 1, 1939, and the coming into force of the present treaty . . . " It is provided by the Treaties of Peace (Italy, Rumania, Bulgaria, Hungary and Finland) Act, 1947, and the Treaty of Peace (Italy) Order, 1948, that, *inter alia*, art. 76 shall be and have effect as law.

In *The Bellaman and The Agostino Bertani* (1) the Crown sought condemnation of two Italian vessels which were lying aground in Tripoli Harbour, having been sunk by Allied action while the port was in enemy hands. The ships were not formally seized in prize until Feb. 3, 1947, although Tripoli was captured by British troops on Jan. 23, 1943, and the owners of the ships claimed to have the ships released to them. LORD MERRIMAN, P., held, in those cases (i) that the claims of the owners arose out of the " purported exercise of belligerent rights " within art. 76 of the Treaty of Peace with Italy, which operated to bar those claims ; and (ii) that the failure for four years to comply with the Naval Prize Act, 1864, s. 16 (which imposes a duty to deliver up every ship taken as a prize to the marshal of the court forthwith), did not rebut the presumption that the vessels were seized when Tripoli was captured, and they were, therefore, condemnable as good and lawful prize. It was now held by LORD MERRIMAN, P., that the principle in *The Bellaman* (1) applied, not only where the vessel sought to be condemned was in a port which had been captured, but also (*a*) where she was in a land-locked bay of an island which had been captured, and (*b*) where she was removed from a harbour, which was about to be captured, to be scuttled in deep water, and he made a decree of condemnation in regard to each of the six ships.

Quintin Hogg for the Crown.
The owners of the ships were not represented.

LORD MERRIMAN, P. : These six Italian ships require separate consideration, though I can group together the first four, the Giuseppe Mazzini, the Nazario Sauro, the Urania and the Prometeo, and deal with them by the same standard. They were in a land-locked bay, called Ghubbet Mus Nefit, of Dahlak Island, some fifty miles east of Massawa. This land-locked bay, which is a deep water bay, is protected at its mouth by a little island called Nocra Island, with access by a channel of which the shallowest markings are between four and five fathoms. It is now verified that all four ships were above water, or partly above water. One was lying on her side. She may have been actually submerged, but she was quite visible, and the others had only their masts showing. I have the detailed evidence of the capture of these islands in April, 1941, and it seems to be impossible to distinguish this case from that, *e.g.*, of Tripoli Harbour, with which I have already dealt in *The Bellaman and The Agostino Bertani* (1). It does not seem to me that it can make any possible difference in principle whether the particular harbour is artifically protected from the sea and the weather, as in the case of Tripoli, or protected by natural features, as in the case of the harbour with which I am now dealing. These seem to be cases which are clearly covered by the decision in *The Bellaman* (1). The other two cases are rather different, and require separate consideration. The Riva Ligure was lying in a bay which could not by any possibility be described as a land-locked bay as it has a very wide open mouth. It is immediately to the south of Massawa Harbour proper, but part of it, so to speak, shades off into Massawa Harbour. The Riva Ligure was lying in this bay at a spot which is not identified otherwise than by the fact that she was only partly submerged, so that, in view of the sound readings on the chart, she must have been very close inshore. I think that she is covered by other cases [*The Moncalieri, The* XXIII *Marzo, The Alberto Treves* (2)] with which I have had to deal in connection with Massawa Harbour as being, on any reasonable interpretation, within the limits of the harbour and, therefore, I think there is no doubt that, when Massawa Harbour and the surrounding territory were captured, this ship should also be taken to have been captured.

The Antonia C. is in a category by itself and really comes within the cautionary reservation which I made in deciding *The Bellaman* (1), where I said ([1948] 2 All E.R. 683) :

> " I am not called on to consider any question concerning the limits of the port, for both vessels were clearly within the narrowest possible limits which could be drawn. Nor need I consider whether vessels lying in deep water, or hulks sunk to block the harbour entrance, can fairly be reckoned as vessels captured with the port. Such questions can be dealt with when they arise."

I think that that question now arises. The Antonia C., according to the evidence of a local pilot, who actually conveyed the orders for the operation from the Italian officer in command and himself witnessed the operation, was taken out a mile and a half or thereabouts into deep water in Harkiko Bay, to the southward of a little island called Sheikh Said Island, on which the southernmost of the two lights of Massawa Harbour is situated, and scuttled in deep water.

Two points arise : (i) whether the place itself can be said to be within the limits of the harbour, and (ii) whether the vessel is still a vessel which can fairly be said to be the subject of prize. I will deal with the last point first. This is not like the case of the Alberoni with which I dealt at the time when other cases came on in connection with Massawa Harbour. The Alberoni was a vessel which had been blown up by an internal explosion in 1938 and had been left in peacetime at the bottom of the sea, not thought worth salving, and I adjourned that case for some evidence that there was anything which could be called a ship at all. In this case I think it is clear that the Antonia C. was scuttled as a ship, and scuttled because the port was about to be captured by British forces. I have no doubt, therefore, that at the material time (*i.e.*, on Apr. 8, 1941, when the port was captured), if she could fairly be said to be within the port, she was captured as a ship and not as a piece of wreckage at the bottom of the sea.

Was she captured with the port ? This is one of those cases which is clearly a question of degree, and I am bound to say that I think it is on the border line, but counsel has convinced me that I can fairly say, in view of the circumstances to which I have alluded, namely, that she was taken where she was and scuttled because we were about to capture the harbour, that this vessel should be taken to have been captured when the harbour itself was captured. That being so, I am prepared to condemn her, but I do wish to emphasise that progress from one degree to the next must not be taken as likely to proceed indefinitely without check.

Decree of condemnation in regard to each of the six ships.

Solicitor : *The Treasury Solicitor.*

[*Reported by* R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

SAUNDERS (INSPECTOR OF TAXES) *v.* PILCHER.
INLAND REVENUE COMMISSIONERS *v.* SAME.

[COURT OF APPEAL (Tucker, Singleton and Jenkins, L.JJ.), November 17, 18, 21, 24, 1949.]

Income Tax—Profits of trade—Deductions—Fruit grower and fruit salesman——Growing cherries bought with freehold—Admissibility of deduction of apportioned cost of cherries—Income Tax Act, 1918 (c. 40), *sched. D, Cases I and II, r.* 3 (*f*).

Excess Profits Tax—Profits of trade—Deductions—Fruit grower and fruit salesman—Growing cherries bought with freehold—Admissibility of deduction of apportioned cost of cherries.

The taxpayer, who was a fruit grower and salesman, bought freehold land, comprising, *inter alia*, a cherry orchard, for £5,500. The sale was expressed as " inclusive of this year's fruit crop " and the taxpayer had valued the cherries on the trees at £2,500. The cherries were subsequently sold by the taxpayer for £2,903 and, in computing his profits of trade for assessment to income tax and excess profits tax, he sought to deduct the £2,500 as representing the cost to him of the fruit.

HELD : (i) cherries growing on trees were *fructus naturales* and not *fructus industriales,* and, therefore, formed part of the land.

(ii) in either case, the purchase of the growing crop was part of a transaction for the purchase of a capital asset—the land and the trees—and, therefore, the price paid for the crop was not a sum which could be deducted in computing the amount of profits or gains to be charged to tax.

[AS TO CAPITAL EXPENDITURE NOT DEDUCTIBLE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 158-160, para. 325 ; and FOR CASES, see DIGEST, Vol. 28, pp. 42-57, Nos. *215-292*.]

Cases referred to :

(1) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce,* [1915] A.C. 433 ; 84 L.J.K.B. 417 ; 112 L.T. 651 ; 6 Tax Cas. 399 ; 28 Digest 56, *287*.

(2) *Hughes* v. *British Burmah Petroleum Co., Ltd.,* (1932), 17 Tax Cas. 286 ; Digest Supp.

(3) *Coltness Iron Co.* v. *Black,* (1881), 6 App. Cas. 315 ; 51 L.J.Q.B. 626 ; 45 L.T. 145 ; 1 Tax Cas. 287 ; 28 Digest 6, *13*.

(4) *British Insulated and Helsby Cables* v. *Atherton,* [1926] A.C. 205 ; 95 L.J.K.B. 336 ; 134 L.T. 289 ; 28 Digest 52, *264*.

(5) *Graves* v. *Weld,* (1833), 5 B. & Ad. 105 ; 2 Nev. & M. K.B. 725 ; 2 L.J.K.B. 176 ; 2 Digest 58, *316*.

(6) *Evans* v. *Roberts,* (1826), 5 B. & C. 829 ; 8 Dow. & Ry. K.B. 611 ; 4 L.J.O.S.K.B. 313 ; 2 Digest 54, *296*.

(7) *Latham* v. *Atwood,* (1638), Cro. Car. 515 ; 2 Digest 58, *317*.

(8) *Kingsbury* v. *Collins & Elmes,* (1827), 4 Bing. 202 ; 12 Moore, C.P. 424 ; 5 L.J.O.S.C.P. 151 ; 2 Digest 60, *342*.

(9) *Kauri Timber Co.* v. *Taxes Comr.,* [1913] A.C. 771 ; 83 L.J.P.C. 6 ; 109 L.T. 22 ; 28 Digest 47, *237c*.

APPEALS by the taxpayer from a decision of CROOM-JOHNSON, J., dated Jan. 18, 1949, allowing an appeal by the Crown against a decision of the Special Commissioners who held that a growing crop of cherries included in the purchase by the taxpayer of certain land was to be regarded as *fructus industriales,* and that, even if that were not so and the cherries formed part of the freehold, the taxpayer bought two things, the land and the cherries, and, in computing his profits and gains for the purpose of his assessment to income tax and excess profits tax, he was entitled to deduct the amount he had paid for the cherries as distinct from that which he had paid for the land. CROOM-JOHNSON, J., held that the taxpayer was not entitled to deduct any part of the purchase price.

The first appeal was against an income tax assessment, the other two appeals were against assessment to excess profits tax. The point in all three cases was the same and judgment, which was delivered in relation to the second appeal, applied to the three appeals. The Court of Appeal upheld the decision of the learned judge, and dismissed the appeals. The facts appear in the judgment of SINGLETON, L.J.

Millard Tucker, K.C., and *Borneman* for the taxpayer.
Sir Andrew Clark, K.C., J. H. Stamp and *R. P. Hills* for the Crown.

Cur. adv. vult.

Nov. 24. **TUCKER, L.J.** : I will ask SINGLETON, L.J., to deliver the first judgment.

SINGLETON, L.J.: The taxpayer, Mr. Arthur William Pilcher, was a fruit grower and fruit salesman. On May 1, 1942, he attended a sale by auction of a property known as Chekes Court, Tonge, and he bought Lot 2 for the sum of £5,500. He signed the contract and paid the deposit. The particulars show Lot 2 as

> "The celebrated cherry orchard known as The King's Orchard together with other orchards, arable land and marshland situated abutting the road from Tonge Church, opposite Chekes Court, and adjoining the last lot on the south-west side, and comprising about seventeen acres of prolific cherry orchards, four acres of standard apples, seven acres of arable and 13½ acres of pasture and marshland, in all forty-one acres, one rood, thirty-six perches (more or less) . . . The cherries are in their prime and crop exceptionally well even in unfavourable years . . . The varieties include about fourteen acres cherries: Early River, Governor Wood, Circassian, Frogmore, Roundel, Waterloo, Amber and Napoleon, interplanted with a few bush plums."

Vacant possession was to be given on completion, and the sale was, as the particulars show, "inclusive of this year's fruit crop." The date of completion was June 12, 1942, and the conveyance of that date shows that the property was conveyed to the taxpayer for the sum of £5,500 paid by him. He also paid to the vendor, under the conditions of sale, the sum of £194 10*s.* 3*d.*, the usual valuation payable by an incoming tenant for unexhausted manurial values and the like, which included the value of work done in the orchard, namely, spraying and artificial manures. In accordance with custom, the taxpayer was allowed to enter on the land as soon as he had paid his deposit. He had a man in the orchard to scare birds, he began to pick the cherries on May 25, and finished picking in about six weeks. From this it would appear that none of the cherries was ready for picking for more than three weeks after the date of the sale by auction, and some of them were not picked until the first week in July. There were, as the particulars show, a number of different varieties. He sold the cherries for £2,903, and that sum was duly brought into his profit and loss account as a trading receipt. He claims to set against that a sum of £2,500 which, he says, was the amount paid by him for the cherries, and included in the sum of £5,500. In the profit and loss account as delivered there appears as a debit the sum of £2,694 10*s.* 3*d.* being the amount of £2,500 and the further sum of £194 10*s.* 3*d.*, as to which last-mentioned item there was no dispute.

The facts on which the taxpayer bases his claim appear sufficiently from the facts as found in paras. 2 and 3 of the stated Case. Paragraph 2 says:

> "The respondent [taxpayer] has been engaged in trade as a fruit grower and fruit salesman for upwards of thirty years, and, *inter alia*, has been accustomed to buying fruit on trees for the purpose of selling it after it had been picked. In April, 1942, he learnt that a property known as Chekes Court, Tonge, was to be sold by auction on May 1, 1942. He was interested in purchasing part of this property known as the King's Orchard. There is attached hereto marked 'A' a copy of the auction particulars wherein the King's Orchard was shown as part of Lot 2. The particulars stated that Lot 2 was to be sold with vacant possession on completion and inclusive of the year's fruit crop. The fruit trees in the orchard comprised seventeen acres of cherry trees and four acres of apples out of a total acreage in Lot 2 of about forty-one acres, the remainder comprising pasture and marshland."

Paragraph 3 states:

> "The respondent visited the orchard on two occasions prior to the sale with a friend who was, like himself, well acquainted with the value of fruit,

> but who has since died, and inspected the fruit trees carefully. He and the friend made a careful and detailed valuation of the cherries on the trees on the basis of their value to a purchaser in the respondent's position, *i.e.*, of a person intending to pick them and sell them at a profit. The cherries were an exceptionally fine crop that year and nearly ripe for picking, and the valuation so arrived at was £2,500. He also valued the land at £3,210 on the following basis."

The paragraph goes on to say how he arrived at the total valuation of £5,710.

The submission made before the commissioners on behalf of the taxpayer is stated in para. 9 of the Case in this way :

> "It was contended on behalf of the [taxpayer] that in computing his profits he was entitled to charge the sum of £2,500 being the purchase price of the cherries sold for £2,903, which sum had been brought into credit as a trading receipt. It was contended that such cherries in the state of maturity at which they were at the date of the sale did not form part of the land bought, being *fructus industriales* and not *fructus naturales*. Even however if that were not so and if the cherries did form part of the land he was entitled, on making up his accounts upon proper commercial principles, to charge the sum of £2,500 as their cost."

The contention on behalf of the Crown may be stated as appearing in para. 10 of the Case in this way :

> "(1) the cherries were *fructus naturales*, and were not chattels, but formed part of the land," and (3) "the respondent in buying Lot 2 had bought land inclusive of cherries and the purchase was a single operation resulting in the acquisition of a single capital asset."

The decision of the Special Commissioners was in favour of the taxpayer. It is expressed in para. 11 of the Case as follows :

> "The respondent is a fruit grower and dealer in fruit. In the period under appeal he sold certain cherries for £2,903. That sum has to come as a credit into his profit and loss account as a trader. We have to decide what can be set against that sum as the cost of the cherries, which were acquired in the same period. It was argued by the Crown that he was not entitled to set anything against the price he obtained except the sum of £194 10*s*. 3*d*. which he has to pay to the vendor by way of tenant right, and that he was not entitled to set off any part of the £5,500 paid for the orchard because that was the purchase price of the freehold of which the cherries formed a part, the purchase of the freehold being a capital transaction. The argument has the merit of simplicity but in our view it fails. In the first place we are not satisfied on the authorities quoted that the cherries growing on the trees in the present case were part of the freehold. We hold that they were *fructus industriales* and accordingly did not form part of the freehold. Even, however, if we are wrong upon this and the cherries did form part of the freehold, this does not, in our judgment, conclude the matter. What we have to decide is the correct accountancy principles to be applied in computing the profits of the respondent's trade, and we hold that under such principles the respondent was entitled to set against the sale price of the cherries that part of the £5,500 which was paid for them when they were in ripe condition. We are satisfied, on the evidence, that the respondent bid for two things, the land and the ripe cherries. We consider that this is borne out by the words in the auction particulars 'inclusive of this year's fruit crop.' These words make it plain that the vendor was selling prime cherries as well as land. The respondent for his part would not have bid

> nearly as much as he did for the orchard if there had been no ripe fruit on the trees. We accordingly hold that the respondent is entitled to set against the sale price of the cherries some part of the £5,500 which he paid. It is not easy to determine what price was paid for the cherries, since an inclusive price was paid for them and for the land; but the respondent's evidence, which has not been seriously challenged, was that he was ready to pay £5,710, of which £2,500 was for the cherries. In the event he paid £5,500. We hold that the respondent is entitled to deduct as the cost price of the cherries a sum equal to 5500/5710 of £2,500 and we leave the figures of the assessment to be agreed on this basis."

On the facts, there was no evidence to show that there were any ripe cherries on the trees on May 1, the date of the sale by auction. Indeed, picking did not commence until more than three weeks later. The commissioners' finding may be summarised in this way. They held (i) that the cherries growing on the trees were *fructus industriales*; (ii) that the taxpayer bid for two things, the land and the cherries, and that, on correct accountancy principles, he was entitled to deduct the amount he had paid for the cherries as distinct from that which he had paid for the land. CROOM-JOHNSON, J., allowed the appeal against the decision of the Special Commissioners, and held that the taxpayer was not entitled to deduct any part of the purchase price.

The appeal, which was argued before us, was in reference to the assessment to excess profits tax for a period from Apr. 1 to Sept. 26, 1942. For this purpose, profits are to be computed on income tax principles in an endeavour to ascertain the profits or gains arising or accruing from the trade which was being carried on by the taxpayer. We were referred in particular to r. 3 (*f*) of the Rules Applicable to Cases I and II of sched. D of the Income Tax Act, 1918. Counsel for the taxpayer submitted that the taxpayer was carrying on two businesses—one, that of a fruit grower, and the other, that of a fruit salesman, and that in the one he was entitled to deduct the cost of growing, while in the other he was entitled to deduct the cost of buying cherries for sale, and the commissioners had found that the cost of buying these cherries was around £2,500. Consequently, he claimed that the taxpayer was entitled to deduct the amount so found. He relied on the finding of the commissioners at the beginning of para. 2 of the Case Stated:

> "The respondent has been engaged in trade as a fruit grower and fruit salesman for upwards of thirty years, and, *inter alia*, has been accustomed to buying fruit on trees for the purposes of selling it after it had been picked."

The obstacles in the way of this submission are twofold: (*a*) The taxpayer was not carrying on two businesses. There were, perhaps, two aspects of one business. He rendered one profit and loss account. If he had had two businesses, he could have claimed a separate assessment, and r. 13 might have been brought into play. If that had been done, the result might well have been that he as the grower (the buyer of the freehold) would have had to show the cherries as sold to himself as the salesman. (*b*) There was no separate purchase of the cherries as such. The freehold was acquired for the sum of £5,500. There were cherry trees on the land, and some cherries were showing signs of ripening, though none of them was ripe at the date of the sale by auction.

A number of authorities was cited to us, but it is unnecessary to refer to more than two of them. The first is *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (1) and, in particular, the words of LORD PARKER ([1915] A.C. 458):

> "The expression 'balance of profits and gains' implies, as has often been pointed out, something in the nature of a credit and debit account, in which the receipts appear on the one side and the costs and expenditure necessary

> for earning these receipts appear on the other side. Indeed, without such account it would be impossible to ascertain whether there were really any profits on which the tax could be assessed. But the rule proceeds to provide that the duty 'shall be assessed, charged, and paid without other deductions than is hereinafter allowed.'"

The other authority is *Hughes* v. *British Burmah Petroleum Co., Ltd.* (2). In A that case Finlay, J., said (17 Tax Cas. 295) :

> "There is no doubt about the law on this matter. The difficulty, of course, is to apply it to the varying facts of different cases."

Then the learned judge dealt, quite shortly and most usefully, with a number of authorities beginning with *Coltness Iron Co.* v. *Black* (3) and ending with B *British Insulated and Helsby Cables* v. *Atherton* (4). After citing the words of Lord Cave ([1926] A.C. 213) in the latter case, Finlay, J., said (17 Tax Cas. 296) :

> "Various tests have been proposed ; that [the test laid down by Lord Cave] is the latest and the most authoritative. But whatever test exactly C one applies, one always, I think, has to get back to this—one has to look at the facts and say : Was this a capital expenditure ? Was it an expenditure which resulted in the addition of an asset to the business which was to be used for the working of that business, or was it in truth simply a revenue expenditure—that is to say, an expenditure to buy stock to be turned over in the business ?" D

It is true to say that, if arrangements of a different kind had been made, the taxpayer might have been in a better position. If he had bought the growing cherries first and acquired the freehold later, he might not have had so great a liability to tax. The question, however, is not how he arrived at the value of that for which he decided to bid, nor is it what he thought he was buying. As E counsel for the Crown submitted : "Whatever he went to buy, or thought he was buying, is immaterial." Regard must be had to the contract, to the conditions, and to the conveyance. When that is done, it is clear that the taxpayer was acquiring a capital asset. On the lot which he acquired there were cherry trees, and there were some cherries on those trees. The purchaser, in those circumstances, cannot be heard to say afterwards : "I paid £2,500 for F the cherries and £3,000 for the land." That was not the transaction between the parties, nor was it the bargain. If it had been the bargain, the vendor might have become subject to tax on the £2,500 as part of his profits as grower. No doubt, he was advised as to the position, and he determined to sell, and sold, the freehold before the cherries were ripe. I am wholly satisfied that it would be wrong to go behind the documents in this case, otherwise there would be no finality. However one looks at it, the £5,500 can only be regarded as payment G by way of capital, and no part of it can be deducted to arrive at the profits or gains of the taxpayer.

On the argument of counsel for the taxpayer, it was immaterial whether the cherries growing on the trees were to be regarded as *fructus industriales*, as the commissioners found, or as *fructus naturales*. Counsel relied on the finding that the cherries were *fructus industriales*, coupled with the further finding that H the taxpayer had paid the sum of £2,500, or thereabouts, for them. This, he submitted, was an end of the case, and the finding of the commissioners ought to be restored. The submission was based on the right at common law to emblements in certain cases. In Halsbury, Hailsham Edn., vol. 1, p. 401, para. 675, it is put in this way :

> "The right to 'emblements' is a right given to one who has an estate

> of uncertain duration, which is unexpectedly determined without any fault on his part, to take the crops growing upon the land when his estate determined. Emblements extend only to such produce as grows by the industry and manurance of man, and to one crop only of that produce ; and are confined to a crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed. Hops, however, fall within the doctrine of emblements."

It is right to say that the crop was cultivated to the extent of manuring and spraying the trees, but no case can be found in which fruit growing on trees has been held to be *fructus industriales*. The most useful authority on the point is probably *Graves* v. *Weld* (5) where it was recognised, both in argument and in the judgment of Denman, C.J., that fruit trees did not come within the designation. The Chief Justice, quoting the observations of Lord Coke (Co. Litt. 55a) said (5 B. & Ad. 119) :

> " . . . ' the reason of this is, for that the estate of the lessee is uncertaine, and, therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes or sow hempe or flax, or any other *annual* profit, if after *the same be planted*, the lessor oust the lessee ; or if the lessee dieth, yet he or his executors shall have *that yeare's* crop. But if he plant young fruit trees, or young oaks, ashes, elms, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, because they will yield *no present annuall profit* '."

In *Evans* v. *Roberts* (6) Bayley, J. (5 B. & C. 835), says :

> " In Tidd's Practice, p. 1039, it is laid down that under a *fieri facias* the sheriff may sell *fructus industriales*, as corn growing, which goes to the executor, or fixtures which may be removed by the tenant ; but not furnaces or apples upon trees, which belong to the freehold, and go to the heir."

It is sufficient for this purpose to repeat that no case can be found in which fruit growing on trees has been treated as *fructus industriales*.

Counsel for the taxpayer referred to the definition of " goods " in the Sale of Goods Act, 1893. Section 62 provides :

> " ' Goods ' include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

He recognised, I think, that the facts of a case such as this present difficulties as to when the property in the fruit passed. The short answer to the point under the Sale of Goods Act is that the Act has no application to a sale of land, which this was. I find myself unable to agree with counsel's submission, or with the finding of the commissioners, having regard to the authorities which were cited to us. In my opinion, the judgment of Croom-Johnson, J., was right, and this appeal should be dismissed.

JENKINS, L.J. : I agree. It is a well settled principle that outlay on the purchase of an income-bearing asset is in the nature of capital outlay, and no part of the capital so laid out can, for income tax purposes, be set off as expenditure against income accruing from the asset in question. This principle holds good even in the case of a wasting asset, such as a coal mine, the income from which is literally produced by the consumption of the capital asset itself. *A fortiori* does it apply in the case of a capital asset such as an orchard of fruit trees which, subject to periodical replacement of casualties among the trees and the usual attention in the form of pruning, spraying, manuring, and so on, constitutes what may be described as a permanent source of income. The learned judge cited some of the leading cases by which this principle has been established. I need not refer to them again, as the validity of the principle, which applies A equally to excess profits tax as to income tax, is not challenged. The question at issue is simply whether it is excluded by the special circumstances of the present case. The Special Commissioners held in effect that the principle was excluded in the present case on two grounds. First, they held that the cherries were *fructus industriales* as opposed to *fructus naturales*. As to that finding, in my judgment, it is clearly wrong in law. When the authorities are looked B into (and Singleton, L.J., has referred to some of them), it is abundantly plain that fruit growing on trees has never been regarded as *fructus industriales*. A clear contrast has always been drawn between those crops which, broadly speaking, are produced in the year by the labour of the year, and crops such as fruit growing on trees, where the productive act is the planting of the trees, and where the fruit is produced by the trees year after year, primarily as the C result of that initial productive act.

There is one other authority, in addition to those mentioned by Singleton, L.J., to which I should like to refer, namely, *Latham* v. *Atwood* (7). The question there concerned hops, and the court held (Cro. Car. 515)

> " . . . that they are like emblements, which shall go to the husband or D executor of the tenant for life, and not to him in remainder ; and are not to be compared to apples or nuts, which grow of themselves. Wherefore adjudged for the plaintiff."

That was a clear statement, in effect, that apples or nuts were not to be considered as *fructus industriales*. The case of hops, which in *Latham* v. *Atwood* (7) were held to be *fructus industriales*—and one may add the case of teazles which arose E in *Kingsbury* v. *Collins & Elmes* (8) referred to in *Graves* v. *Weld* (5) (5 B. & Ad. 120)—are, if anything, in the nature of extension of the general rule due to the fact that, although the cultivation or growing of the crop is not confined to the year—for example, hops grow from permanent roots—yet so much of the growth and so much of the attention takes place year by year that apparently it was thought right to treat them as *fructus industriales*. In my judgment, therefore, F this first ground on which the Special Commissioners have found in favour of the taxpayer can be shortly dismissed by saying that clearly, on the authorities, the cherries in the present case were not *fructus industriales*.

The matter does not rest there, for, even if the cherries were *fructus industriales*, it by no means follows that the consequence adduced by the commissioners would have flowed from that circumstance. The distinction, G as I understand it, between *fructus naturales* and *fructus industriales* is one which arises, or used to arise, between the executor and the heir, between the life tenant and the remainderman, and between the agricultural tenant and his landlord. Under the old law when a man died intestate his freeholds went to his heir and his personalty went to his executor. In such a case, where he had planted an annual crop it was considered that, inasmuch as he was prevented from recouping H himself for his toil by the accident of death, justice demanded that the fruits of his labour and of his sowing should go to the executor and not to the heir. Similarly, as between tenant for life and remainderman, it was held that the tenant for life's estate should profit by the labour and manurance of the last year. Again, where agricultural tenancies are concerned, independently of any statutory regulation, it was obviously right and proper that the outgoing tenant should take his last crop, but it by no means follows that the distinction has the same materiality as between vendor and purchaser. When the owner in fee simple of a farm in hand sells for a like estate to a purchaser the common practice, of course, is for the contract to contain special provisions in regard to such things as growing crops, and, generally, they are either expressly reserved to the vendor with a right to gather them or the purchaser is required to take and pay for the crop when ripe at a valuation. Where, however, the contract is silent as to such matters, and there is simply an out and out sale of a farm in hand from an absolute owner to a purchaser, then, I apprehend, the crops in the ground, whether they be *fructus industriales* or *fructus naturales*, pass with the land in the ordinary way. It is, however, unnecessary to deal further with that aspect of the matter, for, in my judgment, this part of the case is shortly answered by saying that these cherries were *fructus naturales*.

The second ground on which the Special Commissioners found in favour of the taxpayer was that he bid for two things, first, the cherries, and, secondly, the land. In my judgment, there was no evidence on which the Special Commissioners could come to any such conclusion. The most the evidence showed was that the taxpayer, in consultation with a friend with whom he inspected the property before the sale, decided in his own mind that at the auction he would be prepared to go to £5,700, of which he regarded £2,500 as representing the price or value of the cherries and the balance as representing the price or value of the remainder of the property. That was no more than his own calculation by which he arrived at the price he was prepared to pay. In the result, he did not have to go to the full price of £5,700 which he had in mind as he succeeded in buying at the auction for only £5,500. That was not bidding for two different things. It was bidding for one thing on a calculation made by the purchaser for his own information as to the worth of what he would get if he bought it. What he did was to bid one entire price for the entire lot including the land, the trees, and the fruit on the trees. Moreover, he could not have bid for or purchased the property on any other terms under the particulars and conditions of sale governing the auction. What he was entitled to bid for was Lot 2 as a whole, and he bid for it as a whole and got it, and he paid for it as a whole. I think the express inclusion of "this year's fruit crop" in the conditions of sale was a matter the effect of which was misapprehended by the Special Commissioners. They seem to have regarded these words as suggesting that "this year's fruit crop" was a separate item of sale. In my judgment, that is wrong. I think the express inclusion of "this year's fruit crop" only meant that the vendor was not to be entitled, as he otherwise would have been entitled, to pick, in the ordinary course of husbandry, say, fruit which might become ripe between the date of the contract and the date of completion. It did not make the fruit a separate subject of sale at all. It merely precluded the vendor from exercising that ordinary right. So far from suggesting that the fruit was a separate subject of sale, it seems to me that the express provision to the effect that "this year's fruit crop" was to be included emphasised the fact that the fruit was being sold and would be bought as a part of the land. Accordingly, in my judgment, the Special Commissioners erred on both these grounds and came to a wrong conclusion.

In the argument before us, counsel for the taxpayer developed a third ground on which he sought to support the Special Commissioners' decision, and that was this. Pointing to the facts as found in the Case Stated, he said that the taxpayer was carrying on two businesses, the one being that of a fruit grower and the other that of a fruit salesman and dealer. He said the acquistion of the cherries was a transaction carried out by the taxpayer in his capacity as a salesman or dealer, and not in his capacity as a grower. The short answer to that submission is that there was no evidence to support it. The Special Commissioners never found that he was carrying on two separate businesses. Their finding clearly is to the effect that he was carrying on one business with two aspects, that of growing and that of selling and dealing. His business, no doubt, included providing himself with fruit by means of purchasing it as well as by means of growing it, but it was not two businesses. It was one business. Even, however, if it were right to say that the taxpayer was carrying on two businesses, I do not think the consequences claimed by counsel would have ensued at all. It is clear that, for income tax purposes, a man cannot treat himself as carrying on two businesses and divide one entire transaction, such as the purchase of Lot 2 in the present case, into two transactions, and say : "I bought part of this in my capacity as a person carrying on one business, and the other part in my capacity as a person carrying on another business." The assumption, if made, must be carried, in my judgment, to its logical conclusion. If that were done, the position would be this. The grower would have acquired the cherries as part of a capital asset. That is admitted. When the cherries were ripe and were picked, he himself would have to be regarded as selling them to the dealer or salesman. So far as tax was concerned, the grower would be entitled to be allowed no more in the shape of expenditure in respect of the cherries than the £194 10*s.* 3*d.* for tillage, and so forth, which is admittedly a proper expense. No doubt, the dealer or salesman would be able to deduct the price he paid to the grower as an expense of his trade, but the tax would have been paid on the basis here claimed as tax in respect of the business of the grower. Accordingly, in my judgment, counsel's contention about there being two businesses fails. It was an ingenious attempt to make bricks without straw, and to construct a position for which there was no foundation in the actual facts as stated by the Special Commissioners.

At first sight this case seemed to me, and I think also to my brethren, as, in a sense, a hard one, because it looked as if the taxpayer had blundered by carrying out the transaction in the least advantageous way to himself from the tax point of view when he might easily have done what would have been in substance the same thing in a different way by buying the cherries separately from the land simply by a modification in the form of the transaction, but, on further consideration, that first impression does not seem to me to be justified. One has to remember that this transaction concerned not merely the taxpayer, but also the vendor of the orchard. The taxpayer was able to buy the orchard complete with the cherries from the vendor, and according to his own calculation, the amount of the purchase price represented by the value of the cherries was £2,500. It by no means follows that, if he had been minded to buy the cherries from the vendor apart from the land, as a separate transaction, the vendor would have been willing to sell them to him for £2,500, or some such price. The difference is obviously a material one from the vendor's point of view, because, dealing with the matter as he did, he was selling a capital asset, and the resulting capital receipt *prima facie* would attract no tax. If he had sold the cherries separately in the way of trade, he would at once have created an income receipt on which *prima facie* tax would have been exigible. Therefore, the alteration in the form of the bargain required to make it more favourable to the taxpayer from the tax point of view would have involved an alteration, not merely of form, but of substance, owing to its adverse effect on the tax situation of the vendor, and it cannot be assumed that the bargain thus altered would have been one to which the taxpayer would have received the vendor's agreement. Therefore, in my judgment, this is a case in which it cannot justifiably be said that there is anything unreasonable in making the liability to tax depend on the actual transaction as actually carried out, and on the bargain as it in fact stood between the vendor and the taxpayer. For these reasons, I agree that the learned judge was right in reversing the decision of the Special Commissioners, and that the appeal fails and should be dismissed.

TUCKER, L.J. : In my view, this appeal fails, for two reasons which I can state in a very few words. The foundation of the argument of counsel for the taxpayer was that the taxpayer carried on two businesses, the business of fruit grower and salesman and the business of fruit dealer. He conceded that, if the taxpayer's business was simply that of a fruit grower, his case would fail, as this clearly would have been the purchase of a capital income-bearing asset. The answer to this contention is that there is no such finding in the Case. There is no sign of such a point ever having been taken before the Special Commissioners, or, for that matter, before CROOM-JOHNSON, J. So, in my view, the very foundation of counsel's argument has no substance in it. I think the case is on all fours with the decision in *Kauri Timber Co.* v. *Commissioner of Taxes* (9). Our attention was drawn to a passage from the judgment of LORD SHAW therein where, after referring to the objects of the company in its memorandum, he added ([1913] A.C. 755) :

> "It is apparent from this description that, so far as the company was concerned, it is a mistake to treat it as if its objects were merely the carrying on of a timber merchant's business."

In the present case, I express no opinion—it is not necessary to do so—as to what the position might have been had the taxpayer been a dealer in fruit and nothing else. Different considerations possibly would have arisen in such circumstances, but that is not this case. The argument addressed to us by counsel with regard to *fructus industriales* and the Sale of Goods Act, 1893, similarly fails, for it presupposes that there was, in fact, a separate sale of the fruit from the land. In my view, there was no such thing. It is clear on the documents that this was simply a sale and conveyance of land which carried with it the fruit trees and the fruit on the trees. I am in complete agreement with what has been said by my brethren with regard to the point as to *fructus industriales* and *fructus naturales*. It is far too late to argue now that cherry trees are *fructus industriales*. For these reasons, and for the reasons given by my brethren, I agree that these three appeals fail, because they are all governed by the point with which we have been dealing.

Appeals dismissed with costs.

Solicitors : *Faithfull, Owen & Fraser*, agents for *Winch, Greensted & Winch*, Sittingbourne (for the taxpayer) ; *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

SOLLE *v.* BUTCHER.

[COURT OF APPEAL (Bucknill, Denning and Jenkins, L.JJ.), October 24, 25, 26, November 25, 1949.]

Rent Restriction—Standard rent—Change of identity of dwelling-house—Reconstruction of war damaged dwelling-house—Question of fact whether premises so altered as to become a new dwelling—Garage not previously forming part of the demise included in the letting—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), *s.* 1 (1); *s.* 12 (1) (*a*).

Mistake—Mistake of fact—Mistake whether a dwelling-house had been so substantially altered as to become a new and separate dwelling under the Rent Restrictions Acts—Estoppel.

In 1947 the landlord acquired a long lease of a war-damaged house which in 1939 had been let in flats subject to the Rent Restrictions Acts. The landlord carried out repairs and alterations to the house, in the course of which he re-constructed the flat the subject of the present proceedings. The alterations left the outside and cubic capacity of the house and of the flat in question unchanged, the only substantial change made to the flat being the removal of inner walls so as to subtract from a bedroom a space which was then incorporated into the dining-room. During the course of the work the parties discussed whether the flat when rebuilt A would be subject to the standard rent fixed by the 1939 letting, and they came to the conclusion that it would not, the tenant expressing that opinion. The standard rent of the flat in 1939 was £140 a year, and if the reconstructed flat were the same dwelling it would have been possible to increase the rent in respect of expenditure on improvements, in accordance with s. 2 (1) of the Increase of Rent and Mortgage Interest B (Restrictions) Act, 1920, as amended by the Rent and Mortgage Interest Restrictions Act, 1939, sched. I, to approximately £250, by serving the necessary notices of increase. On Sept. 29, 1947, on completion of the work, the landlord let the flat, including a garage which had not formed part of the 1939 demise, to the tenant on a lease for seven years at a rent of £250 a year, but, being under the impression that the rent C fixed by the 1939 letting had no application to the re-constructed flat, he served no notice of increase. The tenant paid rent at £250 a year for some time and then took proceedings in the county court for a declaration that the standard rent of the flat was £140 a year and that he was entitled to recover from the landlord the amount overpaid since the commencement of the tenancy. The landlord contended that the alterations were such that D the flat had become a new and separate dwelling by reason of change of identity, but the county court judge found as a fact that the flat was not a new and separate dwelling. The landlord further contended that the lease should be rescinded as it had been entered into under a mutual mistake of fact.

Held: (i) the structural alterations and improvements were not such E as to destroy the identity of the flat as let in 1939, and the inclusion of the garage had no material effect on its identity.

Langford Property Co., Ltd. v. *Batten* ([1949] 2 All E.R. 422), *applied.*

(ii) (Jenkins, L.J. *dissentiente*) on the evidence, the parties had addressed their minds to the material issue of identity of the new flat, and their mistake or common misapprehension as to whether the flat had been so F altered as to destroy its identity was a mistake of fact, and the landlord was entitled to have the lease set aside in equity on such terms as the court thought fit.

Cooper v. *Phibbs* (1867) (L.R. 2 H.L. 149), *applied.*

Observations of Atkin, L.J., in *Phillips* v. *Barnett* ([1922] 1 K.B. 227) and of Lord Campbell, L.C., in *Wilde* v. *Gibson*, (1843), 1 H.L. Cas. 605, G *explained.*

Angel v. *Jay* ([1911] 1 K.B. 666), *criticised by* Denning, L.J.

Per Jenkins, L.J.: "The parties knew all the material facts bearing on the effect of the Rent Restrictions Acts on a lease of those premises, but they materially misapprehended the effect which in that state of facts those Acts would have on such a lease. That is a mistake of law of a kind H which, so far as I am aware, has never yet been held to afford good ground for rescission. Any misrepresentation shown to have been made by the tenant must be taken to have been an innocent misrepresentation, and it has been repeatedly held that an innocent misrepresentation affords no sufficient ground for rescission after completion, and there is authority for the view that this applies to a lease no less than to a conveyance: see *Angel* v. *Jay* (*supra*) and cases there cited. The effect of the imperative terms of s. 1 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is not only that the excess of the contractual rent over the permitted rent is irrecoverable even if the parties have expressly agreed that it should be recoverable notwithstanding the Act, but also that the excess is irrecoverable even if the parties, whether through total ignorance of the legislation, or through misapprehension of its effect, believed that the full contractual rent would be, and intended that it should be, legally recoverable.

(iii) the tenant was not estopped by conduct from asserting that the control by virtue of the pre-war letting relieved him from his obligation to pay the landlord £250 a year as reserved by the lease, for no rule of estoppel could oust the jurisdiction of the court to decide whether the rent claimed in respect of a dwelling-house infringed the provisions of the Rent Restrictions Act.

Welch v. *Nagy* (*ante*, p. 868), *applied.*

[As to Standard Rent, see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369, 370 ; and for Cases, see DIGEST, Vol. 31, pp. 559-561, 563-565, Nos. *7068-7084, 7111-7127.*

As to Right to Rescission of Contract in Case of Mistake, see HALSBURY, Hailsham Edn., Vol. 28, pp. 147-150, paras. 207-213 ; and for Cases, see DIGEST, Vol. 35, pp. 122-127, Nos. *242-275.*]

Cases referred to :

(1) *Ellis & Sons Amalgamated Properties, Ltd.* v. *Sisman*, [1948] 1 All E.R. 44; [1948] 1 K.B. 653 ; [1948] L.J.R. 929 ; 2nd Digest Supp.

(2) *Langford Property Co., Ltd.* v. *Batten*, [1949] 2 All E.R. 422.

(3) *Hemns* v. *Wheeler*, [1948] 2 K.B. 61 ; [1948] L.J.R. 1024 ; 2nd Digest Supp.

(4) *Vaughan* v. *Shaw*, [1945] 2 All E.R. 52 ; [1945] K.B. 400 ; 114 L.J.K.B. 350 ; 173 L.T. 6 ; 2nd Digest Supp.

(5) *R. & P. Properties, Ltd.* v. *Baldwin*, [1938] 4 All E.R. 845 ; [1939] 1 K.B. 461 ; 108 L.J.K.B. 463 ; 160 L.T. 445 ; Digest Supp.

(6) *Cooper* v. *Phibbs*, (1867), L.R. 2 H.L. 149 ; 16 L.T. 678 ; 35 Digest 93, *27.*

(7) *Mitchell* v. *Barnes*, *Same* v. *Allen*, [1949] 2 All E.R. 719.

(8) *Phillips* v. *Barnett*, [1922] 1 K.B. 222 ; 91 L.J.K.B. 198 ; 126 L.T. 173 ; 31 Digest 566, *7132.*

(9) *Welch* v. *Nagy*, [1949] 2 All E.R. 868.

(10) *Barton* v. *Finchan*, [1921] 2 K.B. 291 ; 90 L.J.K.B. 451 ; 124 L.T. 495 ; 85 J.P. 145 ; 31 Digest 579, *7280.*

(11) *Brown* v. *Draper*, [1944] 1 All E.R. 246 ; [1944] K.B. 309 ; 113 L.J.K.B. 196 ; 170 L.T. 144 ; 2nd Digest Supp.

(12) *British Launderers Research Assocn.* v. *Central Middlesex Assessment Committee and Hendon Rating Authority*, [1949] 1 All E.R. 21 ; [1949] 1 K.B. 462 ; [1949] L.J.R. 416 ; 113 J.P. 72.

(13) *Seaford Court Estates, Ltd.* v. *Asher*, [1949] 2 All E.R. 155 ; [1949] 2 K.B. 481.

(14) *Bell* v. *Lever Bros., Ltd.*, [1932] A.C. 161 ; 101 L.J.K.B. 129 ; 146 L.T. 258 ; *revsg.* S.C. *sub. nom.*, *Lever Bros.* v. *Bell*, [1931] 1 K.B. 557 ; 100 L.J.K.B. 78 ; 144 L.T. 348 ; Digest Supp.

(15) *Smith* v. *Hughes*, (1871), L.R. 6 Q.B. 597 ; 40 L.J.Q.B. 221 ; 25 L.T. 329 ; 35 Digest 107, *125.*

(16) *Sowler* v. *Potter*, [1939] 4 All E.R. 478 ; [1940] 1 K.B. 271 ; 109 L.J.K.B. 177 ; 162 L.T. 12 ; 2nd Digest Supp.

(17) *King's Norton Metal Co., Ltd.* v. *Edridge, Merrett & Co., Ltd.*, *Same* v. *Roberts*, (1897), 14 T.L.R. 98 ; 39 Digest 534, *1455.*

(18) *Nicholson & Venn* v. *Smith Marriott*, (1947), 177 L.T. 189 ; 2nd Digest Supp.

(19) *Torrance* v. *Bolton*, (1872), 8 Ch. App. 118 ; 42 L.J. Ch. 177 ; 27 L.T. 738 ; 37 J.P. 164 ; 35 Digest 66, *624*.

(20) *Cundy* v. *Lindsay*, (1878), 3 App. Cas. 459 ; 38 L.T. 573 ; 42 J.P. 483 ; *sub nom.*, *Lindsay & Co.* v. *Cundy*, 47 L.J.Q.B. 481 ; *affmg.*, (1877), 2 Q.B.D. 96 ; 46 L.J.Q.B. 233 ; 36 L.T. 345 ; *revsg.*, (1876), 1 Q.B.D. 348 ; 45 L.J.Q.B. 381 ; 34 L.T. 314 ; 33 Digest 560, *430*.

(21) *Lansdown* v. *Lansdown*, (1730), as reported in Mos. 364 ; 35 Digest 91, *11*. A

(22) *Bingham* v. *Bingham*, (1748), 1 Ves. Sen. 126 ; 35 Digest 122, *244*.

(23) *Beauchamp* (*Earl*) v. *Winn*, (1873), as reported in L.R. 6 H.L. 223 ; 35 Digest 97, *57*.

(24) *Huddersfield Banking Co., Ltd.* v. *Lister* (*Henry*) *& Son, Ltd.*, [1895] 2 Ch. 273 ; 64 L.J.Ch. 523 ; 72 L.T. 703 ; 35 Digest 320, *645*.

(25) *Norwich Union Fire Insurance Society, Ltd.* v. *Price, Ltd.*, [1934] A.C. 455 ; 103 L.J.P.C. 115 ; 151 L.T. 309 ; Digest Supp. B

(26) *MacKenzie* v. *Royal Bank of Canada*, [1934] A.C. 468 ; 103 L.J.P.C. 81 ; 151 L.T. 486 ; Digest Supp.

(27) *Seddon* v. *North Eastern Salt Co., Ltd.* [1905] 1 Ch. 326 ; 91 L.T. 793 ; 35 Digest 20, *118*.

(28) *Angel* v. *Jay*, [1911] 1 K.B. 666 ; 80 L.J.K.B. 458 ; 103 L.T. 809 ; 30 Digest 479, *1408*. C

(29) *Wilde* v. *Gibson*, (1843), 1 H.L. Cas. 605 ; 35 Digest 68, *649*.

(30) *Erlanger* v. *New Sombrero Phosphate Co.*, (1878), 3 App. Cas. 1218; 48 L.J.Ch. 73 ; 39 L.T. 269 ; 35 Digest 77, *748*.

(31) *Garrard* v. *Frankel*, (1862), 30 Beav. 445 ; 31 L.J.Ch. 604 ; 26 J.P. 727 ; 35 Digest 130, *301*.

(32) *Paget* v. *Marshall*, (1884), 28 Ch.D. 255 ; 54 L.J.Ch. 575 ; 51 L.T. 351 ; 49 J.P. 85 ; 35 Digest 128, *291*. D

(33) *Brakspear* (*W. H.*) *& Sons, Ltd.* v. *Barton*, [1924] 2 K.B. 88 ; 93 L.J.K.B. 801 ; 131 L.T. 538 ; 31 Digest 566, *7134*.

APPEAL by the landlord from an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Bromley County Court on May 11, 1949, declaring E that the standard rent of Flat No. 1, Maywood House, Beckenham, was £140 per annum, and that the tenant was entitled to recover under the Rent Restrictions Acts from the landlord £137 10*s*., rent overpaid. The county court judge dismissed the landlord's counter-claim for rescission of the lease on the ground of mutual mistake of fact, holding that the mistake, which was whether or not the property was within the Rent Restrictions Acts, was one of law and not F of fact. The landlord appealed against the order for repayment of £137 10*s*. and against the dismissal of his claim for rescission of the lease, and the Court of Appeal (JENKINS, L.J., *dissentiente*) allowed the appeal, ordering rescission of the lease on terms and reversing the order for repayment of £137 10*s*.

Levy, K.C., and *Alan Campbell* for the landlord. G

J. Comyn for the tenant.

Cur. adv. vult.

Nov. 25. The following judgments were read.

BUCKNILL, L.J. : This is an appeal from a judgment of His Honour JUDGE SIR GERALD HURST, K.C., in favour of the tenant, the plaintiff, Godfrey Frank Solle. The judge decided that the standard rent of Flat No. 1, Maywood H House, Beckenham, of which the tenant was in occupation, and the defendant, Charles Butcher, was the landlord, was £140 per annum. The judge also decided that the tenant was entitled to recover the sum of £137 10*s*., in respect of overpayments in rent for the flat, from the landlord.

The issues in the case and points raised thereon are set out in the pleadings. According to the particulars of claim Flat No. 1 was let to one, Howard Taylor, at a yearly rental of £140 by a tenancy agreement dated July 22, 1938, and made between Howard Taylor, as tenant, and Florence Burnell, as landlord. Then it was alleged that the same premises were let to the present tenant by the present landlord from Sept. 29, 1947, for a term of seven years at a yearly rental of £250. It was alleged that the standard rent of the flat was £140, and that the tenant had paid to the landlord £137 10*s.* as rent in excess of that standard rent. The landlord alleged that Maywood House had been severely damaged by enemy action during the 1939-1945 war, and rendered uninhabitable, and that during the years 1946-47 was re-built and/or re-constructed, repaired, altered and improved by the landlord in accordance with plans, the contents of which were well known to the tenant. Then the landlord alleged that he granted the lease to the tenant on the oral assurance made by him that the rent of £250 was in no way controlled by any pre-war damage letting of Maywood House. He denied that the premises were controlled by virtue of any pre-war damage letting, but in the alternative contended, *inter alia*, that the tenant was estopped by his conduct from asserting that any such control relieved him of his personal obligation to pay the rent of £250. By way of counter-claim the landlord asserted that the lease was entered into in circumstances amounting to a mutual mistake of both the tenant and landlord, and asked for rescission of the lease.

The material facts were as follows. The tenant, who is a surveyor, became a partner with the landlord in a business as estate agents in 1947, and about that time introduced the landlord to the representative of the head lessor of Maywood House. That house, which was built originally as a private house, had been converted into five flats in 1931. In 1939 the five flats were let for a gross annual rental of £625 per annum, the flat which is the subject of this action being let to Mr. Taylor for three years at a rent of £140. In consequence of a land-mine exploding near the house considerable damage was done to it, and in 1947 it was unoccupied. In that year the landlord took a long lease of the house with the intention of repairing the war damage and doing substantial alterations to the flats. There was a good deal of dispute between the tenant and the landlord as to what part the tenant took in connection with this scheme of the landlord. The learned judge said in his judgment that he in general preferred the landlord's evidence to the tenant's evidence, and I have taken as proved the landlord's version of these disputed facts except where the judge has found in favour of the tenant. The landlord said in his evidence that he discussed with the tenant the rents to be charged for the flats when re-constructed, and he also discussed with the tenant the pre-war lettings of the flat as set out in a document supplied by the previous owners of the house which contained the statement as to the lease of the flat to Mr. Taylor for £140. The landlord, who was managing director of a limited company carrying on business as builders under the style of C. F. Butcher & Co., Ltd., who were engaged on the work, discussed with the tenant the repairs and alterations to be done to the building and to this flat, and the tenant said he would obtain legal advice whether the flat would be outside the Rent Restrictions Acts as regards the standard rent because of the improvements which the landlord proposed to make. The landlord said he relied on the tenant on this subject of rents, and that the tenant raised the question with him as to the standard rent and said: "Be careful because it may be within the Rent Acts." Later, the tenant produced an opinion from counsel on the point, and read it to the landlord. This opinion was not produced in court. It is clear, however, from the evidence of the landlord that he and the tenant were both satisfied that the previous rent of £140 per year did not apply as the standard rent. The landlord also said that because he was satisfied on this point he did not take any action to calculate the permitted increases to the standard rent which he would be entitled to make under s. 2 (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by sched. I to the Rent and Mortgage Interest Restrictions Act, 1939, in respect of the work which he proposed to do to the flat.

Dealing now with the work done to the house, it appears from the landlord's evidence that he spent £6,420 for repair of war damage. This damage appears to have been mainly to the outer walls of one side of the house, and on some of the interior party walls. As regards the alterations made to this flat itself they consisted mainly of the cutting away of two broken walls which formed the south end of the main bedroom and the north end of the living room. These walls having been cut away, the weight of the structure overhead was taken by A steel joists, and further to compensate for the removal of the walls some underpinning was done in the cellar beneath them. Between these two walls in the original plan of the flat there was a small space which contained a cupboard and another transverse brick wall, and this brick wall was also removed. The net result of that work, which was difficult and expensive, was to subtract from the south end of the main bedroom a space which was then incorporated into B the dining room so as to form part of a dining recess at the north end of the living room, a space which was further increased by incorporation of the space previously occupied by the passage and the cupboard. That was the only substantial alteration made to the flat. Some wooden partitions were put into another bedroom to make a small box-room, and two cupboards were put into a third bedroom. Electric fires were put in three or four places, and the hot water C system of the whole building was improved.

On the first issue whether this was the same building after these alterations had been made, I find a statement in Megarry on the Rent Acts, 4th ed., at p. 27, which appears to me to sum up correctly the various decisions on the point. The statement refers to a general principle that, if a house within the Acts is subjected to such substantial structural alteration that it becomes a D new and separate dwelling-house in fact by reason of change of identity, the new premises shed all the attributes of the old. On this issue the learned judge in his judgment said :

> "The defendant's [the landlord's] case is that the flat was gravely injured in 1940, and has since been so restored, altered and re-constructed as to E destroy the identity of the dwelling-house. This is a question of fact. The alterations leave the outside and the cubic capacity of the house unchanged. They are not such as to increase the lettings or to accommodate more people. The boxroom is of slight importance. If the house had been damaged by enemy action the tenant would have claimed that the flat was still the same : *Ellis & Sons Amalgamated Properties, Ltd.* v. *Sisman* (1). F These alterations fall short of satisfying the test. The plans almost speak for themselves. The only changes in structure are (*a*) boxroom (a mere utilization of space) ; (*b*) two cupboards ; (*c*) fireplaces ; (*d*) transfer of recess from bedroom into dining room—simply a question of moving the partition—not fundamental—very minor. Landlord claims he spent £1,200. It is clear he spent about £1,000 on minor alterations and on G substantial decorations and amenities. It still remains the identical dwelling-house although decorated and beautified. Therefore, £140 is the standard rent."

Counsel on behalf of the landlord argued that the judge misdirected himself in at least two important particulars : First, *Ellis & Sons Amalgamated Properties, Ltd.* v. *Sisman* (1) had no bearing on the present point. That case H dealt with the right of the tenant of a house demolished by enemy action to claim his rights as a tenant of any building on the land unless those rights had been terminated by notice. The second alleged misdirection was in saying that the expensive and difficult task of removing brick walls and making the dining recess was simply a question of moving the partition. Although there is force in these contentions of counsel, the ultimate question which this court has to decide is whether the work done, which I have mentioned, was of such a nature as to come within the general principle to which I have referred. It seems to me that in all essential respects this flat was the same as the flat which was let to Mr. Taylor in 1937.

There is, however, one other point to which I must refer, and that is the question of the garage. There is a room in the north-west corner of the flat, part of the main building and next to the maids' room. This room formed a garage at the time when Mr. Taylor took the flat, but his lease makes no mention of any garage. It appears from the evidence of Mr. Burnell and also of Mrs. Burnell, who granted the lease to Mr. Taylor, that it had been the practice for years to include the right to use the garage by the tenant of the flat. Mr. Burnell in his evidence said :

> " I think Taylor had a car. Not certain whether he used the garage, but could have used it if he wanted it. Five garages and each tenant also held a garage, although garage not mentioned in their agreements. The garage went with the flat."

In the lease granted to the tenant by the landlord there is a special demise of the garage apportioned to the flat. It was argued by counsel for the landlord that the fact that the tenant had this demise of the garage tended to strengthen his argument that the property demised to the tenant was substantially different from the property demised to Taylor. The point was taken before the county court judge who dealt with it in this way :

> " The fact that the letting of the flat in 1939 did not, at any rate, in terms include the garage is immaterial if the identity of the flat is essentially unchanged. It may well be that the garage did not form part of the original letting. It was not proved to my satisfaction that it was included. It is left as an open matter."

It seems to me that on this point about the garage this court must follow the decision of the Court of Appeal in *Langford Property Co., Ltd.* v. *Batten* (2). In that case a flat which came within the Rent and Mortgage Interest Restrictions Act, 1939, was let at £135 per annum in 1939, and a garage in the vicinity of the flat was let to a different tenant at 5*s.* per week. In 1946 the flat and the garage were let by a single lease at a rent of £175 per annum. In proceedings to determine the standard rent of the premises it was held that the garage fell to be treated as part of the dwelling-house, and, accordingly, the standard rent of the dwelling-house, including the flat and garage, was £135 per annum. On this point, while recognising that this court was bound by the decision of the Court of Appeal in *Langford Property Co., Ltd.* v. *Batten* (2), counsel for the landlord relied on a passage of TUCKER, L.J., in *Hemns* v. *Wheeler* (3), where the same point was dealt with as arose in the *Langford Property* case (2). TUCKER, L.J., said ([1948] 2 K.B. 67) :

> " The dwelling-house remains the same, and it is, in my view, erroneous to say that this dwelling-house was not let in August, 1914, merely because a piece of land has been added. Looked at in this way, *Vaughan* v. *Shaw* (4), and *R. & P. Properties, Ltd.* v. *Baldwin* (5), cited by Mr. *Blundell* do not, I think, really afford us any assistance. For these reasons I think that this appeal fails ; but, in so deciding, I desire to make it plain that I am not saying that the addition of a piece of land in connection with structural alterations and improvements is not a relevant matter to be taken into consideration, as I think it was by the county court judge in the present case, on the issue of fact as to the identity of the dwelling-house."

It seems to me that on the particular facts of this case the demise of this garage had no material effect on the identity of the flat. In my judgment, therefore, the learned judge was right in his conclusion that the standard rent of this house is £140 per annum, plus such additions to the rent as the landlord is entitled to make under the Rent Acts in respect of alterations and improvements thereto.

I will now deal with another question, namely, whether in all the circumstances this court should order a rescission of the contract on the ground of mutual mistake of fact. The importance of this point to the parties is very considerable. The lease in question is for seven years from Sept. 29, 1947, and, if the rent is to be solely the standard rent of £140, then the landlord will be debarred from recovering as rent those increases of rent permitted to him under s. 7 (4) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938—increases which the landlord asserted would bring the legally permissible rent up to £250. It is doubtless for this reason that the judge started his judgment by saying that he felt great sympathy with the landlord. He said :

> "I am satisfied that £250 is a fair and proper economic rent and that there are no merits in the case."

The judge, however, dismissed the landlord's claim for rescission of the contract for the following reasons. He found there was

> "no mistake of fact, possibly a mistake of law in that both parties for some obscure reason imagined that the Rent Acts did not apply. I do not think they ever addressed their minds to the material issue of identity."

As regards the first point, I think, with due respect to the learned judge, that the evidence strongly points to the fact that both tenant and landlord addressed their minds to the material issue of identity. It is true that the judge accepted the evidence of the tenant that he discovered in 1947 that the flat had previously been let in May, 1939, at a monthly rent of £11 13*s*. A receipt for rent for that amount by a fortunate accident came into his hands. But, assuming that the tenant did not know and had not troubled to inquire what the previous rent was, it seems to me that all the evidence tends to show that he knew that the flat had been previously let, and he must surely be taken to have known that the previous rent was *prima facie* the standard rent for a flat which, even when improved, was rated at £52 per annum, unless, indeed, it had been so altered as substantially to lose its identity. In addition to the evidence given by the landlord on the point to which I have already referred, there is strong evidence as to the tenant's knowledge which was given by the tenant himself. Thus, on Mar. 5, 1947, the tenant sent the drawings in connection with the proposed development of Maywood House to a firm for the purpose of obtaining a mortgage, and the plans, as the judge said, almost speak for themselves as showing that no substantial change to this flat was being contemplated such as would in substance make a new flat. The tenant in his evidence said that he questioned the landlord about the rents before the building was complete, pointing out that he and the landlord must have regard to the Rent Acts in relation to the plans, and that the landlord said he would take counsel's opinion on the point. He said that the question whether the rent of the flat was controlled by pre-damage rents never arose, and he and the landlord had no discussions whether it was controlled. He admitted reading to the landlord part of an opinion of counsel, but said it was not to show that the flat was not controlled by the pre-war rent, but was merely to show that regard must be had to the rent of the whole house before conversion. He said that he read this part of the opinion to show that it was not safe to assume that there was no standard rent. The tenant admitted that he told the landlord that his opinion was that the landlord could charge £250 rent and that there was no previous control. He frankly admitted that he was "taking advantage of our mistake to get the flat at £140 for seven years." It seems to me that a good deal of the tenant's evidence is inconsistent with the landlord's evidence, which the judge has said he accepted in preference to the tenant's. In addition to the evidence of the landlord and all the probabilities that the tenant knew what the pre-war rent was, there was the evidence of Mr. Barnard, the valuation officer of the Beckenham Borough Council. He said that he visited Maywood House in September, 1947, when the work was nearing completion, in order to make a new valuation. He saw the tenant and told him the pre-war assessment for this flat was £45, and he proposed to increase it to £52. He also said that he asked the tenant if he had considered that the building was controlled and that the tenant had said " No." The evidence establishes, to my mind, beyond any doubt that before the rent of £250 was fixed both the tenant and the landlord knew that the flat had been previously let for £140 per annum, but thought that there was no previous controlled rent by reason of the alterations made in 1947 and 1948 to the flat. I, therefore, do not agree with the view taken by the judge that the parties never addressed their minds to the issue of identity. It seems to me that the reason why they thought that the Rent Acts did not apply (as the judge said in his judgment) was, not obscure, but patent on the evidence, namely, that they made a mistake and thought the work done made such a substantial alteration as to make it in effect a different flat.

The second question then arises for decision : Was this mistake a question of fact or a question of law ? In my opinion, it was a question of fact, and the principle applies to this case which was laid down by LORD WESTBURY in his speech in *Cooper* v. *Phibbs* (6), where he said (L.R. 2 H.L. 170) :

> " . . . if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."

I agree with the opinion expressed by the learned judge in his judgment that it was a question of fact whether the flat had been so restored, altered and re-constructed as to destroy its identity. The point was discussed in *Mitchell* v. *Barnes* (7), a recent case in the Court of Appeal. That was an appeal from a decision of the judge as to the standard rent of certain premises, and one of the points taken by the plaintiff landlord was similar to the point in this case, namely, that the re-construction of the premises had altered their identity. The appeal was dismissed on the ground that there was evidence on which the trial judge could come to his conclusion. DENNING, L.J., in the course of his judgment, said ([1949] 2 All E.R. 721) :

> " If there was a substantial structural alteration so that the old dwelling-house changed its identity and two new dwelling-houses were in fact created, then, when the old dwelling-house ceased to exist, its standard rent would have fallen with it. On this point the county court judge went to see the premises himself . . . He found that there was no change of identity. The question of change of identity is primarily an inference to be drawn by the county court judge. If he has directed himself properly—as in this case he did—we can only interfere if it is quite plain that he has come to the wrong conclusion. It would be clearly unjust if a landlord, by making one or two comparatively small alterations—putting in a window, or a door, or a sink —could thereby get rid of the standard rent altogether. On the other hand, if he does a great deal of structural work he ought to be able to charge a new rent. It is a question of degree, and one primarily for the county court judge. It seems to me that in this case we cannot say he was so clearly wrong that we can interfere."

Phillips v. *Barnett* (8) was cited to us as authority for the proposition that the issue of change of identity was a matter of law and not of fact. In that case the defendant was the owner of three adjoining houses, which were each let at a different rent. When the houses became vacant, the defendant threw the three houses together and converted them into a factory and then let the premises to the plaintiffs, and the question was raised whether the factory was a different thing from the three houses of which it was comprised. The Divisional Court held that it was, and this decision was affirmed in the Court of Appeal. Bankes, L.J., in the course of his judgment, said ([1922] 1 K.B. 225) :

> " . . . the rights of the parties depend on the true inference to be drawn from the facts. The county court judge has not drawn the inference which alone could support his judgment and in my opinion there was no evidence from which he could have drawn that inference."

I think these words clearly indicate that Bankes, L.J., considered it to be a question of fact. Atkin, L.J., in the course of his judgment, said (*ibid.*, 227) :

> " It is said that this question whether the original houses have lost their identity is a question of fact which must have been answered by the county court judge in favour of the appellants. In my opinion the question involves matter of law. As matter of law the only inference that can properly be drawn from the facts is that this building first came into existence when it was let to the appellants and is not identical with the houses . . . "

These words seem to me to mean no more than this, that it is a matter of law whether on the evidence only one inference can properly be drawn from the facts. In other words, it is a matter of law whether there is any evidence to support the particular inference of fact. That is, I think, well established. But in this case before us the material facts were such that an inference of fact might be drawn either way, namely, that there had been a change of identity or that there had not been a change of identity. Thus, in a case tried in the county court where the claim is based on negligence, if the facts were such that a judge could properly hold that there was negligence that is a finding of fact, and I apprehend that no appeal would lie to the Court of Appeal. In my opinion, therefore, there was a mutual mistake of fact on a matter of fundamental importance, namely, as to the identity of the flat with the dwelling-house previously let at a standard rent of £140 per annum, and that the principle laid down in *Cooper* v. *Phibbs* (6) applies.

There are two other points taken by counsel for the landlord with which I must deal. One was that the tenant made a misrepresentation of fact, namely, that, because of the re-construction, the rent was not controlled. The learned judge made no specific finding on that issue, but as I read the notes of his judgment I think that he intended to find there was no misrepresentation of fact by the tenant, because he said :

> " I find there was no mistake of fact . . . I do not think they ever addressed their minds to the material issue of identity."

I have already dealt with that last sentence of the note. In the absence of any specific finding by the judge, I am not satisfied that the tenant made any specific misrepresentation of fact to the landlord such as would entitle the landlord to rescind the contract.

The other point was that the tenant was personally estopped by conduct from asserting that the control by virtue of the pre-war letting relieved him from his personal obligation to pay the landlord £250 per annum as reserved by the lease. The question of estoppel in cases arising under the Rent Acts was recently considered by the Court of Appeal in *Welch* v. *Nagy* (9). The essential facts in that case were that the defendant had agreed to take a dwelling-house furnished.

The rateable value of the house was such as to bring it within the Rent Restrictions Acts. In an action by the landlord for a declaration that the letting was a furnished one the defendant tenant sought to establish that he had bought the furniture in the house from his previous landlord, and that he had described the house as "furnished" by inadvertence. The landlord asserted that the defendant was estopped from proof of these facts. On appeal the Court of Appeal held that the rule of estoppel could not oust the jurisdiction of the court to decide whether the letting was within or without the purview of the Rent Acts. ASQUITH, L.J., in the course of his judgment on this point, said (*ante* pp. 873, 874):

> "The Rent Restrictions Acts compel the courts to treat an unfurnished lease of a dwelling-house within the statutory limits of rateable value in a certain way. They are not to permit more than the standard rent and permitted increases to be charged, nor (except under certain conditions laid down in the Acts) have they jurisdiction to make orders for possession. The court must take these points even if the parties do not raise them, as they go to jurisdiction. The court's power, on the other hand, to make orders for possession in the case of leases of 'substantially' furnished houses is left unfettered by the Rent Restrictions Acts. In my view, the parties cannot, by describing (whether by accident or design) what is, in fact, an unfurnished tenancy as a furnished or substantially furnished one, alter the fact that the furniture is actually the tenant's and that such a tenancy cannot be a furnished or substantially furnished one. To treat the tenant as estopped from denying that the tenancy is furnished when it is, in fact, unfurnished is to confer on the courts by the act of one of the parties a jurisdiction (namely, an untrammelled power to make orders for possession of premises in fact unfurnished) which Parliament has said the court shall not have . . . Just as, in general, parties are not competent to contract out of the protection of the said Acts (see *Barton* v. *Fincham* (10), and *Brown* v. *Draper* (11)), where the true facts attract that protection, so here the tenant cannot, in my view, be estopped from proving the true facts where those facts attract that protection."

It seems to me that the same principle would apply in this case and that no rule of estoppel can oust the court from its jurisdiction to decide whether the rent claimed in respect of any dwelling-house infringes the provisions of s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which declares that:

> "Subject to the provisions of this Act, where the rent of any dwelling-house to which this Act applies . . . is . . . increased, then, if the increased rent . . . exceeds by more than the amount permitted under this Act the standard rent . . . the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant . . ."

Section 14 enacts:

> "(1) Where any sum has . . . been paid on account of any rent . . . which is by virtue of this Act . . . irrecoverable by the landlord . . . the sum so paid shall be recoverable from the landlord . . . by the tenant . . ."

To apply the rule of estoppel in the present case would, to my mind, defeat these essential provisions of the Act. In my judgment, therefore, the tenant made out his case as regards the standard rent. On the other hand, the landlord established his point that the lease should be rescinded on the ground of mutual mistake, on a suitable undertaking being given by him as regards a new lease to the tenant.

Since writing this judgment, I have read the judgments of DENNING and JENKINS, L.JJ. Subject to agreement by counsel on the point, I agree with the terms proposed by DENNING, L.J., on which the present lease should be set aside.

DENNING, L.J. : The first question is: What is the rent which may lawfully be charged for this flat and garage ? The judge has, I think, misdirected himself in several respects, so it is open to this court to review his findings : *British Launderers Research Association* v. *Central Middlesex Assessment Committee & Hendon Rating Authority* (12). On this review I think that the structural alterations and improvements were not such as to destroy the identity of the original flat. The landlord was entitled, therefore, to increase the rent by eight per cent of their cost, but was not able on this account to charge a new rent unrestricted by the Rent Acts.

The inclusion in the lease of a garage, which had previously not formed part of the demise, gives rise to difficult questions. Even when taken together with the structural alterations, the addition of the garage does not change the identity of the flat. The standard rent, therefore, remains at £140 : *Hemns* v. *Wheeler* (3); *Langford Property Co., Ltd.* v. *Batten* (2). It does not follow, however, that the tenant gets the benefit of the garage for nothing. The landlord is probably entitled to increase the rent on account of it. Such an increase is justified by s. 2 (3) of the Act of 1920 as interpreted by this court in *Seaford Court Estates, Ltd.* v. *Asher* (13). Just as the landlord was entitled in that case to increase the rent because the tenant was relieved of the contingent burden of providing himself with hot water, if he wanted it, so here the tenant is relieved of the contingent burden of providing himself with a garage, if he wants one. I do not, however, pursue the point because it was not argued before us. It is said that, even allowing nothing for the garage, the permitted increases for structural alterations and improvements and increase of rates bring up the rent lawfully payable from £140 to £250. If, therefore, the landlord had served the prospective tenant with a proper notice of increase, the lease at £250 a year would have been valid. But he did not serve any notice at all because he thought that, owing to the improvements, the new rent was not restricted by the Acts. The tenant says that, there having been no notice, the landlord can only recover £140 a year for the seven years of the lease. So long as the lease stands the tenant's argument is unanswerable. The Acts prevent the landlord from recovering any more than the standard rent unless a notice of increase is given either to the sitting tenant or to a prospective tenant, and, although errors or omissions in a notice are not necessarily fatal, nevertheless there must be a notice, however informal. In this case the landlord conceded that no notice was served before the new lease was granted. It follows that the raising of the rent from £140 to £250 was invalid, and the landlord can do nothing now to repair the omission because no fresh notice of increase can be effective so long as the lease continues. The landlord tried to overcome this difficulty by saying that the tenant was estopped from saying that the rent of £250 was invalid, but, just as parties cannot contract out of the Acts, so they cannot defeat them by any estoppels.

In this plight the landlord seeks to set aside the lease. He says with truth that it is unfair that the tenant should have the benefit of the lease for the outstanding five years of the term at £140 a year when the proper rent is £250 a year. If he cannot give a notice of increase now, can he not avoid the lease ? The only ground on which he can avoid it is on the ground of mistake. It is quite plain that the parties were under a mistake. They thought that the flat was not tied down to a controlled rent, whereas in fact it was. In order to see whether the lease can be avoided for this mistake it is necessary to remember that mistake is of two kinds : first, mistake which renders the contract void, that is, a nullity from the beginning, which is the kind of mistake which was dealt with by the courts of common law, and, secondly, mistake which renders the contract not void, but voidable, that is, liable to be set aside on such terms as the court thinks fit, which is the kind of mistake which was dealt with by the courts of equity. Much of the difficulty which has attended this subject has arisen because, before the fusion of law and equity, the courts of common law, in order to do justice in the case in hand, extended this doctrine of mistake beyond its proper limits and held contracts to be void which were really only voidable, a process which was capable of being attended with much injustice to third persons who had bought goods or otherwise committed themselves on the faith that there was a contract. Since the fusion of law and equity there is no reason to continue this process, and it will be found that only those contracts are now held void where the mistake was such as to prevent the formation of any contract at all.

Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell* v. *Lever Bros., Ltd.* (14). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. *A fortiori* if the other party did not know of the mistake, but shared it. The cases where goods have perished at the time of sale, or belong to the buyer, are not really contracts which are void for mistake, but are void by reason of an implied condition to that effect, and even cases like *Smith* v. *Hughes* (15) turn at law on whether there was a contractual condition or not. So far as cases later than *Bell* v. *Lever Bros., Ltd.* (14) are concerned, I do not think that *Sowler* v. *Potter* (16) can stand with *King's Norton Metal Co., Ltd.* v. *Edridge, Merrett & Co., Ltd.* (17), which shows that the doctrine of French law as enunciated by POTHIER is no part of English law. Nor do I think that the contract in *Nicholson and Venn* v. *Smith Marriott* (18) was void from the beginning. Applying these principles it is clear that here there was a contract. The parties agreed in the same terms on the same subject-matter. It is true that the landlord was under a mistake which was to him fundamental. He would not for one moment have considered letting the flat for seven years if it meant that he could only charge £140 a year for it. He made the fundamental mistake of believing that the rent he could charge was not limited to a controlled rent, but, whether it was his own mistake or a mistake common to both him and the tenant, it is not a ground for saying that the lease was from the beginning a nullity. Any other view would lead to remarkable results, for it would mean that in the many cases where the parties mistakenly think the house is outside the Rent Acts when it is really within them, the tenancy would be a nullity, and the tenant would have to go, with the result that tenants would not dare to seek to have their rents reduced to the permitted amounts lest they should be turned out.

Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. While presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained: *Torrance* v. *Bolton* (19). This branch of equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was

not fraudulent or fundamental, or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake, which is, I venture to think, the ground on which the defendant in *Smith* v. *Hughes* (15) would be exempted nowadays, and on which, according to BLACKBURN, J.'s view of the facts (1 Q.B.D. 355), the contract in *Lindsay* v. *Cundy* (20) was voidable and not void, A
and on which the lease in *Sowler* v. *Potter* (16) was, in my opinion, voidable and not void. A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault. That principle was first applied to private rights as long ago as 1730 in *Lansdown* v. *Lansdown* (21). B
There were four brothers and the second and third of them died. The eldest brother entered on the lands of the deceased brothers, but the younger brother claimed them. So the two rival brothers consulted a friend who was a local schoolmaster. The friend looked up a book which he then had with him called the Clerk's Remembrancer and gave it as his opinion that the lands belonged to the youngest brother. He recommended the two of them to take further C
advice which at first they intended to do, but they did not do so, and acting on the friend's opinion the eldest brother agreed to divide the estate with the youngest brother and executed deeds and bonds giving effect to the agreement. Lord Chancellor KING declared that the documents were obtained by a mistake and through a misrepresentation of the law by the friend, and ordered them to be given up to be cancelled. He pointed out that the maxim *ignorantia juris non* D
excusat only means that ignorance cannot be pleaded in excuse of crimes. Eighteen years later in the time of LORD HARDWICKE, L.C., the same principle was applied in *Bingham* v. *Bingham* (22). If and in so far as those cases were compromises of disputed rights, they have been subjected to justifiable criticism, but in cases where there is no element of compromise, but only of mistaken rights, the House of Lords in 1867 in the great case of *Cooper* v. *Phibbs* (6) affirmed the E
doctrine there acted on as perfectly correct doctrine. In that case an uncle had told his nephew, not intending to misrepresent anything but being in fact in error, that he (the uncle) was entitled to a fishery, and the nephew, after the uncle's death, acting in the belief of the truth of what the uncle had told him, entered into an agreement to rent the fishery from the uncle's daughters, whereas it actually belonged to the nephew himself. The mistake there as to the title F
to the fishery did not render the tenancy agreement a nullity. If it had done so, the contract would have been void at law from the beginning and equity would have had to follow the law. There would have been no contract to set aside and no terms to impose. The House of Lords, however, held that the mistake was only such as to make it voidable, or, in LORD WESTBURY's words (L.R. 2 H.L. 170) "liable to be set aside" on such terms as the court thought fit to impose, G
and it was so set aside.

The principle so established by *Cooper* v. *Phibbs* (6) has been repeatedly acted on: see, for instance, *Earl Beauchamp* v. *Winn* (23) (L.R. 6 H.L. 234); *Huddersfield Banking Co., Ltd.* v. *Lister (Henry) & Son, Ltd.* (24). It is in no way impaired by *Bell* v. *Lever Bros., Ltd.* (14) which was treated in the House of Lords as a case at law depending on whether the contract was a nullity H
or not. If it had been considered on equitable grounds, the result might have been different. In any case the principle of *Cooper* v. *Phibbs* (6) has been fully restored by *Norwich Union Fire Insurance Society* v. *Price, Ltd.* (25). Applying the principle in the present case, the facts are that the tenant was a surveyor who was employed by the landlord, not only to arrange finance for the purchase of the building and to negotiate with the rating authorities as to the new rateable values, but also to let the flats. He was the agent for letting

and he clearly formed the view that the building was not controlled. He told the valuation officer so. He advised the landlord what were the rents which could be charged. He read to the landlord an opinion of counsel relating to the matter and told the landlord that, in his opinion, he could charge £250 and that there was no previous control. He said that the flats came outside the Rent Acts and that the landlord was "clear." The landlord relied on what the tenant told him and authorised the tenant to let at the rentals which he had suggested. The tenant not only let the four other flats to other people for a long period of years at the new rentals, but also he took one himself for seven years at £250 a year. Now he turns round and says, quite unashamedly, that he wants to take advantage of the mistake to get the flat at £140 a year for seven years instead of the £250 a year, which is not only the rent he agreed to pay but is also the fair and economic rent, and it is also the rent permitted by the Acts on compliance with the necessary formalities. If the rules of equity have become so rigid that they cannot remedy such an injustice, it is time we had new rules invented, but, in my view, the established rules are amply sufficient for this case. On the landlord's evidence, which the judge preferred, I should have thought there was a good deal to be said for the view that the lease was induced by an innocent material misrepresentation by the tenant. It seems to me that the tenant was not merely expressing an opinion on the law. He was making an unambiguous statement as to private rights and a misrepresentation as to private rights is equivalent to a misrepresentation of fact for this purpose: *MacKenzie* v. *Royal Bank of Canada* (26). But it is unnecessary to come to a firm conclusion on this point, because, as BUCKNILL, L.J., has said, there was clearly a mutual mistake, or, as I would prefer to describe it, a common misapprehension, which was fundamental and in no way due to any fault of the landlord, and *Cooper* v. *Phibbs* (6) affords ample authority for saying that, by reason of the common misapprehension, this lease can be set aside on such terms as the court thinks fit. The fact that the lease has been executed is no bar to this relief. No distinction can in this respect be taken between rescission for innocent misrepresentation and rescission for common misapprehension, for many of the common misapprehensions are due to innocent misrepresentation, and *Cooper* v. *Phibbs* (6) shows that rescission is available even after an agreement of tenancy has been executed and partly performed. The observations in *Seddon* v. *North Eastern Salt Co., Ltd.* (27) have lost all authority since SCRUTTON, L.J., threw doubt on them in *Lever Bros., Ltd.* v. *Bell* ([1931] 1 K.B. 588) (14), and the Privy Council actually set aside an executed agreement in *MacKenzie* v. *Royal Bank of Canada* (26). If and in so far as *Angel* v. *Jay* (28), decided that an executed lease could not be rescinded for an innocent misrepresentation it was, in my opinion, a wrong decision. It would mean that innocent people would be deprived of their right of rescission before they had any opportunity of knowing they had it. I am aware that in *Wilde* v. *Gibson* (29), LORD CAMPBELL said that an executed conveyance could be set aside only on the ground of actual fraud, but this must be taken to be confined to misrepresentations as to defects of title on the conveyance of land. In the ordinary way, of course, rescission is only granted when the parties can be restored to substantially the same position as they were before the contract was made, but, as LORD BLACKBURN said (3 App. Cas. 1,278) in *Erlanger* v. *New Sombrero Phosphate Co.* (30):

> "... the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract."

That, indeed, was what was done in *Cooper* v. *Phibbs* (6). Terms were imposed so as to do what was practically just.

What terms then should be imposed here? If the lease were set aside without any terms being imposed, it would mean that the tenant would have to go out and would have to pay a reasonable sum for his use and occupation. That would, however, not be just to the tenant. It is similar to a case where a long lease is made at the full permitted rent in the common belief that notices of increase have previously been served, whereas in fact they have not. In *Cooper* v. *Phibbs* (6), as in this, when the lease is set aside, terms must be imposed so as to see that the tenant is not unjustly evicted. When SIR JOHN ROMILLY, M.R., was faced with a somewhat similar problem, he gave the tenant the option either to agree to pay the proper rent or to go out: see *Garrard* v. *Frankel* (31), and when BACON, V.-C., in *Paget* v. *Marshall* (32) had a like problem before him, he did the same, saying (28 Ch.D. 267) that

> "... the object of the court is, as far as it can, to put the parties into the position in which they would have been in if the mistake had not happened."

If the mistake here had not happened a proper notice of increase would have been given and the lease would have been executed at the full permitted rent. I think this court should follow these examples and should impose terms which will enable the tenant to choose either to stay on at the proper rent or to go out.

The terms will be complicated by reason of the Rent Acts, but it is not beyond the wit of man to devise them. Subject to any observations which the parties may desire to make, the terms which I suggest are these: The lease should only be set aside if the landlord is prepared to give an undertaking that he will permit the tenant to be a licensee of the premises pending the grant of a new lease. Then, while the tenant is a licensee, the landlord will in law be in possession of the premises, and will be able to serve on the tenant, as prospective tenant, a notice under s. 7 (4) of the Act of 1938 increasing the rent to the full permitted amount. And the landlord must further be prepared to give an undertaking that he will serve such a notice within three weeks from the drawing up of the order, and that he will, if written request is made by the tenant within one month of the service of the notice, grant him a new lease at the full permitted amount of rent, not, however, exceeding £250 a year, for a term expiring on Sept. 29, 1954, subject in all other respects to the same covenants and conditions as in the rescinded lease. If there is any difference of opinion about the figures stated in the notice, that can, of course, be adjusted during the currency of the lease. If the tenant does not choose to accept the licence or the new lease, he must go out. He will not be entitled to the protection of the Rent Restrictions Acts because, the lease being set aside, there will be no initial contractual tenancy from which a statutory tenancy can spring.

In my opinion, therefore, the appeal should be allowed. The declaration that the standard rent of the flat is £140 per annum should stand. An order should be made on the counter-claim that, on the landlord giving the undertakings which I have mentioned, the lease be set aside. An account should be had to determine the sum payable for use and occupation. The tenant's claim for repayment of rent and for breach of covenant should be dismissed. In respect of the tenant's occupation during the rescinded lease and subsequent licence, he will be liable to pay a reasonable sum for use and occupation. That sum should, *prima facie*, be assessed at the full amount permitted by the Acts, not, however, exceeding £250 a year. Mesne profits as against a trespasser are assessed at the full amount permitted by the Acts, even though notices of increase have not been served, because that is the amount lost by the landlord. The same assessment should be made here because the sums payable for use and occupation are not rent, and the statutory provisions about notices of increase do not apply to them. All necessary credits must, of course, be given in respect of past payments, and so forth.

JENKINS, L.J.: There is no doubt that the lease of Dec. 1, 1947, under which the landlord demised to the tenant 1, Maywood House, Beckenham, for seven years from Sept. 29, 1947, at the yearly rent of £250, was executed on the assumption, common to both parties, that in the circumstances of the case the Rent Restrictions Acts would not operate to prevent the whole of the rent expressed to be reserved by the lease from being legally recoverable by the landlord from the tenant. There is, further, no doubt—indeed the tenant admitted in evidence—that in the course of the negotiations leading to the grant of the lease he himself expressed the opinion to the landlord that the landlord "could charge £250 and that there was no previous control." The point was material not only in relation to the letting to the tenant of 1, Maywood House, but also in relation to the four other flats in the building, in the arrangements for letting which the tenant was assisting the landlord in his capacity as a surveyor. So far as the letting to the tenant himself was concerned, his attitude at the date of the lease is probably best summed up by his own statement in evidence to the effect that he did not mind whether £250 was the controlled rent or not, but meant to pay it for seven years. At this time the landlord and the tenant were friends, and, indeed, partners in an estate agents' business styled "Godfrey & Charles." They were dealing on perfectly equal terms in the matter of the lease, the rent of £250 was a perfectly fair and reasonable rent, and the tenant was well content with his bargain. Relations between the parties later deteriorated, and the tenant finally brought in the Bromley County Court the proceedings leading to the present appeal in which he has contended (successfully before the learned county court judge) that the standard rent of the premises under the Rent Restrictions Acts is £140, being the rent at which the corresponding flat then known as No. 2 was let (but without the garage) to a Mr. Howard Taylor for three years from July 1, 1938, and, accordingly, that, as no permitted increase has been made in that standard rent in accordance with the procedure laid down by the Acts, the rent recoverable by the landlord under the lease of Dec. 1, 1947, is limited to £140 per annum and the landlord is liable to repay to the tenant the rent he has so far paid in excess of that figure.

The learned county court judge, while deciding in favour of the tenant, expressed great sympathy for the landlord. That sympathy I confess I fully share, the tenant's case being as completely devoid of merit as any case could well be. Moreover, if the landlord had appreciated the possibility of such a claim while the lease was in negotiation he could have defeated it in advance by serving a notice of increase under s. 7 (4) of the Act of 1938, which, by taking due credit for the landlord's expenditure on the premises and the increase in rates, could have brought the standard rent of £140, if applicable, up to, or substantially up to, a permitted total of £250 per annum, that is to say, the rent actually expressed to be reserved by the lease. However, the landlord did not take that step, and the position, accordingly, is that if £140 per annum is indeed the standard rent of the premises then, inasmuch as no permitted increase has in fact been made in accordance with the Acts, by the express terms of s. 1 of the Act of 1920, the amount (*i.e.*, £110 per annum) of the excess of the agreed rent of £250 over the standard rent of £140 is "notwithstanding any agreement to the contrary . . . irrecoverable from the tenant." Moreover, as the landlord has missed his opportunity under s. 7 (4) of the Act of 1938, he cannot, if the lease stands, serve any effective notice of increase until the expiration of the seven years term, as, under the provisions of s. 3 (1) of the Act of 1920, he can only effect an increase of rent in respect of a period during which he would but for the Act be entitled to obtain possession. The consequence to the landlord must, therefore, be to tie him for seven years from Sept. 29, 1947, to a tenant from whom he can recover only a grossly uneconomic rent, in the teeth of a fair and reasonable bargain freely made. No useful purpose will be served by further comment on the tenant's conduct. Section 1 of the Act of 1920 is expressly made to operate "notwithstanding any agreement to the contrary" and if he can reconcile it with his conscience in the circumstances I have briefly stated to go back on his bargain with the landlord in the matter of rent, he is doing no more than the statute invites him to do.

The only relevant questions for the court are : (i) Whether on the facts of the case the tenant is right in law in his contention that the standard rent of the premises is £140 per annum, and (ii) If so, whether the landlord can save himself from the disastrous consequences I have already mentioned by making out a case for rescission of the lease or, alternatively, for holding the tenant estopped from claiming the benefit of the Acts. The question as to the standard rent of the demised premises turns on the nature, extent and effect of the alterations and improvements made by the landlord before the letting to the tenant, the inclusion in the tenant's lease of the garage which was not included in Mr. Howard Taylor's lease being taken into account as well as the physical alterations and improvements made in and to the subject-matter of the demise. The duty of the learned county court judge as regards this issue was to consider the nature, extent and effect of these alterations and improvements and ask himself whether, having regard to their nature, extent and effect, the premises let to the tenant in 1947 at the rent of £250 per annum constituted substantially the same dwelling-house as the premises let to Mr. Howard Taylor in 1938 at the rent of £140 per annum. An affirmative answer to this question must lead to the conclusion as a matter of law that the standard rent of the premises let to the tenant is £140, while a negative answer would mean that the premises let to the tenant constituted for the purposes of the Acts a new dwelling-house to which no existing standard rent applied, with the result that the landlord was free under the Acts to charge the rent of £250 per annum expressed to be reserved by the lease, which would itself constitute the standard rent for the purposes of future control.

Given the application of the correct test, which I have endeavoured to state in the form of the question posed above, the result of its application depends essentially on matters of fact and degree on which the findings of the learned county court judge must not be disturbed unless there was no evidence on which he could reasonably come to his conclusion. Criticism of the learned county court judge's judgment on this issue was mainly directed to his reference to the case of *Ellis* v. *Sisman* (1). The relevant passage in the very short note of his judgment with which we have been provided is in these terms :

> " If the house had been damaged by enemy action, the tenant could have claimed that the flat was still the same (*Ellis* v. *Sisman* (1)). These alterations fall short of satisfying the test."

The reference to *Ellis* v. *Sisman* (1) was clearly inappropriate, as the point in that case was that a contractual tenant can, so long as his contract of tenancy remains in force, claim to be tenant of any building for the time being erected on the land comprised in his contract of tenancy, differing in this respect from a statutory tenant whose rights as such depend on the continued existence as such of the dwelling-house to which his statutory rights were attached. It was, therefore, contended for the landlord that the learned county court judge showed himself to have applied a wrong test, and if his reference to *Ellis* v. *Sisman* (1) really meant that in his view, because a contractual tenant of the flat for a term beginning on a date prior to the war damage and ending on a date after the re-construction could have claimed that he was still tenant of the re-constructed flat, therefore the flat as re-constructed is the same dwelling-house as the flat as it existed before the war damage for the purposes of standard rent, then I think he quite plainly misdirected himself. But looking at the note of the judgment as a whole I am not satisfied that the learned county court judge did really found himself on a wrong principle erroneously derived from *Ellis* v. *Sisman* (1). His reference to that case is certainly difficult to understand, but twice earlier in his judgment he refers to substantial identity as the test (once in relation to the inclusion of the garage and again in stating the tenant's contention) and his unfortunate reference to *Ellis* v. *Sisman* (1) was followed by a detailed consideration of the nature and extent of the alterations including the expense involved, with the ultimate conclusion that: "It still remains the identical dwelling-house although decorated and beautified." His detailed consideration of the work done was criticised on account of his description of the conversion of part of a bedroom into a dining recess communicating with the living room as: "Transfer of recess from bedroom into dining room—simply a question of moving the partition—not fundamental—very minor," when in fact it involved cutting through two main walls between the living room and the bedroom and the insertion of steel joists to take the weight formerly carried by those walls. I agree that the learned county court judge is not quite accurate here, but after all from the point of view of a tenant his description of the effect of this alteration is not wide of the mark, the effect on the identity and character of the flat being no different from what it would have been if the walls removed had in fact been mere partition walls. The fact that structural precautions were incidentally necessary to secure the safety of the building no doubt added to the expense of this alteration and was in that respect material, but I do not think it was otherwise important for the purpose of considering the effect of this particular alteration on the identity of the flat as a dwelling-house. I am, therefore, disposed to hold that the learned county court judge's judgment on this issue, read as a whole, discloses no such misdirection of himself as to justify the interference of this court on what was essentially a question of fact for him. But, be that as it may, having myself considered the nature, extent and effect of the alterations and improvements, including the matter of the garage, I am satisfied that the learned county court judge's conclusion was right, and, assuming the question to be open to this court, I would myself come to the same conclusion. As to the inclusion of the garage, this court is precluded by its decision in *Langford Property Co., Ltd.* v. *Batten* (2) from treating this as more than a circumstance to be taken into account in conjunction with the physical improvements and alterations in and to the premises, and so considered I cannot regard it as enough to turn the scale in the landlord's favour, particularly in view of the doubt as to the practice actually followed in regard to the user of the garage in Mr. Howard Taylor's time. I am, accordingly, of opinion that the learned county court judge's decision was right on the question of standard rent and, accordingly, that the tenant is entitled to hold his judgment unless the landlord's case for rescission of the lease or alternatively for holding the tenant as estopped from claiming the benefit of the Acts can be made out.

The landlord's claim for rescission is based on the alternative grounds of misrepresentation and mutual mistake. As to misrepresentation, it is important to observe that fraud is not alleged. Therefore, any misrepresentation shown to have been made by the tenant must be taken to have been an innocent misrepresentation. Moreover, the contract of which rescission is claimed is one which has been executed by the grant of a lease under seal. An executed contract will, no doubt, be set aside notwithstanding completion when it is shown to have been induced by fraudulent misrepresentation, but it has been repeatedly held that an innocent misrepresentation affords no sufficient ground for rescission after completion, and there is authority for the view that this applies to a lease no less than to a conveyance: see *Angel* v. *Jay* (28), and the cases there cited. I appreciate that, as DENNING, L.J., has pointed out, doubts have of comparatively recent years been expressed as to the validity of this principle, but, for my part, I am not prepared to hold that it is no longer to be regarded as the law, and, accepting it as I do, I think it suffices to dispose of the claim for rescission on the ground of misrepresentation in the present case. I should, however, add that the evidence in the case seems to me to disclose nothing amounting to a misrepresentation on the part of the tenant. The most

that can be held against him is that he gave the landlord his opinion that the landlord "could charge £250 and that there was no previous control." According to the landlord the tenant said he (the landlord) "was clear" (*i.e.*, clear of any previous control under the Rent Restrictions Acts), but I think this comes to the same thing. In either case the tenant was merely giving the landlord his view of the law. Fraud being neither charged nor proved, the tenant must be taken to have been expressing the opinion he genuinely held at that time. A
The expression of an opinion *bona fide* held on a question of law is not misrepresentation.

As regards the alternative ground of mutual mistake, it is pertinent to note the learned county court judge's finding of fact on this issue which appears in the note of his judgment in these terms :

> "I find there was no mistake of fact—possibly a mistake of law in that B
> both parties for some obscure reason imagined that the Rent Acts did not apply. I don't think they ever addressed their minds to the material issue of identity."

This finding was subjected to considerable criticism in the course of the argument before us, but I think there was ample evidence to justify the learned county C
court judge, preferring as he did the landlord's evidence to the tenant's, in concluding that before the grant of the lease was completed both parties knew all the material facts about Maywood House and the flats into which it had been divided. That is to say, they knew that in 1939 the building consisted of five separate flats separately let, they also knew the rents at which the flats were then let, and, in particular, that the rent of No. 1 (then known as No. 2) had been D
£140. They also knew the nature and extent and effect on the lay-out and character of the flats of the alterations and improvements that had been made in conjunction with the restoration of the war damage ; and they also knew the rateable value of each flat. These were all the facts necessary to be known in order to form a conclusion on the question whether the flat proposed to be let to the tenant was, under the Acts, subject to a standard rent of £140 fixed by E
reference to the pre-war letting of the corresponding flat to Mr. Howard Taylor. The mistake consisted simply in the drawing by the parties of an erroneous conclusion from these facts to the effect that the standard rent of £140 was no longer applicable on account of the alterations and improvements which had been made since Mr. Howard Taylor's time. The learned county court judge in the passage I have just quoted said that "both parties for some obscure reason F
imagined that the Rent Acts did not apply," and that he did not think "they ever addressed their minds to the material question of identity." This was criticised as contrary to the evidence. I do not agree. I think the learned county court judge, who had himself formed a clear opinion to the effect that the re-constructed flat was in substance the same dwelling-house as the original flat, described the reason why the parties did not appreciate this and the G
consequent continued application of the standard rent of £140 as "obscure," but accounted for it by concluding that the parties formed the view that the alterations and improvements prevented the old standard rent from applying without really directing their minds to the material question whether, notwithstanding all the alterations and improvements, the flat proposed to be let to the tenant was not, after all, substantially the same dwelling-house as the H
flat formerly let to Mr. Howard Taylor. I see nothing in the evidence inconsistent with this explanation of the mistake, but, whether the parties failed to ask themselves the right question or, having asked it, answered it wrongly, I find it impossible to hold that a mutual mistake of the character here involved affords a good ground for rescission. The landlord meant to grant and the tenant meant to take a lease in the terms in which the lease was actually granted of the premises which the lease as granted actually comprised. They knew all the material

facts bearing on the effect of the Rent Restrictions Acts on a lease of these premises, but they mutually misapprehended the effect which in that state of facts those Acts would have on such a lease. That is a mistake of law of a kind which, so far as I am aware, has never yet been held to afford good ground for rescission. It is a mistake, not as to the subject-matter, nature or purport of the contract entered into, nor as to any question of private right affecting the basis of the contract entered into: see *Cooper* v. *Phibbs* (6); but simply a mistake as to the effect of certain public statutes on the contract made, being in all respects precisely the contract the parties intended to make.

The mistaken conclusion to the effect that on the facts of the case (all relevant facts being known to both parties) the Rent Restrictions Acts did not have the effect of making £140 the standard rent of the flat in question was, as it seems to me, equally a mistake of law, whether it was due to a failure to appreciate and apply the test of identity, or proceeded from an application of that test, followed by an erroneous inference or opinion drawn from the facts to the effect that the flat in question was not in substance the same dwelling-house as the flat formerly let to Mr. Howard Taylor. The application of the test, if it was indeed applied, was merely a step in the reasoning leading from the facts to the conclusion of law. It is, moreover, to be noted that the provisions of s. 1 of the Act of 1920 are imperative and are expressly declared to be applicable notwithstanding any contract to the contrary. This must mean, I think, not only that the excess of the contractual rent over the permitted rent is irrecoverable, even if the parties expressly agreed that it should be recoverable notwithstanding the Act, but also that the excess is irrecoverable even if the parties, whether through total ignorance of the legislation, or though misapprehension of its effect, believed that the full contractual rent would be, and intended that it should be, legally recoverable. Further, I think that by necessary implication the effect of s. 1 must be, not merely to prevent the tenant from being liable to pay the excess, but to entitle him to hold the tenancy on payment of the permitted rent and no more: see *Brakspear (W.H.) & Sons, Ltd.* v. *Barton* (33) ([1924] 2 K.B. 96).

If the landlord could procure rescission of the tenancy merely by alleging and proving that he and the tenant entered into the tenancy under a mutual mistake to the effect that the Acts imposed no restriction on the rent which could legally be charged, the whole object of the Acts would, so far as I can see, be frustrated in such a case. That object is to fix maximum rents for dwelling-houses within the purview of the Acts and to ensure that tenants of such dwelling-houses shall be secure in their possession of them on paying no more than the maximum permitted rent even if they have in fact agreed to pay more. If when a tenant claims his rights under the Acts the landlord can say: "We neither of us knew the Acts applied," or "We both thought the Acts did not apply", and threaten rescission, the tenant must either risk rescission and consequent ejectment or else submit to pay whatever the landlord demands as consideration for renouncing his right to rescind. I see no distinction for this purpose between a letting at more than the permitted rent under a contract purporting to exclude the Acts, due perhaps to a mutual mistake to the effect that the Acts permitted "contracting out," and a letting in mutual ignorance of the existence of the Acts, or a letting under a mutual misapprehension as to the application and effect of the Acts in a particular case. In all these cases the Acts operate on the contract made notwithstanding the intention of the parties, and, accordingly, I fail to see how the existence of a mutual intention at the time of entering into the contract to the effect that the full contractual rent should be exigible, whether based on mutual ignorance of the Acts or of the prohibition against contracting out of the Acts, or on a mutual misapprehension as to the application or effect of the Acts in the particular case, can affect the validity of the contract when it is afterwards discovered that, contrary to the intention and belief of the parties at the time they made the contract, the rent legally recoverable is limited to a standard rent less in amount than the rent contractually reserved. It should further be noted that, if the landlord's contention is correct, the landlord's right to rescission would arise in such a case so soon as he discovered the mistake as to the effect of the Acts on the lease or tenancy granted. The tenant could thus be deprived of his bargain and turned out, even though he had never dreamed of claiming the benefit of the Acts and had no other intention than to pay the full contractual rent whether legally recoverable or not. This seems to me a curious result indeed. Yet the right to rescind, if it exists at all, must exist from the moment the contract is entered into, and cannot be made to depend *ex post facto* on the conduct of the tenant. For these reasons, I, for my part, find it impossible to hold that a case for rescission on the ground of mutual mistake is made out.

I have considered whether rescission might not be justified on the ground that the tenant stood in a fiduciary relationship to the landlord as his agent and adviser in the matter of the letting of the flats in Maywood House, and, consequently, must not be allowed to take advantage for his own benefit of the mistaken advice he gave the landlord even though given in good faith, but the case was never put in this way and I do not think the fiduciary relationship essential to relief on this ground can be made out on the evidence.

The contention to the effect that the tenant is estopped from claiming the benefit of the Rent Restrictions Acts can I think be disposed of on the short ground that, inasmuch as the tenant could have claimed the benefit of the Rent Acts even if he had expressly agreed not to do so, he cannot be precluded from claiming such benefit by words or conduct not amounting to an express promise not to do so but in effect implying such a promise. For these reasons, if the result rested with me, I should find myself reluctantly compelled to dismiss the appeal, but my brethren take a different view, and I may perhaps be allowed to add that my regret in differing from them is tempered by satisfaction that they have found it possible to arrive at a solution which accords with what I myself feel to be the merits of the case.

Appeal allowed with costs here and below. Judgment for the landlord on the claim for repayment of rent overpaid and on the counter-claim for rescission of the lease. Rescission ordered on terms that the tenant pays as a licensee a fair sum for use and occupation of the premises from the commencement of the rescinded lease until the date of judgment, credit being given for sums already paid as rent and account being taken of the effect of non-repair of the premises on the value of the use and occupation, the amount to be assessed by the registrar, the landlord to serve notice of increase of rent in respect of improvements within three weeks of the drawing up of the order of the Court of Appeal and to undertake to allow the tenant to occupy the premises as licensee pending the grant of a new lease, and, on written request made by the tenant, within one month of the serving of the notice of increase, to grant a new lease at the full permitted rent, but not exceeding £250 *a year, for the same term and subject in all other respects to the same covenants and conditions as in the rescinded lease.*

Solicitors : *Davis & Davis* (for the landlord) ; *Roy S. Wildman* (for the tenant).

[*Reported by* C. N. BEATTIE, ESQ., *Barrister-at-Law.*]

END OF VOLUME TWO

(*and of this series of reports for* 1949).

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